U.S. Employer Considerations for Managing Through COVID-19

Mark Bodron, Jennifer Trulock | March 2020

From an employer's perspective, a crisis such as the COVID-19 pandemic raises many issues and highlights the importance of nurturing every company's most valuable asset: its people. This is a high-level overview of our developing thoughts to help our clients navigate the current environment which, in many ways, feels like uncharted territory. The considerations outlined below are intended to provide a framework for how to manage current issues without losing sight of long-term goals.

Providing a Safe Work Environment. Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. Although no new legal regulations or standards have been mandated, the Occupational Safety and Health Administration (OSHA) has provided guidance on how to prepare the workplace, which includes steps to take to prevent risk of exposure, planning guidance based on infection prevention and industrial hygiene practices, and a discussion of engineering, administrative, and work practice controls and personal protective equipment (PPE).

Employers should not rely on general guidelines. Rather, they should assess their work site(s), workforce, and risk factors. Employers with different workforce needs will likely implement different protocols and procedures. If possible, employers should consider issuing their own guidance to their workforce regarding infection prevention, how to handle illness or symptoms, and any requirements the employer wants to implement with respect to travel.

Employees with Symptoms. If an employee (or anyone else who may come to the workplace regularly such as contractors) **has symptoms** consistent with the COVID-19 virus, which include fever, cough, sore throat, muscle aches or shortness of breath:

- They should not come to the office.
- They should consider seeking immediate medical attention.
- They should not return to work until they are symptom-free for 24 hours and they have written clearance from their healthcare provider.
- If their jobs permit them to work from home, they should do so according to the employer's remote work policy.

Employees without Symptoms. If an employee (or anyone else who may come to the workplace regularly such as contractors) has been in contact with an individual who is positive or presumed positive for COVID-19, and is **not experiencing any symptoms**:

- They will be expected to self-quarantine for 14 days from exposure.
- If their jobs permit them to work from home, they may be expected to work from home during this time, according to the employer's remote work policy.

Traveling Employees without Symptoms. An employer with employees who are required to travel for essential business, either via roadways, rail, or air, should develop protocols for the employees to follow. For example, if an employee **begins experiencing symptoms** while traveling, they cannot enter a third-party site and must return home, or if an employee has experienced symptoms within the last 14 days, the employee cannot travel and they must take their temperature each morning to confirm no fever, etc.

Recommendations for Implementing Guidelines.

- Confirm that staffing agencies, contractors, and temp agencies are following the same protocol with respect to any leased or temporary employees and notify the employer if a worker experiences symptoms.
- Consider whether an employer's paid time off (PTO) and unpaid leave practices, such as requiring employees who are quarantined and unable to work remotely to use all PTO and sick leave, incentivize the desired behavior of staying away from the workplace and avoiding infection.
- Consider waiving normal eligibility requirements, such as employment for a certain period of time, for new employees to use PTO for medical or quarantine reasons.
- Determine whether any of the employer's short-term disability (STD) eligibility requirements should be waived, including whether any circumstances warrant such waiver being handled on a case-by-case basis during the outbreak.
- Communicate and confirm with any insurance providers before disseminating information relating to applicable coverage and waiving eligibility requirements.

Families First Coronavirus Response Act (FFCRA) Provides Emergency Paid Sick Leave. Part of the FFCRA, the Emergency Paid Sick Leave Act (EPSLA) requires that employers with fewer than 500 employees must provide paid sick time to employees arising out of the COVID-19 pandemic.

- Permitted Reasons. An employee may use the leave for the following reasons:
    - To self-isolate due to a federal, state, or local quarantine or isolation order related to COVID-19.
    - To self-isolate on advice of a health care provider because of COVID-19.
    - To seek a medical diagnosis due to experiencing symptoms of COVID-19.
    - To care for an individual under self-isolation.
    - To care for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 precautions.
    - Due to experiencing substantially similar conditions to those specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

- Duration: Full-time employees are entitled to 80 hours of paid sick leave, while part-time employees are entitled to a number of hours for paid sick leave equal to the number of hours worked, on average, over a two-week period.
- Amount: The compensation amount is calculated based on the greater of the employee's regular rate of pay, federal minimum wage, or the state or local minimum wage rate where the employee is employed. However, paid sick leave is capped at $511 per day ($5,110 in the aggregate) when leave is taken for an employee's own illness or quarantine, and $200 per day ($2,000 in the aggregate) when leave is taken to care for others or due to school closures.
- Availability: Paid sick leave is available for immediate use. Emergency paid sick leave is in addition to an employer's other PTO, paid sick, and vacation benefits. Employers cannot require employees to take any other paid leave before using paid sick time under this act.
- Carryover: Employees may not carry over this leave after December 31, 2020, and it is not payable upon termination.
- Tax Credit for Qualified Sick Leave Wages. For sick leave paid to an employee under the EPSLA, an employer receives a federal income tax credit for wages paid to the employee during the first 10 days of the employee's entitlement to paid sick leave under the EPSLA. The tax credit is limited to $511 per day (or $200 per day in cases where the employee utilizes the paid sick time off to care for others or due to school closures). According to the Internal Revenue Service's (IRS) News Release, guidance will be available soon regarding how eligible employers who pay qualifying sick leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick leave that they paid, rather than deposit them with the IRS.
- See FFCRA: Employer Expanded Family and Medical Leave Requirements
- See DOL News Release regarding tax credits
- See IRS News Release

Understanding FMLA Leave – Expanded by the FFCRA. Like the EPSLA, the Family and Medical Leave Act (FMLA) Expansion Act applies to employers with fewer than 500 employees. Although the Department of Labor (DOL) has issued an FAQ on application of the FFCRA, small employers are hoping that once the DOL issues regulations, which are expected in April 2020, employers with fewer than 50 employees may not be required to comply with all provisions of the FMLA Expansion Act.

- Eligibility. Normally, to be eligible for FMLA leave, an employee must work for a covered employer, and must have worked for 1250 hours during the last 12 months. To be eligible for the FMLA Expansion Act, an employee must have been employed for 30 days.
- Benefits. Under the FMLA Expansion Act, employers must provide 12 weeks of leave to eligible employees for qualifying need relating to a public health emergency. The qualifying need is that the employee is unable to work (or telework) due to a need for leave to care for their (under 18) son or daughter if their school or place of care is closed, or child care provider is unavailable, due to a public health emergency.
- Unpaid leave. The first 10 days may be unpaid, although an employee may elect to substitute PTO benefits during this time. The final version of the Act is silent as to whether employers may require employees to use any such paid benefits.

- Paid Leave. Employers must compensate an employee for each day of leave at no less than two-thirds the employee's regular rate of pay for the number of hours the employee normally would have been scheduled to work. The required amount of pay is capped at $200 per day and $10,000 in the aggregate.
- Job Restoration. Employees must be restored to their position or an equivalent one upon their return to work. There is an exception to this requirement for employers with fewer than 25 employees, if the employee's position does not exist due to economic conditions or other changes in the employer's operating conditions that affect employment, which are caused by a public health emergency during the leave. In this case, the employer is required to make reasonable efforts to restore the employee to an equivalent position and reasonable efforts to contact the employee if an equivalent position becomes available.
- Exclusions. The Secretary of Labor has the authority to issue regulations to exclude certain health care providers and emergency responders from the definition of "eligible employee" and to exempt small businesses (defined as having fewer than 50 employees) if the leave would jeopardize the viability of the business. Employers also may exclude employees who are health care providers or emergency responders from this emergency FMLA entitlement. Employers with fewer than 50 employees will not be subject to liability in a private right of action by employees for failing to permit leave because of a qualifying need related to a public health emergency.
- Tax Credit for Qualified Family Leave Wages. For leave paid to an employee under the FMLA Expansion Act, an employer receives a federal income tax credit for wages paid to the employee during the full term of an employee's additional leave as permitted under the FMLA Expansion Act. The tax credit is limited to $200 per day and $10,000 in the aggregate for each employee. Guidance will be issued by the IRS shortly regarding how eligible employer who pay child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying child care leave that they paid, rather than deposit them with the IRS. See IRS News Release.
- **For employers with 500 or more employees, the FMLA's ordinary provisions apply**.
    - COVID-19 may be considered a serious health condition depending on the circumstances. Accordingly, an employee with COVID-19 or an employee who is taking care of a qualifying family member with COVID-19 may be permitted to take protected FMLA leave.
    - FMLA leave consists of up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons which may include the flu where complications arise that create a "serious health condition" as defined by the FMLA.
    - Employees who take time off to avoid exposure to COVID-19 would not be protected under the FMLA.
    - The DOL's guidance asks employers to encourage employees who are ill or who are exposed to ill family members to stay home and consider flexible leave policies for employees in these circumstances.
    - The FMLA does not require paid leave, but it allows employees to elect or an employer to require the substitution of paid sick leave and paid vacation or personal leave in some circumstances.
    - Employers should also consider state requirements if paid leave or paid disability benefits are mandated by the state.
- See FFCRA: Employee Expanded Family and Medical Leave Rights and FFCRA: Employer Expanded Family and Medical Leave Requirements

- See FFCRA: Questions and Answers
- See FFCRA: Employer Expanded Family and Medical Leave Requirements
- See DOL News Release regarding tax credits
- See President Trump Signs into Law "Families First Coronavirus Response Act
- See Q&A: COVID-19 or Other Public Health Emergencies and the FMLA

Reviewing and Updating Policies and Agreements. Employers should review their policies to determine whether changes are required or recommended in the current environment.

- *Sick Leave or PTO Policies*
    - Confirm these policies permit paid leave in the event of a family member's illness, quarantine, or school closure.
    - Consider waiver of eligibility requirements, such as employment for a certain period of time.
    - Add new benefits provided by emergency legislation or regulations, such as the federal FFCRA described above, N.Y. Senate Bill S8091, which provides sick leave for employees subject to mandatory or precautionary quarantines, and the Colorado HELP rules, which provide four days of paid sick leave to workers in certain industries.
- *Short-Term Disability Policies*. Consider waiver of eligibility requirements, such as employment for a certain period of time.
- *Unpaid Leave or Other Personal Leave Policies.* Consider granting leave for employees who chose to travel to a place with a Level 2 or Level 3 Alert from the Centers for Disease Control and Prevention (CDC) and lack time off to cover the quarantine period.
- *Remote Work, Telecommuting, and Alternative Work Schedule Policies*. Implement or revise to prepare for the event that a large part of the workforce may need to work remotely.
- *Healthcare Plans*. Employers with self-insured medical plans may consider whether to waive or reduce the cost-sharing requirements for testing, future vaccinations and treatment for COVID-19. Certain state insurance departments, including California, New York and Washington, are requiring no-charge for testing for COVID-19. Employers that have insured plans should confirm with the insurer how it will treat testing, future vaccinations, and COVID-19 treatment under the plan in anticipation of increased questions about these issues.
- *401(k) Plans*. If the employer's 401(k) plan does not permit in-service distributions for employees who are age 59½ or older or allow plan loans, consider whether to amend the plan to provide one or both features to assist employees with expenses arising in connection with COVID-19.
- *Collective Bargaining Agreements*. Review for any special provisions covering emergencies or disruption of business operations.
- *Staffing Agency or Contractor Agreements*. Ensure the agency or contractor is required to notify the employer if a contract worker or leased employee has symptoms of COVID-19 or is required to be quarantined, and verify that the agency or contractor is responsible for providing health insurance coverage.
- *Independent Contractor Agreements*. Ensure that contractors are classified correctly, otherwise they should be provided with employee benefits that would include the recently enacted paid sick leave and paid FMLA leave benefits under the FFCRA.

- *Anti-Harassment, Anti-Retaliation Policies*. New Jersey has enacted legislation prohibiting retaliation by employers against employees for taking time off due to an infectious disease, and there have been a number of reports of harassing remarks directed toward individuals of Chinese national origin with regard to COVID-19.

Considering the Implications of the ADA.

- Carefully consider whether an employee who becomes ill with COVID-19 has a disability before providing reasonable accommodations under the Americans with Disabilities Act (ADA). "Disability" is a physical or mental impairment that substantially limits one or more major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment.
- The ADA governs employers' disability-related inquiries and medical examinations for all applicants and employees, including those who are not "disabled."
- If an employer wants to conduct a medical exam, which would include checking employees' body temperatures, the exam must be job-related and consistent with business necessity, which means that the employer has a reasonable belief that an employee's ability to perform essential job functions will be impaired by a medical condition or an employee will pose a direct threat due to a medical condition.
    - Whether or not a procedure is a medical exam is determined by "considering factors such as whether the test involves the use of medical equipment; whether it is invasive; whether it is designed to reveal the existence of a physical or mental impairment; and whether it is given or interpreted by a medical professional."
    - A "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r). If an individual with a disability poses a direct threat despite reasonable accommodation, the employee is not protected by the nondiscrimination provisions of the ADA.
    - As of March 19, the U.S. Equal Employment Opportunity Commission (EEOC) has advised that because the CDC, state, and local health authorities have acknowledged the community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.
- Employers must keep in mind that the ADA prohibits employers from excluding employees with disabilities from the workplace for health or safety reasons unless they pose a "direct threat," which is defined as a significant risk of substantial harm even with reasonable accommodation. However, this applies to employees who fall under the definition of disability, which is why it is important to carefully consider whether an employee with COVID-19 falls within the definition.
- See Pandemic Preparedness in the Workplace and the ADA
- See What You Should Know About the ADA, the Rehabilitation Act, and COVID-19

Understanding the Policies and Procedures that Are Acceptable under the EEOC's Pandemic Preparedness in the Workplace and the ADA Guidance.

- Employers may send employees home if they display COVID-19 symptoms.
- Employers may ask employees if they are experiencing COVID-19 symptoms, such as fever or chills and a cough. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
- If pandemic COVID-19 symptoms become more severe or if pandemic COVID-19 becomes widespread in the community, as assessed by state or local health authorities or the CDC, then employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.
- Employers can mandate that employees report on their recent travels to assess exposure risks. Employers can encourage employees not to travel during this time and cancel business travel to high risk destinations. Employers should be sensitive to employee requests to avoid travel, particularly to high risk countries. When an employee returns from travel to a country or region with an active COVID-19 outbreak, employers do not have to wait until the employee develops symptoms to ask questions about exposure during the trip, even if the travel is personal.
- If employees voluntarily disclose (without a disability-related inquiry) that a specific medical condition or disability that puts them at increased risk of COVID-19 complications, the employer must keep this information confidential. The employer may ask these employees to describe whether any assistance will be needed (e.g., telework or leave for a medical appointment).
- Employers may encourage telework as an infection control strategy and as a reasonable accommodation.
- Employers may require employees to adopt infection-control practices, such as regular hand washing, at the workplace.
- Employers may still ask employees why they have been absent from work if the employer suspects it is for a medical reason.
- Employers may require employees who have been away from the workplace during the pandemic to provide a healthcare provider's note certifying fitness to return to work. However, this may change, as advised by the CDC, if healthcare providers are too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary or a willingness to permit the employee to return to work during the wait for certification.

Tailoring a Remote Work or Telecommuting Policy to an Employer's Needs. Allowing employees to work remotely can be a lifesaver in a situation where an entire office must close due to an outbreak. However, employers that normally do not permit remote work or do not have remote work policies should consider implementing one and whether it is more desirable for any such policy to be limited to specific emergency situations.

- Although allowing employees to work remotely can be crucial to staying operative throughout closures, an employer should consider that many employees with disabilities request telecommuting as an accommodation. If all jobs move to remote work in case of an emergency, an employer may lose its argument that a certain job cannot be performed remotely. Consider including language in a policy that

employees are permitted to work remotely in the emergency or crisis situation and acknowledge specifically that not all of the employees' essential job functions can be performed remotely.

- Items that may be included in a remote work policy:
    - Technology requirements, e.g., internet
    - Security requirements
    - Equipment provided by employer
    - Hours of work
    - Expectation that employee will take PTO appropriately
    - Safety requirements (workplace injury notification requirements)
    - Availability for calls, online meetings
    - Job expectations
    - Temporary nature
    - At-will nature of employment is unchanged
    - Expenses reimbursed – pay attention to state requirements here
    - Acknowledge in an emergency that there will be some juggling of work and personal responsibilities
    - Non-exempt employees – recording all hours worked accurately
    - Tax consequences are employee's responsibility
    - Acknowledgment that arrangement is temporary and on an emergency basis
- If an employer already has a Bring Your Own Device (BYOD) policy in place, it may be helpful to extend that policy if employees will be doing work on their own equipment instead of using an employer laptop.

Handling Common Wage and Hour Issues.

- Employers are required to pay employees who are absent from work, who are being quarantined, who are self-monitoring at home, or who are otherwise ill with COVID-19 or caring for a family member, if they have accrued PTO pursuant to any paid safe/sick leave law.
- Employees may be entitled to paid leave benefits under state or local leave laws if they are caring for qualifying family members with COVID-19 or to federal paid leave if they are caring for children under age 18 whose schools or child care arrangements are closed.
- After any paid safe/sick leave is exhausted, the obligation to pay employees depends on whether they are classified as exempt or non-exempt, and whether they are required to be absent from work.
    - Non-exempt employees are only paid for actual hours worked. Therefore, if they are unable to return to work after exhausting any paid leave entitlement, they are not required to be paid.
    - Exempt employees must be paid their full weekly salary if they perform any work during a work week (subject to a number of permitted deductions). Further, if an employer requires exempt employees to be absent from work, such as to self-monitor for COVID-19 symptoms at home, the employer must pay these employees the full weekly salary.
    - If exempt employees are diagnosed with COVID-19 and are unable to work due to their medical condition, then the employer likely would not have to pay them after the exhaustion of any paid leave entitlement.
- Employers should extend any state- or employer-provided disability benefits to eligible employees who are absent from work due to COVID-19.

- See Q&A: COVID-19 or Other Public Health Emergencies and the FLSA

Understanding Implications of Layoffs or Plant Closings and the WARN Act.

- The Worker Adjustment Retraining Notification (WARN) Act requires employers who are planning a plant closing or a mass layoff to give affected employees at least 60 days' notice of such an employment action. Damages and civil penalties can be assessed against employers who violate the WARN Act.
    - An employer is any business enterprise that employs 100 or more employees, excluding part-time employees.
    - A plant closing is a temporary or permanent shutdown of a single site of employment resulting in termination or layoff exceeding six months for 50 or more employees (excluding part-time employees) in any 30-day period.
    - A mass layoff is a reduction in force of at least 50 employees (excluding part-time employees) at a single site of employment, where at least 33% of the active employees are terminated or laid off for more than six months.
- The regulations allow for reduced notice to employees where the plant closing or mass layoff is caused by business circumstances that were "not reasonably foreseeable as of the time that notice would have been required." However, employers must give as much notice as practicable and must state why the notice period was reduced.
- The unforeseen business circumstances exception requires fact-specific analysis and there are no clear guidelines as to when it applies. This provision could apply to the COVID-19 outbreak, depending on the effect it has on an employer.
- In any event, the WARN Act requires notices with specific information included for employees, government units, and unions, if applicable. Further, a number of states (including California, Illinois, New Jersey, and New York) have mini-WARN Acts that have lower thresholds that trigger notice requirements. It is important to be aware of state law on this topic.

Consider a Wage Reduction or Furlough, But Take Care. Rather than institute a layoff, employers may consider furloughing employees or reducing wages instead. However, a reduction in hours and/or pay can have pitfalls for employers particularly with respect to exempt employees.

- If an employer wants to reduce a salaried exempt employee's pay due to economic circumstances, then the weekly salary must remain at least $684 per week (or otherwise as provided by the regulations) if the employer wants to maintain the exempt status of the employee.
- A reduction in a salaried exempt employee's pay should not correspond with a reduction in hours, or the employer runs the risk of losing the exempt status.
- Furloughs are complicated because employers must pay exempt employees their full salary amount in any week that the employee performs any work without regard to the number of days or hours worked (subject to certain deductions). If an employer furloughs employees two of five days in a workweek, the employer cannot deduct for the two furlough days because they were caused by the employer or its operating requirements. If the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

- One option is that there is no requirement that an employee's weekly salary must be paid if the employee performs no work for an entire workweek. That is easier said than done when employees have phones and laptops, and are constantly connected with the workplace.
- Furloughs and salary reductions should be carried out after careful consideration of the regulations and guidance regarding the exemption issues. See DOL's FAQ Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues.

Assessing Unemployment Insurance and Workers' Compensation Coverage.

- Employees subject to furlough due to a temporary shutdown of the employer's operations may be eligible for unemployment insurance (UI). Depending on the size and length of any temporary shutdown, an employer may be required to notify the applicable state unemployment department.
- Employers may also be eligible for UI work-sharing programs as an alternative to layoffs, where the employer reduces an employee's hours and wages, which are partially offset with UI benefits.
- Workers' compensation (WC) policies generally extend insurance benefits to employees for work-related injuries. Employees who are unable to perform their regular duties because of contracting COVID-19 and who can show they contracted the virus on the job could potentially be eligible for WC benefits.
    - As part of the WC claim, an employee must show that they contracted the virus at work, and such contraction was "peculiar" to their employment.
    - The analysis is very fact-specific and must be analyzed under state law, but is more likely to be successful in the case of a health care worker or first responder, as these workers may be more likely to benefit from a presumption that they contracted the virus in the course of their job.

Understanding COVID-19 and its Impact on Employer Health Plans. An employer should anticipate the possibility of receiving an increased number of questions relating to its health plans and coverage relating to COVID-19 and ensure that their plans adequately protect their employees.

- Under the FFCRA, group health plans and health insurance issuers offering group or individual health insurance coverage, including "grandfathered" plans for purposes of the Patient Protection and Affordable Care Act, to provide without any cost-sharing (deductibles, co-pays, or co-insurance) or other prior authorization requirements federally-approved forms of testing for COVID-19, and without any charges for office, urgent care or emergency room visits related to the testing during the period of the declared national emergency.
- IRS guidance provides that a high deductible health plan (HDHP) under Section 223(c)(2)(A) of the Internal Revenue Code (Code) may provide health benefits associated with testing for and treatment of COVID-19 without a deductible or with a deductible below the minimum deductible (self only or family) for an HDHP without jeopardizing the plan's status as an HDHP. See Notice 2020-15. As a result, an employee covered by the HDHP will not be disqualified from being an "eligible individual" under Section 223(c)(1) of the Code who may make tax-favored contributions to a health savings account.
- State insurance departments in California, New York and Washington are requiring no-charge for testing for COVID-19.

Reviewing 401(k) Plan Distributions. Employees may want to access funds in their accounts under their 401(k) plan to help with various expenses that may be related to COVID-19. At this time, the IRS has not yet issued guidance addressing COVID-19 and 401(k) plans. However, there are several options available under current law.

A 401(k) plan may allow in-service distributions for employees who are age 59½ or older and/or allow plan loans in order to assist employees with expenses arising in connection with COVID-19. Subject to certain restrictions, a plan may allow after-tax contributions and rollover contributions to be withdrawn. However, if the employee is under age 59½, a 10% early distribution tax may apply (in addition to regular income tax).

A 401(k) plan may allow the employee to request a hardship withdrawals from the employee's pre-tax and Roth accounts for an immediate and heavy financial need. The amount of the hardship withdrawal is limited to the amount necessary to satisfy the immediate and heavy financial need requirement and the employee cannot reasonably obtain the needed amount from other sources.

- Safe Harbor Hardship Withdrawal. Under IRS regulations, an employee is deemed to meet the immediate and heavy financial need requirement for certain events, including (1) for medical expenses and certain tuition and related education expenses for the employee, the employee's spouse, dependents or beneficiary, (2) if necessary, to prevent eviction from, or foreclosure on, the employee's principal residence, and (3) for expenses and losses (including loss of income) incurred due to a disaster declared by the Federal Emergency Management Agency (FEMA). In our experience, most 401(k) plans rely on the safe harbor approach for hardship distributions. Medical expenses related to the treatment of COVID-19 that are not covered by medical insurance should be eligible for a hardship distribution. Also, to date, FEMA has declared a major disaster area for California, Iowa, Louisiana, New York and Washington, which should permit hardship withdrawals for employees who reside in those states. Finally, withdrawals to pay the employee's mortgage or tuition expenses may also qualify for hardship withdrawal for an employee placed on unpaid leave. Documentation supporting the distribution and amounts must be retained by the employee or the employer.
- Non-Safe Harbor Hardship Withdrawal. For those 401(k) plans that do not limit hardship distributions to safe harbor events, depending on the facts and circumstances, the plan may conclude that there is an immediate and heavy financial need for some limited COVID-19-related expenses that would not qualify for the safe harbor, in addition to amounts that would otherwise fall under one of the safe harbors.

A hardship withdrawal by an employee who is under age 59½ may be subject a 10% early distribution tax may apply (in addition to regular income tax). There is legislation proposed by Congress that would suspend the early distribution tax and make additional changes to permit employees greater access to amounts in a 401(k) plan.

Considering Impact of Pandemic on Executive Compensation Arrangements. Employers that are currently implementing performance-based plans or considering new executive arrangements should consider the long-term impact of those decisions.

- Incentive Plans. Creating incentive plans and establishing performance goals that will create meaningful and appropriate incentives in a volatile market can be challenging. However, companies generally have greater flexibility than in the past when setting performance goals, given that most companies are no longer concerned about complying with the qualified performance-based compensation requirements of Code Section 162(m).
    - When establishing new performance-based compensation programs, in consultation with the company's accounting and finance departments, consider:
        - Waiting until a future compensation committee meeting to establish performance criteria,
        - Anticipating the need to allow discretion to (or requiring that) future performance measurements be adjusted to neutralize the impact of COVID-19,
        - Using relative performance measures such as the company's total shareholder return (TSR) relative to the TSRs of the company's peer group,
        - Creating new short-term performance goals aimed at incentivizing desired behavior, or
        - Using cash-based awards, rather than (or in substitution of a portion of) awards that are stock-based or track the value of a company's stock.
- Contractual Obligations.
    - A company should be aware of any contractual obligations (such as under employment agreements or severance policies) before making changes to salaries, bonus opportunities, or benefit offerings to ensure the company does not inadvertently breach a contractual obligation or trigger an employee's right to resign and receive severance.
    - When entering into new employment agreements, a company should consider including, as an exception to clauses that provide good reasonable protection in the case of salary or bonus opportunity reductions, reductions that are made in connection with management-wide or company-wide reductions.

Online Resources

- CDC Interim Guidance for Businesses and Employers
- OSHA Guidance for Employers
- Pandemic Preparedness in the Workplace and the ADA
- What You Should Know About the ADA, the Rehabilitation Act, and COVID-19
- Q&A: COVID-19 or Other Public Health Emergencies and the FMLA
- Q&A: COVID-19 or Other Public Health Emergencies and the FLSA
- FAQ Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues
- FFCRA: Employee Expanded Family and Medical Leave Rights
- FFCRA: Employer Expanded Family and Medical Leave Requirements
- FFCRA: Questions and Answers
- DOL News Release regarding tax credits
- IRS News Release