Fine, Boggs & Perkins LLP

Coronavirus Disease 2019 (COVID-19)

Information and Answers for Executives and Human Resources Managers

The world health community continues to monitor closely the emergence of the SARS-CoV-2 virus and the disease it causes, named "coronavirus disease 2019" (COVID-19). The World Health Organization (WHO) has already declared COVID-19 a global pandemic. This means that there is a worldwide outbreak for which no known prevention or immunity currently exists. At this time, no one knows how severe this outbreak will be. Given this uncertainty, and the fact that the seasonal influenza (flu) virus is also widespread, your company must take taking proactive steps to protect the health of all employees, customers and/or visitors. We suggest you issue a Policy Memo to Employees outlining the requirements in the workplace (also available with this memo) and that you require that all employees, vendors, visitors and customers follow and observe the following guidelines:

- Wash your hands frequently with warm, soapy water for at least 20 seconds.
- When you have engaged in any activity that involves locations where other people have been, use a greater than 60% alcohol-based hand sanitizer.
- Keep a bottle of hand sanitizer on hand.
- Avoid handshaking.
- Try to use your knuckle to touch light switches, elevator buttons, etc.
- When opening doors, *e.g.,* restrooms etc., feel free to use provided paper towels to avoid direct contact with knob.
- Use disinfectant wipes for your work areas and work surfaces.
- Clean frequently touched surfaces.
- Cover your mouth with tissues whenever you sneeze, and discard used tissues in the trash.
- Avoid people who are sick with respiratory symptoms.
- Maintain proper social distancing with everyone (at least six feet apart)
- Report any coughing, fever, respiratory issues or other flu-like symptoms of COVID-19 to your department manager immediately.

You should provide alcohol-based hand sanitizers and tissues in common areas. Cleaning sprays and wipes should also be provided to clean and disinfect frequently touched objects and surfaces such as telephones and keyboard. Cleaning staff should regularly clean and disinfect building common areas such as elevator buttons, doors handles, etc., you should make sure that you also are disinfecting your

work areas and other places you frequent throughout the day. You should use an appropriate disinfectant or a water-alcohol solution of greater than 60% alcohol.

COVID-19 usually causes symptoms such as cough, respiratory distress, fever, cough and other flu-like symptoms. As of April 24, 2020, the CDC has identified the following symptoms as correlating with COVID–19:

- Fever
- Cough
- Chills
- Muscle Pain
- Headache
- Repeated Shaking with Chills
- Shortness of Breath or Difficulty Breathing
- Sore Throat
- New Loss of Taste or Smell

The CDC has stated that symptoms may appear as quick as two days or as long as 14 days after exposure. COVID-19 can be spread from person to person through body fluids traveling through the air from coughs and sneezing, or can be transmitted from surfaces contaminated from persons that have the virus. You should inform employees and customers to stay at least 6 feet away from other persons. You should inform employees that they should avoid touching their face, mouth and eyes as much as possible. And employees should not share headsets, keyboards/keypads/mice, staplers, or other desk equipment personal items with each other.

You must not allow employees to come into work while they are experiencing flu-like symptoms such as respiratory symptoms, fever, cough, shortness of breath, sore throat, runny or stuffy nose, body aches, headache, chills or fatigue. You must require the same of all customers if you are aware of such circumstances. Inform employees now that they should not come to work if they are sick.

As clinical information and experience with the pandemic increases, the CDC continues to evolve its guidance and recommendations. The Agency recently updated its guidance for isolation and exclusion from work for personnel with suspected or confirmed COVID–19 cases, differentiating those with symptoms and not showing symptoms:

For employees showing symptoms, the return-to-work evaluations may be symptom-based or test-based. Those who are not tested must remain out of the workplace until at least (a) 10 days have passed since the symptoms first appeared; and (b) 3 days have passed since resolution of fever (without the aid of medication) and improvement of respiratory symptoms such as shortness of breath, cough, etc. Symptomatic employees who are tested should be excluded from work until the fever is resolved (without medication), respiratory symptoms improve, and they individual obtains negative results from at least two tests taken at least 24 hours apart.

Some individuals may show positive diagnostic test results for COVID–19 without demonstrating any symptoms of the condition. Should symptoms develop later, than the return-to-work guidance for symptomatic individuals should be followed. If they remain asymptomatic, then CDC guidance allows workers to return to work 10 days after the date of their first positive COVID–19 test, albeit with protection against infection transmission. (More detailed CDC guidance suggest that such individuals should remain in isolation for at least 7 days post-positive test, with 3 additional days of limited contact with others, including masks or face coverings whenever others are present.

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If difficulty breathing and lethargy develop, or if symptoms had improved but turned for the worse, individuals should contact their healthcare provider or urgent care center ahead of any visit so that they can be prepared to see the individual. People should only call 911 or go directly to an emergency department if they believe that they are extremely sick or their life is in imminent danger.

Employers or other personnel should disclose only the names of employees who may be infected with the COVID-19 virus and should only disclose the names as necessary to prevent further spread of the disease or infection. Employees have the absolute right to privacy in their medical information. Even the name of the employee should only be shared on a need-to-know basis. Other employees who may have had contact with the infected individual may be informed that they should be aware of the potential exposure and be tested if they experience any symptoms. You might consider having exposed personnel go into a limited-period self-quarantine away from work if you believe the risk is more than minimal that the person may have been infected. Consult your legal counsel before doing so.

Employees who need to quarantine themselves (whether voluntarily or mandated) or if employees have COVID-19-related situations that result in an inability to report to work, those employees should be informed to notify the General Manager immediately. The Company should do our best to accommodate employees by allowing them to either work from home or to have time off, which will normally be an unpaid leave. However, even if an unpaid leave, employees should be permitted to use sick leave and/or accrued paid time off (vacation). Employers are discouraged from requiring doctor's notes from employees either to stay at home or return after self-quarantine.

You should also inform employees that they should notify the General Manager and Human Resources immediately if the employee or anyone who is at the workplace has traveled recently within areas that have travel restrictions (including, without limitation, Mainland Europe, Great Britain, Italy, South Korea, Iran, China, Japan, or Hong Kong). Please also monitor and tell employees to monitor the Center for Disease Control & Prevention or the World Health Organization websites for the latest information about the coronaviruses.

Frequently Asked Questions

We have outlined below common questions and answers to assist you in managing these difficult times. As always, you are welcome to contact John P. Boggs (jboggs@employerlawyers.com or 415.378.3150) with any questions you might have.

We recommend that you review these resources intermittently, as both medical and regulatory information is changing regularly.

A. Business Operations

- May my business still operate during this crisis?
- May I continue to allow my fixed operations to remain open?
- Are dealership sales operations an Essential Activity within the exceptions to the business closure orders?
- What can an employer do if employees start complaining or making demands related to COVID-19?

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- How do I notify employees of their rights and do I need to do any paperwork to give employees paid sick leave or paid expanded family leave?
- How must an employer make personnel aware of the Social Distancing and other protection protocols that apply to ongoing essential operations?

B. Protecting Our Employees

- If employer suspects an employee is more at risk of catching COVID-19, due to age or medical condition, can the employer send the employee home?
- What about pregnant employees? Those with pregnant spouses of family members?
- May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, either of which places them at higher risk from COVID-19?
- What should an employer do if a worker says he has a health condition that puts him at greater risk of severe illness if he contracts COVID-19?
- What is an employer's obligation when a worker says that they have someone at home who is at higher risk for COVID-19?
- What if an employee is afraid of catching COVID-19 but has no apparent risk factors—should they be allowed to have time off work?
- Must employers still engage in the interactive process regarding potential accommodation of disabilities during the pandemic?
- What are some reasonable accommodations that we should consider as part of our interactive process with workers who may have pre-existing conditions that put them at a higher risk from COVID–19?
- If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may he or she now be entitled to a reasonable accommodation (absent undue hardship)?
- 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?
- What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation?
- May we implement short-term accommodations in cases where urgency exists? What about as conditions change, including changes in public health orders?
- If an employee takes a leave of absence or is furloughed or laid off as a result of the pandemic, at what point may we inquire as to whether a reasonable accommodation of a disability may be required upon the return of the employee to the workplace?
- Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship?

C. Health-Related Inquiries

- May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace? 4/23/20
- May we ask employees if they have COVID-19 or its symptoms?
- Am I required to take temperatures of employees or others?
- But does screening employees for medical status not conflict with federal and state laws regarding medical examinations and privacy?
- May the company ask an employee to divulge their medical status/health?
- 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?

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- May an employer ask an employee whether his or her family members have COVID-19 or symptoms associated with COVID-19?
- What is an employer's obligation when a worker says that they have someone at home who is at higher risk for COVID-19?
- May an employer ask only one individual (as opposed to all employees) questions about whether they have COVID-19 or its symptoms, or take that individual's temperature?
- What may an employer do if an employee refuses to permit his or her temperature to be taken, or refuses to answer questions about whether they have COVID-19, or its symptoms?
- Can an employer demand that employees disclose where they have traveled.

D. COVID–19 in Your Workplace

- May an employer bar from its place of business employees with COVID-19 or its symptoms?
- If the company suspects an employee is sick, can the company demand that the employee undergo a medical test to check for COVID-19?
- May an employee who is required to come into the workplace inform the employer that another employee has COVID-19 or its symptoms?
- To whom should an employer report if one of its managers learns and confirms that an employee has COVID-19 or its symptoms?
- What information should be gathered and reported internally?
- Can an employer tell the workforce the name of a coworker who has COVID-19?
- What steps should be taken to protect confidentiality of medical information, particularly where managers may be working remotely?
- What should the employer do if an employee tests positive for COVID-19?
- What should the employer do if an employee notifies the employer that the employee has had contact with someone who tested positive for COVID-19?
- Can an employer demand that an employee returning from sick leave provide a doctor's note releasing them to return to work?
- Does the employer have to notify authorities if an employee test positive for COVID-19?
- Is the employer liable if an employee contracts COVID-19 at work?
- Masks — May an employer Require, Permit, or Refuse to have employees wear masks or other Personal Protective Equipment (PPE) at the workplace?
- What if my employees need to travel domestically or internationally for any reason—work-related or otherwise?
- Is testing for COVID-19 covered by the employer's health care coverage?

E. Discrimination and Harassment Avoidance

- Some of our employees are apprehensive around other employees or customers whom they may associate as being more likely than others to carry the virus; What must we do?

F. Returning to "Normal" Operations

- At the risk of jinxing things, as we plan for a resumption of a more traditional workplace environment, how employers know what screening options or limitations can or should be maintained?

G. Employee Schedules and Payment

- If an employee is afraid of catching COVID-19 should they be allowed to have time off work?
- Does the employer have to allow an employee to take time off work if the employee's children's schools close due to COVID-19?

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- Can employees work from home if they are sick with COVID-19 or have to be home with children?
- Should I furlough or lay off employees? What is the difference legally?
- Can the employer furlough employees and close facilities due to COVID-19?
- Does the employer have to pay employees that are on furlough or are on leave due to COVID-19?
- If employees have their hours and compensation reduced (but are not laid off altogether), can they find relief through Unemployment Insurance?
- I have employees that have written pay plans that provide for a guaranteed salary, a minimum draw or target earnings or some other guaranteed minimum payment. Do I need to do anything if I am having them work reduced hours if I do not want to be locked into the guarantee amount?
- Is there specific language that I should include when laying off workers?
- Are there rules that limit my ability to accompany layoffs with severance payments and releases?

H. WARN and the Documentation of Layoffs

- What is the WARN Act?
- Which Employers Are Covered Under WARN?
- When Does the WARN Notice Apply?
- What is the effect of the California Executive Order?
- Who Must Receive Notice?
- What is the Liability for Failing to Comply with WARN Obligations?

I. Basic Information on the FFCRA

- What is the FFCRA?
- When did the new law take effect?
- How long to the provisions remain in effect?
- Am I required to provide Notice of these new provisions to employees?

J. Emergency Family Medical Leave Expansion Act (EFMLEA)

- Which employers are affected?
- Which employees are affected?
- What triggers the expanded Paid Family Leave?
- How many days of Paid FMLA are available?
- Can EFMLEA leave be intermittent?
- How much does the employer have to pay? Should I include Overtime Premiums when calculating that rate?
- What are the reinstatement rights?

K. Emergency Paid Sick Leave Act (EPSLA)

- Who is eligible for leave?
- What triggers Paid Sick Leave eligibility?
- What does it mean to be subject to a Federal, State, or local quarantine or isolation order related to COVID-19?
- What does it mean to be advised by a health care provider to self-quarantine due to concerns related to COVID-19?
- What does it mean to be experiencing symptoms of COVID-19 and is seeking a medical diagnosis?

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- What does it mean to be caring for an individual who is subject to an order as described in (1), or who has been advised as described in (2), or whose school or child-care facility has been closed because of the pandemic (Element 5)?
- What does it mean to have a "substantially similar condition" within the scope of the sixth possible EPSLA trigger?
- How much Paid Sick Leave is available?
- At what rate is the Paid Sick Leave paid? Should I include Overtime Premiums in calculating this rate?
- Is the Paid Sick Leave Retroactive?

L. Small-Employer Exceptions

- I'm a small employer with fewer than 50 employees; do I still have to provide these paid leaves?

M. Tax Credits for EPSLA and EFMLEA Paid Leave

- Which employers are eligible?
- How much is the credit?
- How are these credits recovered?
- Are all paid leaves reimbursable?

N. Documentation under the FFCRA

- May we require employees to document the reasons for leave under the FFCRA?

O. Paycheck Protection Program Loans under the CARES Act

- I may have more than 500 employees; may I still be a "Small Business" eligible for this loan program?
- Do I measure the 500-employee threshold using each separate dealership (*e.g.,* rooftop) or must I include employees of affiliated dealerships?
- In counting employees, do I count all employees or just "Full Time" employees?
- PPP loans exclude employee compensation in excess of $100,000 annually; does that exclusion apply to all employee benefits?
- May my PPP loan be used to cover Paid Time Off?
- What are the measuring periods to determine the size of a PPP loan that may be available to my business?
- Can I count payments to independent contractors in the payroll for PPP loans?
- Does PPP eligibility use gross or net payroll costs?
- I thought the maximum loan amount was set at $10M, but media reports are saying that much smaller loans are coming under extra scrutiny; are larger loans subject to audit?

P. PPP Loan Forgiveness Limitations

- Are these PPP loans really forgivable?
- What are the limitations on forgiveness for the PPP loans?
- The amount of forgiveness of a PPP loan depends on the borrower's payroll costs over an eight-week period; When does that eight-week "Covered Period" begin?
- How is the ratio of FTE Employees calculated?
- If my dealership laid off employees between February 15, 2020, and April 27, 2020, can I avoid liming the loan forgiveness by hiring back employees after the Covered Period?
- How is the Wage Ratio Adjustment calculated?
- Is there a catch-up period for the wage ratio adjustment like there is for the employee headcount element?

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- How is the 75:25 ratio between Payroll Expenses and Non-Payroll Expenses calculated?
- How do these three potential reductions in the forgiveness amount combine?

A. Business Operations

May my business still operate during this crisis?

Yes and No. The State of California and many of California's 58 counties have issued Orders or Directives limiting public activities, including restrictions on travel, gatherings, and business operations. For example, San Francisco and many Bay Area Counties have issued "Shelter in Place" orders; Los Angeles and several of its larger cities have published similar orders, such as the "Safer at Home" order of March 19, 2020. You will need to check the specific restrictions that have been ordered for the County or Counties in which you operate. And you should revisit these orders regularly, as many jurisdictions are revising the guidelines, restrictions, and anticipated durations in response to changing conditions and increased understanding of the pandemic. There may also be detailed Social Distancing Protocols in place you must follow.

Employers should take care in monitoring local relaxations of restrictions as the strict stay-at-home orders begin to give way to cautious return to more widespread business operations. While there are some widespread trends, much of the resumption of business will be governed by local conditions and restrictions, so County- and City-level guidance will vary across the state. Bear in mind that California employers should continue to follow the most restrictive aspects of state and local restrictions.

May I continue to allow my fixed operations to remain open?

Yes. Most of these orders exclude from some (but not all) restrictions activities relating to "Essential Businesses," which in most cases expressly permit the operation of business including "gas stations, auto-supply and auto-repair, and related facilities," which expressly authorize dealerships to operate service and parts departments.

Check with your local jurisdiction to determine whether certain operations will be permitted, and under what circumstances (*e.g.,* requirements of home or business delivery, restrictions on test driving or showroom access, etc.).

Of course, social distancing requirements remain in effect.

Are dealership sales operations an Essential Activity within the exceptions to the business closure orders?

Maybe. But in some cases the answer is No or only under limitations.

While early county-wide health orders left the question in some doubt, some counties have addressed the issue more directly. Some counties specifically prohibit automobile sales, and others permit it to one extent or another.

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The state-wide order—issued Thursday, March 19, 2020—is very broad, restricting individuals to their homes or residences "except as needed to maintain continuity of operations of the federal critical infrastructure sectors," which include, inter alia, Commercial and Transportation sectors. These appear broad enough to permit limited dealership activities to continue during the period in which this Order remains in effect, although further clarifications or modifications may be forthcoming, as the parameters continue to evolve as additional information is identified and released.

Some jurisdictions have reversed as restrictions continue to tighten. Other counties/cities are now permitting limited operations in sales. If you have questions about whether all or part of your company may continue to operate, you should contact competent employment law counsel familiar with your operations.

- **What can an employer do if employees start complaining or making demands related to COVID-19?**

Many federal and state employment and labor laws protect such speech from retaliation by employers.

Before taking any disciplinary action against employees, employers should obtain competent legal advice.

- **How do I notify employees of their rights and do I need to do any paperwork to give employees paid sick leave or paid expanded family leave?**

You must post the new DOL Employee Rights Poster and/or provide the Poster to employees as indicated in the instructions. A copy of the poster is available at https://www.employerlawyers.com/legal-updates/ or through HR Hotlink. Employees must fill out a written Request certifying certain information regarding the request for leave. A sample form is available at the same web links above. If one of your employees takes paid sick leave under the Emergency Paid Sick Leave Act, you must require your employee to provide you with appropriate documentation in support of the reason for the leave, including: the employee's name, qualifying reason for requesting leave, statement that the employee is unable to work, including telework, for that reason, and the date(s) for which leave is requested. Documentation of the reason for the leave will also be necessary, such as the source of any quarantine or isolation order, or the name of the health care provider who has advised you to self-quarantine. For example, this documentation may include a copy of the Federal, State or local quarantine or isolation order related to COVID-19 applicable to the employee or written documentation by a health care provider advising the employee to self-quarantine due to concerns related to COVID-19.

You are also required to obtain certain documentation from your employee in support of any request for Expanded Family and Medical Leave taken to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons. For example, this requirement may be satisfied with a notice of closure or unavailability from a child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper, or emailed to the parent from an employee or official of the school, place of care,

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or child care provider. A copy of sample Leave Request Form is available at https://www.employerlawyers.com/legal-updates/ or through HR Hotlink.

Keep in mind that the documentation requirements are not designed as a hurdle for the employees to overcome to qualify for the leave. Rather they are designed to ensure that employers can validate their entitlement to the accompanying tax credits, as the FFCRA specifically notes that credits are only available for paid leaves required under the statute, not for paid leaves offered by employers in excess of the statutory standards.

- **How must an employer make personnel aware of the Social Distancing and other protection protocols that apply to ongoing essential operations?**

An increasing number of counties across California are mandating "Social Distancing Protocol" documents that must be provided to all employees and posted at each facility. For example, many of the Bay Area counties utilize a common form protocol that requires measures such as

- Signage at each public entrance indicating that those with symptoms should avoid entering the facility; a six-foot distance should be maintained; sneezes and coughs should be into a disposable cloth or tissue (or at least an elbow), and no handshaking or unnecessary physical contact is permitted;
- Steps taken by the employer to enhance social distancing, including (a) directing those who can do so to work from home; (b) directing employees with symptoms to not come to work; (c) symptom checks before employees may enter; (d) six-foot separation of workstations (desks, computers, etc.); (e) regularly scheduled cleaning and disinfecting of common areas, including bathrooms and break rooms; (f) availability of disinfectant and other cleaning supplies; (g) provision of hand sanitizer, soap, and water for washing;
- Other limits on customers allowed at any given time; limits on customer density while at the facility, including while waiting in lines; and efforts to prevent or dissuade customers or others from gathering within the six-foot limits; and
- Other limitations and precautions that may be unique to your facility and or specific operations.

Copies of the Social Distancing Protocol documents should be distributed and posted at each entrance to the facility.

You can obtain a copy of sample protocols and protocol forms through HR hotlink, the Fine, Boggs & Perkins LLP legal updates link (https://www.employerlawyers.com/legal-updates/), and through the CNCDA, as well as from county websites where such are required.

B. Protecting Our Employees

- **If employer suspects an employee is more at risk of catching COVID-19, due to age or medical condition, can the employer send the employee home?**

No. Despite public health recommendations that older workers or those with preexisting health or other conditions that may make them more susceptible to viral infection practice

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self-isolation and take other protective measures, such age- or disability-history-related actions by employers are not permitted. The Age Discrimination in Employment Act prohibits employment discrimination against workers aged 40 and over. If the reason for an action is older age, over age 40, the law would not permit employers to bar older workers from the workplace, to require them to telework, or to place them on involuntary leave. One way to show that an action was based on age would be if the employer did not take similar actions against comparable workers who are under the age of 40.

You may, however, offer all employees that are more at risk the choice whether to request and to take a personal leave of absence while the risk exists if they voluntarily choose to do so. If you offer this voluntary personal leave of absence, you should obtain a written request for the leave in writing signed by the employee.

- **What about pregnant employees? Those with pregnant spouses of family members?**

  No. As with age-related concerns, even the most well-meaning discrimination based on pregnancy status falls afoul of rules against discrimination. Again, you may offer all employees that are more at risk the choice whether to request and to take a personal leave of absence while the risk exists if they voluntarily choose to do so. If you offer this voluntary personal leave of absence, you should obtain a written request for the leave in writing signed by the employee.

- **May an employer postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, either of which places them at higher risk from COVID-19?**

  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.

- **What should an employer do if a worker says he has a health condition that puts him at greater risk of severe illness if he contracts COVID-19?**

  Statements from employees that they have a condition or health issue that puts them at greater risk if they contract COVID-19 should be treated as a request for accommodation under State and Federal disability laws. The employer should engage in the “interactive process” to determine if the worker’s condition qualifies as a disability under State or Federal law, and determine a “reasonable accommodation” for the worker.

- **What is an employer’s obligation when a worker says that they have someone at home who is at higher risk for COVID-19?**

  Ordinarily, an employee only has a right to reasonable accommodation for his own disability. Here the employee does not have a disability, only a member of his household. However, the employer should consider if it is treating the employee differently than other employees with a similar need before it responds to the request.

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- **What if an employee is afraid of catching COVID-19 but has no apparent risk factors—should they be allowed to have time off work?**

The answer may be YES. You may wish to offer employees the option to request and to take a personal leave of absence while the risk exists if they voluntarily choose to do so. If you offer this voluntary personal leave of absence, you should obtain a written request for the leave in writing signed by the employee.

There may be operational requirements that limit your ability to provide time off to all who may request such leave. In such cases, you should contact experienced employment counsel to consider the appropriate course of action.

Finally, an employee who voluntarily takes a leave of absence because of concerns about potential exposure (either with or without apparent risk factors) may or may not be eligible for unemployment benefits. Because decisions on unemployment benefits are made by the EDD and not by employers, you should avoid making commitments about whether an employee in these or other circumstances should expect to receive unemployment benefits.

- **Must employers still engage in the interactive process regarding potential accommodation of disabilities during the pandemic?**

Yes. This obligation is unchanged.

- **What are some reasonable accommodations that we should consider as part of our interactive process with workers who may have pre-existing conditions that put them at a higher risk from COVID–19?**

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. These may include non-structural changes such as

- 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.

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Bear in mind that the process must be "interactive" and bi-directional, and thoughtfully consider proposals from any source. And seek legal guidance where concerns may exist.

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

  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.

  Again, bear in mind that the process must be "interactive" and bi-directional, and thoughtfully consider proposals from any source. And seek legal guidance where concerns may exist.

- **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?**

  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.

- **What if an employee was already receiving a reasonable accommodation prior to the COVID-19 pandemic and now requests an additional or altered accommodation?**

  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.

- **May we implement short-term accommodations in cases where urgency exists? What about as conditions change, including changes in public health orders?**

  Yes. Given the pandemic, some employers may choose to shorten the exchange of information between an employer and employee known as the "interactive process" and grant requests based on urgency. 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 articulate "sunset

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provisions" for accommodations, which will effectively restart the interactive process to reconsider potential accommodations to suit changing circumstances based on public health directives and economic realities.

Employers may also opt to provide a requested accommodation on an interim or trial basis while awaiting clarification of conditions or receipt of medical documentation. This 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.

Bear in mind that because of the strain on medical providers at this time, there may be unusual delays in obtaining medical information or documentation, so employers should be flexible in considering deadlines for providing requested information.

- **If an employee takes a leave of absence or is furloughed or laid off as a result of the pandemic, at what point may we inquire as to whether a reasonable accommodation of a disability may be required upon the return of the employee to the workplace?**

We need not wait until the return is imminent to engage in the interactive process to discuss potential accommodations upon return. Bear in mind that because conditions may continue to change dynamically, employers and employees should remain flexible in their discussions of potential accommodations.

- **Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship?**

Yes. According to the EEOC, an employer does not have to provide a particular reasonable accommodation if it poses an "undue hardship," which means "significant difficulty or expense." In some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now, particularly as supplies of equipment have been interrupted, and as vehicle dealerships and other business have seen their business volume drop in light of social distancing norms and formal government restrictions on operations.

For example, 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.

Employers may also consider whether a proposed accommodation poses a "significant expense" that makes it unreasonable. The sudden loss of some or all of many employers' income streams and cash flow positions may make short-terms costs for accommodations

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more of a factor. But employers will still have to engage in the interactive discussion and weigh the cost of an accommodation against its current budget while taking into account constraints created by this pandemic. There may be many no-cost or very low-cost accommodations.

C. Health-Related Inquiries

➢ **May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace? 4/23/20**

While the ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity," the EEOC has explained that under these pandemic conditions, "employers may take 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 they enter the workplace to determine if they have the virus."

There are many different testing options that may be available, and they vary in application methodology, accuracy, and reliability. The EEOC requires that employers take this into consideration, reviewing guidance from the U.S. FDA about what may or may not be considered safe and accurate testing, as well as other guidance from CDC or other public health authorities. And check for updates, as new tests and new information will continue to become available as time goes on. Remember: accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Notwithstanding the availability of testing options, employers should still require that employees observe infection control practices, including social distancing, handwashing, and other measures spelled out in federal, state, or local health orders to to prevent transmission of COVID–19.

➢ **May we ask employees if they have COVID-19 or its symptoms?**

Yes, but only those entering or present in the workplace. You cannot ask workers who are telecommuting from home about symptoms. The EEOC explained, ". . . employers may ask all employees who will be physically entering the workplace if they have COVID-19, or symptoms associated with COVID-19, or ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, cough, sore throat, fever, chills, and shortness of breath." Note that the EEOC and CHC have recognized additional potential symptoms, including

- New loss of smell or taste; Sore throat; Headache; Muscle pain; Chills; and Shaking with chills; and
- Gastrointestinal problems, such as nausea, diarrhea, and vomiting.

The yardstick for inquiries should remain information about whether the individual may pose a direct threat to health in the workplace.

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- **Am I <u>required</u> to take temperatures of employees or others?**

  In an increasing number of counties, mandatory screening has been included in some Shelter-in-Place and Stay-at-Home orders. For example, Bay Area Counties (including San Francisco, Santa Clara, San Mateo, Marin, Alameda, Contra Costa) and City of Berkeley require that every business that remains open to implement a Social Distancing Protocol that includes a requirement for "symptom checks" before employees may enter the work space. Other counties, such as Fresno, require screening for "febrile respiratory illness" on a daily basis, which would suggest that daily temperature checks may be mandatory. THE CDC protocol has recently been updated to require temperature checks of all employees who have potentially been exposed to COVID-19 each shift before starting work even if they have no symptoms.

  Note: because individual baseline temperatures may vary from person to person, employers may wish to screen for individuals' changes over time to detect fever conditions. Should the employer log employee temperatures over time, all such records must be maintained in accordance with medical record privacy rules, which require confidential handling of such records and storage separate and apart from the employee's personnel record, thus limiting access to this information.

- **But does screening employees for medical status not conflict with federal and state laws regarding medical examinations and privacy?**

  According to the EEOC Pandemic publication at the present time, the COVID-19 pandemic permits an employer to take the temperature of employees who are coming into the workplace. However, if an employer decides to test the temperature of its employees, the test should be done by someone "well versed in how to do it," and it should be somebody with the knowledge and wherewithal of personal safety equipment required to perform the test. The EEOC cautioned against having someone who does not fit these qualifications to perform the temperature tests otherwise employers face the risk of infecting others or creating an unsafe situation.

  Bear in mind, however, that some people exposed to and carrying the virus will not register an elevated temperature or other overt symptoms.

  Note that in an increasing number of counties, mandatory screening has been included in some Shelter-in-Place and Stay-at-Home orders. For example, Bay Area Counties (including San Francisco, Santa Clara, San Mateo, Marin, Alameda, Contra Costa) and City of Berkeley require that every business that remains open to implement a Social Distancing Protocol that includes a requirement for "symptom checks" before employees may enter the work space. Other counties, such as Fresno, require screening for "febrile respiratory illness" on a daily basis, which would suggest that daily temperature checks may be mandatory.

  Updated CDC guidelines for workers in critical infrastructure roles (effectively everyone who is permitted to continue to work outside of their own residence at this time) recommend that Employers pre-screen employees with temperature checks. Ideally, these checks should happen before the individuals enter the facility.

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May the company ask an employee to divulge their medical status/health?

The disability and privacy laws protect an individual from having to disclose private medical information, unless there is a direct threat to themselves or others, or unless the employee cannot perform the essential functions of the job with or without a reasonable accommodation. The EEOC has indicated that during a Pandemic such as this, employers may ask employees if they are experiencing symptoms of the virus, which may include fever, chills, cough, shortness of breath, or sore throat. Any such information disclosed must be treated as a confidential medical record. Accordingly, this inquiry should be made in a manner calculated to protect the privacy of each individual.

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; and
- Gastrointestinal problems, such as nausea, diarrhea, and vomiting.

The yardstick for inquiries should remain information about whether the individual may pose a direct threat to health in the workplace.

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?

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). This obligation is unchanged because of the pandemic.

May an employer ask an employee whether his or her family members have COVID-19 or symptoms associated with COVID-19?

The EEOC believes that such a question is too narrow. Instead, the EEOC recommends the better question is whether the worker has had contact with anyone who the employee knows has been diagnosed with COVID-19, or who may have symptoms associated with the disease.

Updated CDC guidance confirms that a “potential exposure” includes not only those who have had close contact (within 6 feet) of an individual with confirmed or suspected COVID–19, but also any other household contact with such person. And the timeframe for having contact with such an individual includes the period of time from 48 hours before the individual became symptomatic.

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➢ What is an employer's obligation when a worker says that they have someone at home who is at higher risk for COVID-19?

Ordinarily, an employee only has a right to reasonable accommodation for his own disability. Here the employee does not have a disability, only a member of his household. However, the employer should consider if it is treating the employee differently than other employees with a similar need before it responds to the request.

Any contact with a household contact with confirmed or suspected COVID–19 from a point 48 hours before the individual became symptomatic is considered a potential exposure, according to updated CDC guidelines.

➢ May an employer ask only one individual (as opposed to all employees) questions about whether they have COVID-19 or its symptoms, or take that individual's temperature?

Maybe. But definitely not in counties where screenings are mandatory. (*See question above*.)

The EEOC takes the position that the ADA requires the employer to have ***a reasonable belief based on objective evidence*** that a particular person might have the disease in order to ask only the particular employee to answer COVID–19 inquiries or have his or her temperature taken. This directly contradicts some county requirements so you should follow any updates to see how this is resolved. This requires consideration of the motivation behind singling out a particular employee. For example, if an employer notices that an employee has a persistent cough, it could ask about the cough, whether the employee has been to a doctor, and whether the employee knows if she has or might have COVID-19.

Employers should always remain aware of potential claims of disparate treatment, where employees may claim to have been singled out and treated differently than others for illegitimate reasons, such as their membership in a protected class or a history of protected activity.

➢ What may an employer do if an employee refuses to permit his or her temperature to be taken, or refuses to answer questions about whether they have COVID-19, or its symptoms?

The EEOC stated in its March 27, 2020, webinar that the ADA allows an employer to bar an employee from physical presence in the workplace if he or she refuses to answer questions about whether he has COVID-19, symptoms associated with COVID-19, or has been tested for COVID-19; or if the employee refuses to have his or her temperature taken.

If you have an employee who refuses to cooperate in these protective inquiries, you should identify and consider the reasons for the employee's refusal. The employer may be able to provide information or reassurance that they are taking these steps (a) to ensure the safety of everyone in the workplace; and (b) in a manner calculated to protect the privacy of each individual. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace. Explaining and conducting this process in a manner designed to protect the medical information may resolve most concerns.

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If you have questions or issues arise, you should contact competent employment counsel to address these issues.

- **Can an employer demand that employees disclose where they have traveled.**

Where an employee has traveled may be a privacy issue. However, if an employer limits its demand to information of whether the employee has traveled in the last 14 days (possibly even limiting the question to countries identified by CDC), that should not be a problem. Do not ask for more information than you need to obtain the information pertinent to COVID-19 facts.

D. COVID–19 in Your Workplace

- **May an employer bar from its place of business employees with COVID-19 or its symptoms?**

Yes. Currently, 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 health or safety. For those employees who are teleworking, however, they are not physically interacting with coworkers, and therefore the employer would generally not be permitted to ask these questions or limit their ability to continue to working remotely.

- **If the company suspects an employee is sick, can the company demand that the employee undergo a medical test to check for COVID-19?**

If an employee becomes sick during the workday, they should be sent home immediately.

When we inform the employee that he or she must leave the workplace, we should recommend that they seek medical guidance and/or treatment, and ask that they be tested. While the disability laws protect an individual from being subjected to a medical exam, unless there is a direct threat to themselves or others, or unless the employee cannot perform the essential functions of the job with or without a reasonable accommodation, and generally an employer needs medical evidence to do that, the EEOC has previously said that such testing is not a violation of the disability laws when the H1N1 virus was occurring. So, we are confident that the EEOC will again take that position.

Before you require a medical exam of any employee, you should consult with competent employment law counsel based on the individual circumstances presented, as singling out individuals for different treatment may raise issues of disparate treatment.

When we send an employee home because of symptoms of illness that could be virus-related, we should clean and disinfect surfaces in their workplace and compile information on persons who may have had contact (exposure) to the affected employee during the time following symptoms and up to 48 hours prior thereto. Others at the facility who have had close contact (within 6 feet) with the employee during this time should be considered exposed.

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- **May an employee who is required to come into the workplace inform the employer that another employee has COVID-19 or its symptoms?**

  Yes. ADA confidentiality requirements do not prevent an employee from communicating to his supervisor about a co-worker's symptoms. In other words, it is not an ADA confidentiality violation for this employee to inform his supervisor about a co-worker's symptoms. After learning about this situation, the supervisor should contact appropriate management officials to report this information.

- **To whom should an employer report if one of its managers learns and confirms that an employee has COVID-19 or its symptoms?**

  The EEOC confirmed that the ADA requires 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.

  To foster consistency, you should designate a specific representative of the employer to manage the response. Planning ahead enables the employer to be prepared to protect the workplace and individuals working therein, as well as the privacy concerns of affected employees. “Need to know” should be the watchword here.

- **What information should be gathered and reported internally?**

  Specific information gathered and reported should be limited to only the information needed by the specific individual handling the response to fulfill those responsibilities. Further information may be required at a later date, but employers should resist the temptation to gather more information that needed to protect employees and others the workplace from the pandemic.

- **Can an employer tell the workforce the name of a coworker who has COVID-19?**

  No. While some employers may be concerned that simply telling the workforce that “someone at this location” has COVID-19 may not be sufficient information to allow others to protect themselves, the ADA does not permit such a broad disclosure of the medical condition of a specific employee. Both the EEOC and the CDC specifically advise employers to maintain confidentiality of people with confirmed COVID-19.

- **What steps should be taken to protect confidentiality of medical information, particularly where managers may be working remotely?**

  The EEOC has restated the baseline rule that the ADA requires that medical information be kept confidential and stored separately from regular personnel files.

  This confidential medical information will include, without limitation, all screening questionnaires and data (such as temperature logs), statements from the employee about the disease, and any other employer notes or documentation from questioning the employee about symptoms.

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Working remotely does not provide an exception to this rule. A manager or supervisor receives medical information involving COVID-19, or any other medical information, while teleworking should follow the employer's existing confidentiality protocols while working remotely, where possible. But to the extent that 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 see them—even when no other company personnel are located where the manager is working remotely.

- **What should the employer do if an employee tests positive for COVID-19?**

The infected or reporting employee should be sent home and instructed to follow CDC guidelines and any specific medical directives they may have received regarding self-isolation, etc. The affected individual should also be told to seek medical attention by phone, email or video immediately with their doctor.

The Company-designated manager should interview the affected employee to identify people with whom the employee possibly had contact (*e.g.,* within 6 feet) through the workplace either since the onset of symptoms or within the 48 hours prior thereto so that the employer can then take action to notify those exposed individuals. This should not include the disclosure of the name of the affected employee. Of course, for small employers or workgroups, close co-workers might be able to deduct who the affected employee may be, but employers remain prohibited from confirming or revealing the identity of the employee. And those contacted as potentially having had contact with the affected individual should be instructed not to speculate as to or discuss the identity of the affected individual.

The employer should also conduct a more throughout cleaning of all work areas of the reporting employees and the work area of those that were in contact with the reporting employee. You should also communicate with customers and vendors that came in close contact with the infected/reporting employee. Any employee who is tested twice 24 hours apart and is negative may return to work.

Every employee who experiences any symptoms akin to COVID-19, should self-isolate and not come back to work until the later of: (1) a minimum of ten days (10) days after the first symptoms appeared, or (2) at least 72 hours (3 days) after the last sign of fever (without the use of fever-reducing medication), provided that other symptoms have improved (for example, when cough or shortness of breath have improved).CDC and other public health guidelines on responding to exposures are regularly reviewed and updated.

- **What should the employer do if an employee notifies the employer that the employee has had contact with someone who tested positive for COVID-19?**

The CDC calls certain contacts a "potential exposure" to the virus. Specifically, if an employee has a household contact or has close contact (within six feet) of an individual with confirmed or suspected COVID–19, the individual should be considered someone with a potential exposure.

If the individual with a potential exposure exhibits any symptoms, he or she should be sent home immediately. Workspace surfaces should be cleaned and disinfected, and other employees who have worked in close contact (within six feet) of the employee should be

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considered potentially exposed. You should initiate the protocol for identifying and apprising affected employees as discussed in the previous question.

The CDC has issued the following steps to follow where critical infrastructure workers have had potential exposure to COVID–19 but are not showing any symptoms. While such workers may be instructed to isolate, that is not always practical, given the need to ensure continuity of operations of essential functions:

- ***Pre-Screen:*** Employers should measure the employee's temperature and assess symptoms prior to them starting work. Ideally, temperature checks should happen before the individual enters the facility.
- ***Regular Monitoring:*** As long as the employee doesn't have a temperature or symptoms, they should self-monitor under the supervision of their employer's occupational health program.
- ***Wear a Mask:*** The employee should wear a face mask at all times while in the workplace for 14 days after last exposure. Employers can issue facemasks or can approve employees' supplied cloth face coverings in the event of shortages.
- ***Social Distance:*** The employee should maintain 6 feet and practice social distancing as work duties permit in the workplace.
- ***Disinfect and Clean Workspaces:*** Clean and disinfect all areas such as offices, bathrooms, common areas, shared electronic equipment routinely.

You should continue to follow guidance from public health resources and contact experienced legal counsel with any questions that arise.

➢ Can an employer demand that an employee returning from sick leave provide a doctor's note releasing them to return to work?

Yes, but only ask if they are able to return to work, without posting a direct threat to the health and safety of themselves or others, to perform the essential functions of their job or some other job for which they are qualified and which is available, with or without a reasonable accommodation. Never ask an employee returning from a sick leave or a health care leave of absence about which illness they had.

The EEOC notes that because doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation, other approaches may be necessary to confirm that an individual is able to return to work without risk to others. The Department of Labor also recommends the same and discourages such doctors' notes.

➢ Does the employer have to notify authorities if an employee test positive for COVID-19?

Yes. Because COVID-19 is a pandemic, the virus is a recordable disease that should be reported in accordance with OSHA requirements as to any illness. This rule is not preempted by the ADA and its limitations of disclosures relating to medical conditions.

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- **Is the employer liable if an employee contracts COVID-19 at work?**

  Illnesses contracted by employees while at work may be covered by Worker's Compensation programs.

- **Masks — May an employer Require, Permit, or Refuse to have employees wear masks or other Personal Protective Equipment (PPE) at the workplace?**

  Maybe. Based on initial information from CDC and other health care professional, a person wearing a face mask that is not infected does not lessen the risk, and may even increase the risk, of contracting COVID-19. In addition, a shortage of available respirators and an increasingly acute need for such by medical personnel helped drive the initial recommendation that healthy personnel not working with infected individuals should not wear masks or other PPE. These recommendations have bene evolving, however.

  The CDC has updated their recommendations to now recommend the wearing of cloth face coverings in public settings where other social distancing measures are difficult to maintain (*e.g.,* grocery stores, pharmacies, etc.) and especially in areas with significant community-based transmission: areas hardest hit with more infections and hospitalizations. But these recommended coverings are not the surgical masks or N95 Respirators, which the CDC states should be reserved for healthcare workers.

  Most—if not all—jurisdictions are now mandating the wearing of face coverings in certain circumstances. For example, in many counties, commercial establishments require masks for both workers and customers alike, and consumers are regularly turned away without them. In the Amendment to the Health Order in San Diego County, all employees who may have contact with the public in any grocery store/pharmacy/restaurant or other business that serves food must wear a face covering, in addition to honoring the latest Social Distancing and Sanitation Protocols. In the City of Los Angeles, the requirements are broader: All workers at most essential business are required to wear face coverings—which employers are required to provide. If your business operates in an affected jurisdiction, you must follow these orders.

  The EEOC has restated its position that employees may require personnel to wear protective gear (*e.g.,* masks and gloves) and observe infection control practices such as hand washing and other social distancing protocols. But there may be situations where a one-size-fits-all approach will not work. For example, where an employee with a disability needs a related reasonable accommodation for disabilities (*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 (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 under applicable rules.

  Given this increasing trend favoring masks in addition to the other Social Distancing requirements that have been mandated, Dealerships should not ***refuse*** to permit employees to wear masks. Initial concerns (based on early CDC guidance) that the public would perceive a mask-wearing employee as being infected with the virus have been replaced by an increasing number of complaints from members of the public expressing concern that our workers are not wearing masks or other protective coverings. Thus, even in jurisdictions that

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do not (yet) mandate masks, employers ***should permit*** employees to wear appropriate masks or face coverings.

Moreover, employers may be required to provide such masks to affected workers. Certainly in Los Angeles or other jurisdictions where masks are mandated, Labor Code requirements that employers reimburse employees for required expenditures would play a role here. (Indeed, the Los Angeles County requirement mandates employers provide them.)

Finally, if any employee has a medical recommendation to use any device due to a disability, that request should be subjected to an interactive discussion and reasonable accommodation.

- **What if my employees need to travel domestically or internationally for any reason—work-related or otherwise?**

The CDC states that unnecessary travel should be avoided. International travel will likely be heavily restricted for some time, with many of the borders closed in nation-by-nation efforts to slow the spread of the virus. And interruptions to domestic air travel and other transportation options are also being reported.

If travel is necessary, all precautions should be taken. Business travel should not be permitted to areas that are considered at high risk of contracting COVID-19. If employees return from traveling, they should be asked if they have traveled to any high risk area. If so, they should self-quarantine and not report for work or work from home for 14 days.

You cannot stop an employee from traveling anywhere on their personal time. However, you can require that they stay away from the workplace for 14 days after returning from their travels.

- **Is testing for COVID-19 covered by the employer's health care coverage?**

It is very possible that there is coverage for testing. Most major insurance companies committed in March to voluntarily cover testing without copays and coinsurance. And in April, the federal government released updated guidance suggesting that the FFVRA and CARES Act require private insurers and group health plans to cover testing and related services without out-of-pocket expenses for individuals.

Employers should consult their carrier to confirm coverage and any limitations. If employees lose their coverage as a result of not working, the provision of FMLA/CFRA and COBRA would apply like in any other situation where an employee cannot work due to illness. Worker's Compensation might also come into play where the employee claims he/she contracted the virus in the course and scope of employment.

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E. Discrimination and Harassment Avoidance

➢ **Some of our employees are apprehensive around other employees or customers whom they may associate as being more likely than others to carry the virus; What must we do?**

Employers—as ever—are required to provide an environment free of unlawful discrimination and harassment based on any of the myriad protected categories, criteria, and activities that have been identified under public policy as worthy of protection under Title VII of the Civil Rights Act and/or various California provisions, including the State Constitution and the Fair Employment And Housing Act. These characteristics include age, race, national origin, sex and others.

While still relatively insignificant when compared to all employees or other individuals, statistically, there have been reports of unlawful harassment and discrimination targeting individuals based on characteristics such as race or national origin in connection with the pandemic. These have included, but have not been limited to, harassment or violence targeting people of Chinese descent as though they were somehow to blame for the origin or spread of the virus. And some have disparaged older workers, lamenting that their individual freedoms have been unfairly restricted in order to protect aging "Boomers."

Employers should be vigilant to identify and eradicate any such harassment in the workplace, continuing to reinforce our commitment to a workplace free of any discrimination or harassment. An employer should remind all employees that it is against federal and state law to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, age (40 or over), disability, genetic information, or other protected criteria. Employers should remind supervisors and managers of their roles in watching for, stopping, and reporting any harassment or other discrimination. And employers should make clear that it will immediately review any allegations of harassment or discrimination and take appropriate action.

This should also be extended to individuals who may seek to disparage or harass employees who may have been exposed to the virus or show symptoms that may overlap with COVID–19 conditions.

F. Returning to "Normal" Operations

➢ **At the risk of jinxing things, as we plan for a resumption of a more traditional workplace environment, how employers know what screening options or limitations can or should be maintained?**

This remains a dynamic situation few California jurisdictions ready to resume "normal" operations as they were prior to the emergence of the novel coronavirus and COVID–19, so this is a premature question. As we plan going forward, however, one key will be to remember that our inquiries and restrictions should continue to focus on avoiding the direct threat that the pandemic poses to everyone. Direct threat to health or safety 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

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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 as conditions change. This may include continuing to take temperatures and asking questions about symptoms (or require self-reporting) of all those entering the workplace. But we should be attentive to other developments that may impact employers in our areas and in our industry.

We recommend maintaining contact with both qualified attorneys and interested industry players such as the California New Car Dealers Association.

G. Employee Schedules and Payment

- **If an employee is afraid of catching COVID-19 should they be allowed to have time off work?**

The answer may be YES. You may wish to offer employees the option to request and to take a personal leave of absence while the risk exists if they voluntarily choose to do so. If you offer this voluntary personal leave of absence, you should obtain a written request for the leave in writing signed by the employee.

There may be operational requirements that limit your ability to provide time off to all who may request such leave. In such cases, you should contact experienced employment counsel to consider the appropriate course of action.

- **Does the employer have to allow an employee to take time off work if the employee's children's schools close due to COVID-19?**

Most likely, Yes. See comments below under the FFCRA and its enactment of the of Emergency Family and Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA), both of which mandate some paid leave for leaves where the employer is required to care for a child whose school or other facility (day-care or child-care) is closed because of the pandemic)..

- **Can employees work from home if they are sick with COVID-19 or have to be home with children?**

Generally speaking, employers do not have to, but may allow, employees to work from home. However, if an employee has a disability that requires them to work from home, working from home may be required as a reasonable accommodation under the disability laws. If an employee is working from home, the rules on payment of wages and break times and rest periods still apply. If they are subject to being called, texted, etc. while at home, you must pay them for that time.

- **Should I furlough or lay off employees? What is the difference legally?**

There is a lot of misinformation about the term furlough vs. layoff. Legally, there really is little or no difference in California. However, the two terms have different emotional impacts on workers due to long-standing common perceptions in the two terms. The term furlough is commonly used when an employee has been asked not to come to work for a limited period of time and generally is not considered by the employee as though they are terminated from

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employment. A layoff, on the other hand, carries with it more uncertainty and the term is usually used to indicate an uncertain or perhaps permanent period of not working and is considered by employees to be a termination from employment.

In California, however, those terms really don't have any legal significance where the layoff is longer than the current pay period. That is because the California Labor Commissioner does not recognize the difference in the two terms if a furloughed or laid-off employee remains off work into the new pay period. If that happens, the Labor Commissioner considers the employee terminated for the purposes of paying out earned wages and accrued vacation. The Labor Commissioner opined that that if an employer reduces an employee's scheduled work hours to zero — and does not reschedule that employee within the same pay period or the employee is not expected to return to work within the same pay period — the employer has effectively laid off the employee, which triggers the final pay requirements under Labor Code section 201. Also failure to pay those wages timely (including vacation) can lead to significant penalties of up to 30 days of wages.

If an employer with 75 or more employees lays off more than 50 employees within a 30-day period, the California WARN requirements apply. While Governor Newsom waived the 60-day notice period recently as a result of the pandemic, a modified notice must still be sent to the employee, the government agencies and any union that may represent your employees. A free informational guide and sample WARN letters are available at https://www.employerlawyers.com/legal-updates/.

Finally, health care benefits, COBRA, and unemployment benefits generally apply in the same manner whether you call it a furlough and/or a lay off.

- **Can the employer furlough employees and close facilities due to COVID-19?**

Yes. However, if the closure and period of time off is not expected to conclude within the same pay period (unlikely in this case), then the Division of Labor Standards Enforcement (DLSE) requires that the employer treat wage payment the same as in the case of a termination of employment, with all final wages—including accrued-but-unused vacation or PTO—paid to the employee at that time, subject to waiting-time penalties under Labor Code section 203. In addition, such layoffs may trigger notice requirements under the California Workers Adjustment and Retraining Act (WARN). Those provisions (addressed in more detail elsewhere herein) have been relaxed during this pandemic, but not eliminated altogether.

- **Does the employer have to pay employees that are on furlough or are on leave due to COVID-19?**

Generally, the employer does not have to pay employees who are off work. However, if furloughed, employees should get all accrued but unused PTO/vacation paid out to them. Likewise, if employees have sick days left (where the employee is placed on unpaid leave), the employee should be able to use that sick leave pay. Salary employees must be paid for any workweek during which they work at all, unless there is a paid sick leave policy that pays for some of the sick days per year. Employee may also be entitled to government assistance in terms of unemployment and/or special programs related to COVID-19.

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Employees who qualify under the FFCRA paid leave provisions may be entitled to paid leave where work is available, but they are unable to perform work for specified qualifying reasons. Check below for more details.

- **If employees have their hours and compensation reduced (but are not laid off altogether), can they find relief through Unemployment Insurance?**

Maybe. The Employment Development Department (EDD) may authorize unemployment insurance benefits for employees whose earnings have been reduced because of lack of work. Ordinarily, employers with reduced hours and compensation would prepare the EDD Form DE 2063 for employers to submit with their unemployment benefits application. However, because of the crush of applications in connection with the current pandemic, manual systems have become overwhelmed and the EDD is instructing applicants to file online for benefits. As such, for the time being the DE 2063 form is not required.

Bear in mind that unemployment insurance decisions are ultimately made by the EDD and not employers, so you should avoid unequivocal assurances to individual employees that unemployment benefits will be available.

- **I have employees that have written pay plans that provide for a guaranteed salary, a minimum draw or target earnings or some other guaranteed minimum payment. Do I need to do anything if I am having them work reduced hours if I do not want to be locked into the guarantee amount?**

Yes. If you want to pay an employee less than the guaranteed minimum earnings stated in his/her pay plan, you must make changes to the pay plan.

Salary-exempt managers are entitled to the full salary for any workweek in which they work any hours at all unless the manager requests time off for personal reasons in full-day increments. If you don't have the manager work all the normal days, you must pay the salaried manager the entire salary for any workweek the manager works (even taking a few calls or responding to emails from home triggers that obligation). If you want to pay a salary-exempt manager less money for reduced hours where the manager works some hours each workweek, must reduce the salary in writing. That reduction must be given in a prior advance prospective written notice of the reduction. In general, an employer may reduce an exempt worker's salary, as long as the salary does not fall below the minimum salary requirement for exempt workers. The minimum salary requirement for 2020 for white-collar workers is $54,080 for employers ($4507 per month).

If any other classification of employee has a minimum draw, a minimum target earnings or any other form of minimum earnings guarantee, an addendum to the pay plan should also be issued. A sample addendum to reduce minimum guaranteed earnings is available at https://www.employerlawyers.com/legal-updates/ or through HR Hotlink.

- **Is there specific language that I should include when laying off workers?**

We have prepared a sample letter to inform employees that the business conditions have deteriorated such that staffing cannot continue at their current levels. The purpose of the letter is to confirm their status change, encourage them to remain available should conditions change, but not build expectations that they are entitled to either near- or long-term recall.

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If you have questions about the sample letter (included with the legal update), please contact our office.

If you provide a personal leave of absence to employees at their request, you should always do so upon the written request for the employee so that the nature of the leave request will be well documented.

- **Are there rules that limit my ability to accompany layoffs with severance payments and releases?**

Yes. Federal law places restrictions on severance packages when offered in exchange for a release of certain types of claims. In particular, there are mandatory timing and notification requirements that apply when release agreements are intended to cover potential claims of age discrimination. While these apply to individual releases, there are significant additional obligations when more than one individual may be affected by the severance and release offerings. You should check with qualified counsel if you are planning to implement severance and release agreements as part of your overall strategy to manage dynamic working conditions and personnel requirements.

H. WARN and the Documentation of Layoffs

- **What is the WARN Act?**

Under the federal Workers Adjustment and Retraining Notification Act ("WARN" Act) requires covered employers planning a "plant closing" or a "mass layoff" to provide affected employees and specified state and local government officials at least 60 days' written notice. (29 U.S.C. § 2102(a); 20 CFR § 639.2).

California has its own version of a WARN-like statute that, for the most part, parallels the federal law. (Cal. Labor Code § 1400 *et seq.*) Some relevant differences are noted herein.

- **Which Employers Are Covered Under WARN?**

Under the Federal WARN Act, an employer is any business that employs: (a) 100 or more employees, excluding part-time employees; or (b) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of overtime).

Under the California WARN counterpart, a "covered establishment" is one that employs (or within the last 12 months has employed) at least 75 persons.

- **When Does the WARN Notice Apply?**

Under federal law, employers may not order a "plant closing" or "mass layoff" until 60 days after written notice to affected employees or their representatives (i.e., Unions). A "plant closing" is defined as the permanent or temporary shutdown of a single site of employment if the shutdown results in an "employment loss" for 50 or more employees, excluding any part-time employees. A "mass layoff" is a workforce reduction that is not the result of a plant closing and results in an "employment loss" at a single site of employment during any 30-day period for: (a) at least 500 employees; or (b) at least 33% of the total employees at the site who comprise at least 50 employees (part-time employees excluded from each of these

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calculations). An "employment loss" is: (a) an employment termination, other than a discharge for cause, voluntary departure, or retirement; or (b) a layoff exceeding 6 months; or (c) a more than 50% reduction in work hours during each month of any 6-month period.

Under California law, notice is required prior to any "mass layoff," "relocation" or "termination" at a covered employer. Under California law, "mass layoff" means a layoff of at least 50 employees during any 30-day period due to lack of work or lack of funds. A "relocation" means removal of all or substantially all of the employer's industrial or commercial operations at a covered employer to a different location at least 100 miles away. And a "termination" means the cessation of industrial or commercial operations in a covered establishment.

- **What is the effect of the California Executive Order?**

In response to the ongoing state of emergency declared by the California Governor in response to the COVID-19 pandemic, the Governor issued Executive Order N-31-20, suspending certain California WARN Act requirements for an employer that orders a mass layoff, relocation, or termination at a covered establishment under certain conditions. Primarily, the impact is that the 60-day advance notice requirement is suspended, provided the other notice requirements are still met.

While this Order only impacts the California version of the rules, the federal WARN Act already includes an exemption for "unforeseen business circumstances" that eliminates the 60-day requirement where the closures or layoffs were caused by some "sudden, dramatic, and unexpected action or condition outside the employer's control." Thus, the Governor's Order brings California more into line with federal requirements.

- **Who Must Receive Notice?**

Notice must be given to all affected employees (both part-time and full-time employees). In addition, notice must be sent to the State dislocated worker unit, and the chief elected official of the unit of local government within which the closing or layoff is to occur. In California, notice to the State dislocated worker unit should be sent to:

WARN Act Coordinator
Automation and Local Support Section
Workforce Investment Division
Employment Development Department
P.O. Box 826880, MIC 69
Sacramento, CA 94280

- **What is the Liability for Failing to Comply with WARN Obligations?**

Both federal and California law allow aggrieved individuals to bring a civil action to recover for each day of the violation (up to 60 days maximum) backpay and benefits under an employee benefit plan. In addition, the employer may be required to pay a civil penalty that could be as high as $500.00 for each day of the violation. In addition, the California Labor Commissioner has statutory authority to examine company records in connection with any investigation of a WARN violation.

Note: Compliance with the California Executive Order suspends the penalty provisions under California law.

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I. Basic Information on the FFCRA

- **What is the FFCRA?**

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act. Described by a number of politicians as one element of a broader federal response to lessen the negative impacts of the pandemic on the American people, the Act offers temporary relief to employers and employees in three key areas:

  - Expansion of Family and Medical Leave Act through the Emergency Family and Medical Leave Expansion Act (EFMLEA) rights to include more workers, more statutory bases for leave, and paid leave under certain circumstances;
  - Establishment of Emergency Paid Sick Leave Act (EPSLA); and
  - Provision of tax credits to cover the costs of Paid Sick Leave and Paid Family and Medical Leave.

- **When did the new law take effect?**

Signed on March 18, 2020, the law took effect on April 1, 2020. It does not have retroactive applicability to before that date.

- **How long to the provisions remain in effect?**

The Paid Sick and Paid Family Leave provisions, as well as the tax credits created by the law, expire December 31, 2020.

- **Am I required to provide Notice of these new provisions to employees?**

Yes. Each covered employer must post a notice for each current employee of the FFCRA requirements in a conspicuous place on its premises. This requirement can also be satisfied by email or direct-mailing notice to employees, or posting the notice on an employee information internal or external website. A sample notice is included with these updates. In addition, copies may be downloaded and reproduced by employers through the Department of Labor at https://www.dol.gov/agencies/whd/posters

J. Emergency Family Medical Leave Expansion Act (EFMLEA)

- **Which employers are affected?**

Private-sector employers under 500 employees are affected. Some employers may be exempted from some provisions of the law through anticipated regulations, such as small businesses with fewer than 50 employees. (*See* subsequent questions.)

The emergency regulations issued by the Department of Labor indicate that the 500-employee threshold should be measured by including all employees—full- and part-time—within the United States (or its territories or possessions) and not just within California. This count should include

  - Employees on leave;

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- Temporary employees jointly employed by you and another employer (whether or which entity has the worker on the payroll); and
- Day laborers supplied by a temporary agency.

You should not include workers who are independent contractors under the Fair Labor Standards Act (FLSA), which does not apply the same standard required in California under recent changes to independent contractor requirements.

Generally, a corporation (including separate establishments or divisions) will be a single employer. However, where more than one corporation share common ownership or financial control, common management, interrelation between operations, centralized control of labor relations (*e.g.,* centralized Human Resources functions), then separate entities or corporations may be considered an "integrated employer" for employee-count purposes under existing FMLA requirements. While FLSA regulations define "Joint Employers" differently, the regulation under the FFCRA expressly provide that tabulation of the number of employees must include both common employees of "joint employers" and "integrated employers."

This employee count must be viewed as of the time the leave is requested. For example, if an employer has laid off workers in March 2020 resulting in a total of 480 employees, then personnel requesting leave under the EPSLA or EFMLEA would be eligible for such leaves. If, however, the employer recalls 50 employees—perhaps to take on work made available by employees taking leave under the FFCRA provisions—and climbs above the 500-employee threshold, then other employees would no longer be entitled to take these paid leaves.

If you are unclear as to whether your operations would be viewed as a single enterprise under this standard, you should contact experienced legal counsel to review.

➢ Which employees are affected?

Historically, FMLA covers employers with 50 or more employees within a 75-mile radius, providing leave entitlement for employees who have worked for the employer for at least 12 months and have worked at least 1250 hours within the last 12-month period. This law expands coverage to include both smaller employers (all employers with fewer than 500 employees) and new employees: employees need only have worked for the employer for at least 30 days prior to the designated leave to be eligible for leave under EPSLA or EFMLEA. The EFMLEA specifically applies to employees laid off or otherwise terminated on or after March 1, 2020, provided they were rehired or subsequently reemployed by the same employer.

Again, some small employers are exempt from the leave requirement.

➢ What triggers the expanded Paid Family Leave?

The new law provides Paid Family Leave only for employees unable to work (or telework) due to a need to care for a son or daughter under the age of 18 if the child's school or child-care provider is closed due to a COVID–19-related public health emergency. It does not provide Paid Family Leave for the employee's own health condition or for other bases set forth under the historical FMLA provisions.

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➢ How many days of Paid FMLA are available?

Employees are entitled to a total of 12 weeks of job-protected leave (*e.g.,* under historical FMLA standards and the Paid FMLA expansion collectively). However, the first 10 days of expanded FMLA leave remain unpaid. Employees with available vacation, personal, PTO, or paid sick leave (including the EPSLA benefits under the FFCRA) may elect to use such paid time off during this period.

An eligible employee may elect to use, or an employer may require that an employee use, such expanded family and medical leave concurrently with any leave offered under the employer's policies that would be available for the employee to take to care for his or her child, such as vacation or personal leave or paid time off.

The FFCRA does not provide additional time off to those employees who have already utilized part of their FMLA leave allotment for the year. For example, an employee who took 3 weeks of FMLA for an unrelated Serious Health Condition earlier in the year would not be eligible for more than 9 weeks of EFMLEA until the 3 earlier weeks fell out of the measuring window (usually a 12-month rolling window).

➢ Can EFMLEA leave be intermittent?

Intermittent leave for those who work remotely is available under each of the six potential triggering elements. This because a remote worker presents no risk of spreading the virus to work colleagues.

Intermittent leave for those who continue to report to the worksite may only be available where leave is to care for a child whose school or related facility is closed. This, because only under this qualifying reason is there limited risk of spreading the virus. All other potential triggers involve suspected or confirmed presence of the virus or related conditions.

In any event, intermittent leave requires an agreement between the employer and the employee. While not required, this should be in writing to confirm the clear and mutual understanding between the employer and the employee that intermittent leave is available, including agreement on the increments of time in which the leave may be taken.

➢ How much does the employer have to pay? Should I include Overtime Premiums when calculating that rate?

After the 10-day period, the employer must pay at least 2/3 of the employee's regular rate of pay, subject to a limit of $200 per day and an aggregate limit of no more than $10,000 (effectively 50 days at $200 per day). The required rate of pay is the greater of the applicable minimum wage (federal, State, or local) and the "Regular Rate of Pay" under the Fair Labor Standards Act (FLSA), which includes both base compensation and other non-discretionary compensation.

Note: Calculation of the Regular Rate of Pay ***DOES NOT*** include overtime. So an employee who made $1,000 during a week while working 50 hours will have a Regular Rate of $20 per hour. If non-exempt from overtime, the employee should also have been paid $100 in Overtime (50% of the $20 Regular Rate for each of 10 OT hours) during the week. But the Regular Rate under the FFCRA would still be $20 per hour and not $22.00 per hour ($1,100 ÷ 50 hours).

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The total EFMLEA payment per employee for this ten-week period is capped at $200 per day and $10,000 in the aggregate, for a total of no more than $12,000 when combined with two weeks of paid leave taken under the EPSLA.

The number of hours paid must reflect the average number of hours the employee is normally scheduled. Note: The statute uses a measuring period of six months. Thus, the average hours worked for employees whose schedules have already been curtailed by the pandemic or otherwise should be measured over the six-month period to approximate pre-pandemic compensation levels.

- **What are the reinstatement rights?**

Reinstatement obligations match those of FMLA historically. Small employers may have additional flexibility in reinstatement obligations where the position in question no longer exists because of pandemic-related downturn or other circumstances, although these employers must make reasonable efforts to return the employee to an equivalent position, which obligation remains in effect for up to a year following the leave. You should consult competent employment counsel before refusing to reinstate any employee. Also, you should use a Reinstatement Agreement before reinstating the employee to protect the company from risk down the road. A sample Reinstatement Agreement is available free-of-charge at https://www.employerlawyers.com/legal-updates/ or through HR Hotlink.

K. Emergency Paid Sick Leave Act (EPSLA)

- **Who is eligible for leave?**

Paid Sick Leave benefits are available to all employees of employers with 500 or fewer employees, without regard to any length of employment requirement.

These Paid Sick Leave benefits are in addition to any other leave programs that may have applied previously. Thus, every otherwise-eligible employee may take two weeks (up to 80 hours) of this leave even if they had previously exhausted other leave allotments (*e.g.,* twelve weeks of leave under the Family Medical Leave Act (FMLA).

- **What triggers Paid Sick Leave eligibility?**

An individual may be eligible for Paid Sick Leave for his or her own condition, if he or she is

(1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
(2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
(3) is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
(4) is caring for an individual who is subject to an order as described in (1), or who has been advised as described in (2);
(5) is caring for his or her son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19 related reasons; or

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(6) 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 following questions describe these eligibility requirements in more detail.

➢ What does it mean to be subject to a Federal, State, or local quarantine or isolation order related to COVID-19?

Quarantine or isolation orders include a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility. As recognized by the regulations, the question is whether the employer would be able to work (or telework) "but for" the quarantine or isolation order.

The DOL FAQ set offers some guidance here:

- If an employee is prohibited from leaving a containment zone (and the business is operating outside of the containment zone), or under government order to isolate because of, say, returning from a cruise ship, then the employee may take Paid Sick Leave under this criteria, as it is the order that is preventing the employee from working
- But if the employer has shuttered one or more locations because of the government order, then there is no EPSLA available.

Questions about whether your business is closed because of such an order should be directed to your attorneys.

➢ What does it mean to be advised by a health care provider to self-quarantine due to concerns related to COVID-19?

Under the regulations, advice to self-quarantine would trigger this element, provided that the advice is based on the health care provider's belief that the employee has COVID–19, may have COVID–19, or is particularly vulnerable to COVID–19.

And self-quarantining must prevent the employee from working. If the employee can work remotely while self-isolating, then no leave under this provision is available.

➢ What does it mean to be experiencing symptoms of COVID-19 and is seeking a medical diagnosis?

This is triggered by an employee who is experiencing fever, dry cough, shortness of breath, or other recognizing COVID–19 symptoms. And it applies only as long as the employee is taking affirmative steps to obtain a medical diagnosis. This process may take some time, depending upon availability of testing kits and local pressures.

Note: DOL Guidance confirms that employees who unilaterally decide to self-quarantine without actively taking steps to seek medical diagnosis are not eligible for Paid Sick Leave under the FFCRA, even if the individual may have COVID–19 symptoms.

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- **What does it mean to be caring for an individual who is subject to an order as described in (1), or who has been advised as described in (2), or whose school or child-care facility has been closed because of the pandemic (Element 5)?**

  As with the federal, State, or local order element (No. 1), this element is only triggered where the employee has work available from the employer and would be able to perform the work "but for" the need to care for an individual subject to elements 1 or 2. Thus, if there is no work available (*e.g.,* downturn in demand), no EPSLA leave would be available.

  Similarly, there can be no leave under this element if there is no "genuine need" to care for the individual. Paid leave may not be taken to care for someone with whom the employee has no personal relationship. Covered relationships under the regulations include an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.

  Note that an employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual—such as a coparent, co-guardian, or the usual child care provider—is available to provide the care the employee's child needs.

- **What does it mean to have a "substantially similar condition" within the scope of the sixth possible EPSLA trigger?**

  As of the end of April, the US Department of Health and Human Services has not yet identified any such condition. If and when that may happen, further guidance will be made available.

- **How much Paid Sick Leave is available?**

  Eligible full-time employees (averaging at least 40 hours per week) may take up to 80 hours of Paid Sick Leave under this new law over the course of a two-week period.

  Part-time employees whose schedule varies are able to take leave equal to fourteen times the "number of hours that the employee was scheduled per calendar day," as averaged over a six-month period (or less if the employee has not worked six months). The regulations also provide that an employer may also use twice the number of hours that an employer was scheduled to work per workweek over the same six-month period.

- **At what rate is the Paid Sick Leave paid? Should I include Overtime Premiums in calculating this rate?**

  Paid Sick Leave is calculated at the employee's "Regular Rate" where the basis is the employee's own COVID–19 condition or quarantine status under options 1 through 3. This capped at $511 per day, with a two-week maximum of $5,110.

  If the leave is to care for another individual or for an "other similar condition," the leave is calculated at 2/3 of the Regular Rate per hour, capped at $200 per day or $2,000 over the two-week maximum period.

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The "Regular Rate" under the FFCRA paid leave provisions is, per the regulations, to be based on a "representative" rate, based on a weighted average over the same six-month period ending on the date on which the employee first takes paid leave under the FFCRA. This allows the rate and the number of hours to be paid to be measured over the same period.

Note: Calculation of the Regular Rate of Pay ***DOES NOT*** include overtime. So an employee who made $1,000 during a week while working 50 hours will have a Regular Rate of $20 per hour. If non-exempt from overtime, the employee should also have been paid $100 in Overtime (50% of the $20 Regular Rate for each of 10 OT hours) during the week. But the Regular Rate under the FFCRA would still be $20 per hour and not $22.00 per hour ($1,100 ÷ 50 hours).

- **Is the Paid Sick Leave Retroactive?**

No. This means that each otherwise-eligible employee has the full two-week allotment available, even if the employer had provided paid or partially-paid leave prior to the effective date of the FFCRA. And it means that the employer will be unable to apply any refundable tax credit toward offsetting the cost of paid leave provided prior to the April 1 effective date.

L. Small-Employer Exceptions

- **I'm a small employer with fewer than 50 employees; do I still have to provide these paid leaves?**

Employers with fewer than 50 employees may be able to deny requests to take EPSLA and EFMLEA to care for a child whose school/day-care/child-care are closed because of the pandemic when such leave would jeopardize the viability of the business as a going concern. The statutory language offers three examples, including

- Where expenses and financial obligations would cause the small employer to cease operating at a minimal capacity;
- Where the absence of the employee in question would put the business at risk because of the employee's specialized skills, knowledge of the business, or responsibilities; or
- Where the employer cannot find enough workers who are able, willing, qualified, and available to operate the business at a minimum capacity.

If you believe that your operations may fall within this small-employer exception, you should confirm as much with experienced counsel.

M. Tax Credits for EPSLA and EFMLEA Paid Leave

- **Which employers are eligible?**

All affected private-sector employers are allowed a credit against Social Security tax liability for the Paid Sick and Paid Family Medical Leave paid to employees.

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➢ **How much is the credit?**

The credit is generally 100 percent of the qualified Sick Leave wages paid by the employer. And it is a refundable credit, meaning that the employer will be reimbursed if costs for qualified sick leave exceed the corresponding taxes it would owe.

➢ **How are these credits recovered?**

Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage.

While more detailed guidance is expected, the IRS has indicated through its website that employers who pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS as is normally required for federal income tax, Social Security and Medicare taxes. If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS, which the IRS expects to process quickly.

Watch for further guidance on these details as the IRS regulations become available.

➢ **Are all paid leaves reimbursable?**

No. The FFCRA only provides reimbursement through tax credits for leaves that are required under the statute. Thus, if you provide leave in excess of the requirements (*e.g.,* you provide more than two weeks of leave, you offer EPSLA leave to personnel not subject to Elements 1 through 6, or you offer paid leave as an employer with more than 500 employees, you will not be able to claim the tax credits under the Act.

For this reason, it will be important to maintain all applicable records and certifications.

N. Documentation under the FFCRA

➢ **May we require employees to document the reasons for leave under the FFCRA?**

Yes. An employee must provide his or her employer documentation in support of paid sick leave or expanded family and medical leave, including a signed statement containing the following information: (1) The employee's name; (2) the date(s) for which leave is requested; (3) the COVID–19 qualifying reason for leave; and (4) a statement representing that the employee is unable to work or telework because of the COVID–19 qualifying reason. You can obtain a form for this purpose from our website under Legal Updates or through HR Hotlink.

Certain reasons for leave may require additional documentation. For example, employees taking leave under Element 1 must provide the name of the government entity that issued the quarantine or isolation order that triggers the need for leave. And employees under medical instruction to quarantine or self-isolate must provide the name of the health care provider

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issuing the order. Similar requirements exist for leave based on the care for others under those circumstances.

Employees requesting leave to care for child whose school or related facility is unavailable must provide the name of the child; the name of the school/place of care/child-care provider; and a statement that no other suitable person is available to care for the child.

Leave taken under FMLA for one's own serious health condition or that of a qualifying family member is subject to the normal FMLA requirements; the FFCRA does not change this.

While documentation need not be submitted as a matter of course to the Department of Labor or other agency, it should be retained in a manner useful to the employer as may be required to back up tax credit request under FFCRA reimbursement provisions.

O. Paycheck Protection Program Loans under the CARES Act

- **I may have more than 500 employees; may I still be a "Small Business" eligible for this loan program?**

According to guidance issued by the Treasury Department on April 8, 2020, small businesses may still qualify for these loans if they meet the SBA revenue-based size standards that relate to their primary industry. These can be found at www.sba.gov/size. For example, a business can qualify for PPP loans if, as of March 27, 2020 (1) the maximum tangible net worth of the business is not more than $15 million; and (2) the average net income after Federal income taxes (excluding carry-over losses) of the business for the two full fiscal years before the date of the application is not more than $5 million.

Note that updated guidance from the Treasury Department indicates that, in light of high demand for the funds and to focus the relief on small businesses, no "Corporate Group" may obtain more than $20M in aggregated PPP loans. Corporate Group, in this circumstance, is defined as a group of business owned, directly, by a common parent. This restriction became effective on all loans not fully disbursed as of April 30, 2020. If you believe that this may impact your operations, you should seek legal guidance, contact your lender, or both.

- **Do I measure the 500-employee threshold using each separate dealership (*e.g.,* rooftop) or must I include employees of affiliated dealerships?**

Borrowers under the PPP must meet the affiliation rules set forth in the SBA's Interim Final Rule on Affiliation. ***These can be complicated at times, and employers are encouraged to review their specific situation with experienced legal counsel.***

In general, "affiliation" under the SBA rules exists where one business controls or has the power to control another, or when a third party (or parties) controls or has the power to control both businesses. This control may be through ownership, management, or other relationships or interactions between the entities. Because the SBA considers the number of employees of a potential lender to include both (a) the employees of an affiliate; and (b) the employees of any affiliate of the affiliate, many dealership groups will be evaluated on an enterprise basis and not as an individual dealership.

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Note that updated guidance from the Treasury Department indicates that, in light of high demand for the funds and to focus the relief on small businesses, no "Corporate Group" may obtain more than $20M in aggregated PPP loans. Corporate Group, in this circumstance, is defined as a group of business owned, directly, by a common parent. This restriction became effective on all loans not fully disbursed as of April 30, 2020. If you believe that this may impact your operations, you should seek legal guidance, contact your lender, or both.

- **In counting employees, do I count all employees or just "Full Time" employees?**

  The PPP provisions are based on Full-Time employees. Employees are considered full-time under this rule if they are working at least 30 hours per week.

- **PPP loans exclude employee compensation in excess of $100,000 annually; does that exclusion apply to all employee benefits?**

  No. The Treasury Department has opined that the exclusion only applies to cash compensation, excluding non-cash benefits that may include (a) employer contributions to benefits or retirement plans; (b) group healthcare benefit payments, including premiums; and (c) payment of state and local taxes assessed on employee compensation.

- **May my PPP loan be used to cover Paid Time Off?**

  Yes. PPP Loans cover payroll costs that include costs of vacation, paid sick leave, or other paid leaves. However, the CARES Act specifically excludes payroll costs for which a credit is available under the FFCRA (EPSLA or EFMLEA leaves), as described elsewhere in these FAQ resources.

- **What are the measuring periods to determine the size of a PPP loan that may be available to my business?**

  Payroll costs should generally be aggregated either from the previous 12 months or from calendar year 2019. For seasonal businesses, payroll for the period between February 15, 2019, or March 1, 2019, and June 30, 2019, may be used. If the business was not operating during those windows, it may use average monthly payroll costs for the period from January 1, 2020, through February 29, 2020.

  These same periods should be used to determine the number of employees at issue. Or, employers may use the SBA's more usual calculation: the average number of employees per pay period in the 12 completed calendar months preceding the date of the loan application.

- **Can I count payments to independent contractors in the payroll for PPP loans?**

  No. However, such contractors may themselves be eligible for such a loan if they meet the remaining requirements.

- **Does PPP eligibility use gross or net payroll costs?**

  Gross payroll costs. However, costs of employers' shares of payroll taxes (*e.g.,* FICA) are not included as payroll costs under the CARES act.

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- **I thought the maximum loan amount was set at $10M, but media reports are saying that much smaller loans are coming under extra scrutiny; are larger loans subject to audit?**

  As the second round of PPP funding became available, the Treasury Department announced that there will be heightened scrutiny over any loan greater than $2M. This came on the heels of reports that many larger companies received scarce PPP funding that was not objectively necessary, thereby making it harder for companies that need the relief to obtain it.

  Specifically, the Secretary of the Treasury announced that loans in excess of $2M will be audited by the Treasury Department before forgiveness is granted. This is in addition to any auditing process undertaking by the specific lenders. Loan recipients will be required to certify that the loans are necessary and demonstrate that the company cannot turn to another source (*e.g.,* capital markets) for funding at this time.

  Employers seeking loans and forgiveness of less than $2M should also expect some degree of scrutiny over their loans at the forgiveness stage, but those seeking larger loans should absolutely review their loan and forgiveness filings closely to ensure that the required certifications can be supported when the review comes.

P. PPP Loan Forgiveness Limitations

- **Are these PPP loans really forgivable?**

  Yes, but there are limitations built into the statute and the regulations designed to ensure that the loans are used for the intended purpose: the protection of payrolls during this challenging period.

- **What are the limitations on forgiveness for the PPP loans?**

  There are three primary calculations that may reduce the amount of actual forgiveness below the full amount of the loan. They are:

  - The amount of forgiveness will be reduced proportionally if the number of FTE Employees on the payroll is reduced below the measuring period;
  - The amount of forgiveness will be reduced if the wages paid to individual employees during the covered period is not at least 75% of the wages paid during the measuring period; and
  - Borrowers may not receive forgiveness in excess of 25% of the total forgiveness amount for non-payroll expenses, such as mortgage interest, rent, and utilities.

- **The amount of forgiveness of a PPP loan depends on the borrower's payroll costs over an eight-week period; When does that eight-week "Covered Period" begin?**

  Answer: The eight-week Covered Period begins on the date the lender makes the first disbursement of the PPP loan to the borrower. The lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval.

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➢ How is the ratio of FTE Employees calculated?

Reduction in the number of Full-Time Equivalent Employees (FTE Employees) will reduce the forgiveness amount below the maximum Potential Forgiveness level. This is done on a proportional basis by multiplying the Potential Forgiveness amount (*i.e.,* the dollar amount spent during the 8-week period) by the ratio of (a) the average number of FTE Employees employed per month during the Covered Period; to (b) the average number of FTE Employees employed during either the period from February 15–June 30, 2019, or from January 1–February 29, 2020. As non-seasonal employers, Dealerships can choose the smaller of the two figures for this computation.

> ***Example:*** Dealership averaged 150 full-time employees during the selected base period of January–February 2020, but many were laid off during the March 2020 prior to the Covered Period which began at funding in mid-April 2020. During the Covered Period of the loan, the Dealership brought back most of the individuals, although only 50 resumed full-time employment. Of the other 100 individuals, 40 were brought back at 15 hours per week, 45 were brought back at 20 hours per week, and 15 chose not to return or were otherwise not brought back.

Note: this calculation utilizes Full-Time Equivalent Employees and not just the number of actual employees on the payroll. Under this rule (as understood from other federal statutes utilizing the term), an FTE represents an employee who works 30 or more hours per week. Thus, to compute this figure, you would count all employees who regularly work 30 or more hours per week, then tally up the number of hours worked per week by those working less than 30 hours per week and divide by 30 hours per week, aggregating the resulting FTE figure with the number of full-time employees. In other words, the ratio would not be 90% (135/150) but 66.67% (100/150).

The FTE Employee math looks like this:

- 40 Employees × 15 hours/week = 600 hours/week
- 45 Employees × 20 hours/week = 900 hours/week
- 1500 hours/week ÷ 30 hours/week = 50 FTE Employees
- 50 FTE Employees from part-time workers + 50 FTE Employees from full-time workers = 100 FTE Employees Total

Because the FTE Employee averages went from 150 to 100 between the base period and the Covered Period, the Potential Forgiveness amount will be reduced by 2/3 under this rule. (100 FTE Employees ÷ 150 FTE Employees = 2/3, or 66.67%.)

➢ If my dealership laid off employees between February 15, 2020, and April 27, 2020, can I avoid liming the loan forgiveness by hiring back employees after the Covered Period?

Yes, under the FTE Employee limitations. The CARES Act provides a "savings clause" that employers can use to nullify the FTE Ratio Adjustment. To avoid reduction of the Potential Forgiveness amount based on a reduction in the number of FTE Employees between February 15, 2020, and April 27, 2020 (30 days after the statute became law), an employer may restore the number of FTE Employees by June 30, 2020. That is, the employer must bring the total number of FTE Employees back to the level of February 15, 2020 by hiring or

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rehiring sufficient employees and scheduling them for sufficient hours such that the number of FTE Employees on June 30, 2020, matches the FTE Employee count for the measuring period. Returning to our example, even though the average number of FTE Employees during the covered period was only 100, if by June 30, 2020, the employer were to schedule the 85 employees working reduced hours to no fewer than 30 per week and rehire or replace the 15 employees who had not returned during the Covered period, then there would be no 33.33% reduction in forgiveness from the Potential Forgiveness amount. The savings clause does not compare FTE Employees against the pre-Covered Period used for the potential reductions, but rather compares June 30, 2020, FTE level against that from the pre-pandemic target of February 15, 2020.

- **How is the Wage Ratio Adjustment calculated?**

The potential Adjustment to the Potential Forgiveness amount based on wages paid reduces the loan forgiveness by the amount of any reduction in wages to each employee in excess of 25% when comparing Covered-Period wages to Base Period Wages. This element is complicated for a couple of reasons. First, the calculations must be done on an individual basis, not as a whole; as it currently stands, the language appears to establish that reductions in compensation to some cannot be offset by increases in compensation to others. Second, while the Covered Period is the same as for the headcount evaluation, the Base Period is different.

According to the statute, the Base Period for the wage level comparison is the "most recent full quarter during which the employee was employed before the Covered Period." With most employers receiving PPP loan proceeds during April 2020, the most recent full quarter for individuals who have remained employed throughout the pandemic will be the first calendar quarter of 2020. But for those individuals who were laid off during March 2020, the most recent full quarter of employment for them might be October–December 2019. To sidestep this potential ambiguity, employers may wish to compute wages using several options and base wages on the most conservative approach, until the SBA or financial institutions give more guidance on this issue.

This calculation only counts wages up to an annualized amount of $100,000 per year, or up to $15,384.52 for the eight-week Covered Period. So cash compensation for employees making more than that will not be subject to forgiveness. However, this $100,000-per-year limit does not apply to the costs of benefits or defined retirement plans, so these payments should be included.

Based on the example, if we assume that payroll reductions were uniform across the entire set of employees and resulted in payroll costs (including benefits) during the Covered Period of only 2/3 the amount spent in the base period, then this element would reduce the actual forgiveness from the Potential Forgiveness amount by 8.33%, which reflects the amount by which the actual 1/3 reduction (33.33%) exceeded the 25% reduction allowance under the Code.

- **Is there a catch-up period for the wage ratio adjustment like there is for the employee headcount element?**

Yes, but there is little guidance yet on how exactly that will work.

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The Wage Ratio Adjustment (8.33% in our example) also has a potential savings clause that will eliminate the Wage Ratio Adjustment. If by June 30, 2020, the employer were to eliminate the reduction in the salary or wages of employees whose wages had been reduced compared to their salary or wages on February 15, 2020, the Wage Ratio Adjustment may be reduced or eliminated. Neither the statute nor available regulatory guidance offers clarity on what the legislature meant by "eliminating the reduction in the salary or wages" of employees or in returning the FTE Employee headcount level to the pre-pandemic level. Further clarity is expected from regulatory agencies and/or lending institutions that may set minimum requirements for "restoration" of salary or wage levels that may require maintaining staffing or wage levels at or above the required levels for some period of time following June 30. The savings clause does not measure wage level against the Base Period used as the measurement for the potential reductions, but rather compares June 30, 2020, levels against those from the pre-pandemic target of February 15, 2020.

➢ How is the 75:25 ratio between Payroll Expenses and Non-Payroll Expenses calculated?

While the Statute does not include this restriction, the SBA Administrator's regulations include a further limitation on forgiveness: liming forgiveness for non-payroll costs to 25% of the total forgiveness amount. Under the regulations, this computation should be done based on the actual forgiveness amount and not the Potential Forgiveness amount, which may make a difference.

➢ How do these three potential reductions in the forgiveness amount combine?

The agencies involved have not made clear exactly how these limitations on forgiveness amounts should be combined—that is whether it is the greater of the two, an average of the two, a sum of the two, a sequential application of the two, or some other method.

The impact of this ambiguity is best illustrated by example. Assume initially that the PPP Loan Amount was $1,000,000, of which $700,000 was payroll and $300,000 was used for rent, utilities, and mortgage interest. And assume that the FTE Employee count matches the example above (150 during the base period, and 100 during the Covered Period), and that the payroll was uniformly reduced by 1/3 when comparing the Covered Period wages to that paid during the appropriate full quarter prior to the Covered Period.

Under this example, the Potential Forgiveness amount at the outset matches the $1,000,000 in loan proceeds actually spent during the 8-week Covered Period. This Potential Forgiveness amount is reduced by 33.33% because of the reduction in FTE Employees, and by a further 8.33% because of the reduction in wages below the 25% threshold.

- Applied at the same time (e.g., added together), the aggregate reduction from the Potential Forgiveness figure would be 41.67%, leaving $583,333 in forgiveness from the original $1,000,000.
- Taken sequentially (applying first the 33.33% reduction, and then applying the 8.33% reduction), the remaining forgiveness would be 61.11% of the Potential Forgiveness amount, or $611,111. (66.67% remaining after the headcount reduction × 91.67% remaining after the wage reduction = $61.11%)

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In either case, the total reductions are high enough that there is no need to further limit forgiveness of non-payroll elements because the headcount and wage-level reductions already bring the total forgivable amount below the amount actually spent on payroll costs.

We will update this analysis when further clarity is available on this question.