July, 2020

A. Age Discrimination in Employment Act (ADEA)

A.1. **May an employer establish and enforce a policy requiring certain employees over a certain age to stay away from the workplace?**

No. Any policy established and enforced by an employer must not be related to age.

A.2. **May employers have different policies for older employees?**

No. The ADEA and its state law counterparts prevent employers from discriminating against older employees in the absence of a "bona fide occupational qualification." A blanket policy that prohibits employees over a certain age from working would be unlawful. A policy that allows employees in particularly susceptible populations to voluntarily stay home or have priority to telecommute would not be unlawful.

B. Americans with Disabilities Act (ADA)

B.1. **Is COVID-19 considered a "disability"?**

Generally, no. Even under the Americans with Disabilities Act as amended in 2009, the duration of COVID-19 will likely not be long enough to qualify as an ADA disability. Complications from COVID-19 (e.g., pneumonia) may qualify as an ADA disability which in turn would trigger certain obligations for the employer (e.g., reasonable accommodation, etc.). Employers should evaluate any applicable state specific ADAs to ensure they do not contain different or additional requirements or provisions. To the extent that a state law conflicts with the ADA, the state law is preempted by federal law. Alternatively, if a state law provides nondiscrimination requirements or remedies that are similar or additional to the ADA requirements, a person with a disability may use the state law in addition to the ADA.

Notes: California, Illinois, New York, New Jersey, and Pennsylvania do not have additional state ADAs.

The Florida Civil Rights Act of 1992 defines a more narrowly tailored protected class than the ADA (people with cognitive and mental disabilities do not appear to be covered) and its definition of public accommodations appears narrower as well. In Florida, state courts may order compensatory and punitive damages for discriminatory practices, in addition to injunctive relief. Individuals must first file with the Florida Human Relations Commission, which can investigate complaints and order various forms of relief. State law provides

criminal penalties for denial of access to public accommodations or interference with rights under the Florida Civil Rights Act.

B.2. **If an employer treats an employee as if he or she possibly has COVID-19 (e.g., by forcing the employee to stay home until a quarantine period has passed), is that a valid bases for a "regarded as disabled" claim.**

Probably not. The American with Disabilities Act as amended in 2009 makes clear that "regarded as" claims may not be brought for conditions that are "transitory and minor." If COVID-19 in a specific case is not transitory and minor, then COVID-19 would become a condition or complication, which might qualify as an ADA disability. The different condition or complication could potentially give rise to a "regarded as disabled" claim.

B.3. **How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?**

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

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

As public health authorities and doctors learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. These sources may guide employers when choosing questions to ask employees to determine whether they would pose a direct threat to health in the workplace. For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

B.5. **When may an ADA-covered employer take the body temperature of employees during the COVID-19 pandemic?**

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

B.6. **Does the ADA allow employers to require employees to stay home if they have symptoms of COVID-19?**

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

B.7. **When employees return to work, does the ADA allow employers to require a doctor's note certifying fitness for duty?**

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

B.8. **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?**

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take 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.

Consistent with the ADA standard, employers should ensure that the tests are accurate and reliable. For example, employers may rely on information from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from the CDC or other public health authorities and continue to check for updates. Employers may also wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, employers should note that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Based on guidance from medical and public health authorities, employers should still require – to the greatest extent possible – that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

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

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

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

Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.

B.10. **If an employee has a preexisting mental illness or disorder that has been exacerbated by the COVID-19 pandemic, may they 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.

B.11. **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 during this time. Doing so may allow the employer to be able to acquire all the information it needs to make a decision. Further, if a reasonable accommodation is granted, the employer also may be able to make some arrangements for the accommodation in advance.

B.12. **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.

B.13. **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).

B.14. **During the pandemic, may an employer still engage in the interactive process and request information from an employee about why an accommodation is needed?**

Yes, if it is not obvious or already known, an employer may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. Possible questions for the employee may include: how the disability creates a limitation; how the requested accommodation will effectively address the limitation; whether another form of accommodation could effectively address the issue; and how a proposed accommodation will enable the employee to continue performing the "essential functions" of his position (that is, the fundamental job duties).

B.15. **If there is some urgency to providing an accommodation, or the employer has limited time available to discuss the request during the pandemic, may an employer provide a temporary accommodation?**

Yes. Given the pandemic, some employers may choose to forgo or shorten the exchange of information between an employer and employee known as the "interactive process", the discussion between the employer and the employee focused on whether the impairment is a disability and the reasons the accommodation is needed, and grant the request. In addition, when government restrictions change, or are partially or fully lifted, the need for accommodations may also change. This may result in more requests for short-term accommodations. Employers may wish to adapt the interactive process - and devise end dates for the accommodation - to suit changing circumstances based on public health directives.

Whatever the reason for shortening or adapting the interactive process, an employer may also choose to place an end date on the accommodation (for example, either a specific date such as May 30, or when the employee returns to the workplace part- or full-time due to changes in government restrictions limiting the number of people who may congregate). Employers may also opt to provide a requested accommodation on an interim or trial basis, with an end date, while awaiting receipt of medical documentation. Choosing one of these alternatives may be particularly helpful where the requested accommodation would provide protection that an employee may need because of a pre-existing disability that puts her at

greater risk during this pandemic. This could also apply to employees who have disabilities exacerbated by the pandemic.

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

B.16. **May an employer ask employees now if they will need reasonable accommodations in the future when they are permitted to return to the workplace?**

Yes. Employers may ask employees with disabilities to request accommodations that they believe they may need when the workplace re-opens. Employers may begin the "interactive process" - the discussion between the employer and employee focused on whether the impairment is a disability and the reasons that an accommodation is needed.

B.17. **Are the circumstances of the pandemic relevant to whether a requested accommodation can be denied because it poses an undue hardship?**

Yes. 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.

B.18. **What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant difficulty" during the COVID-19 pandemic?**

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.

B.19. **What types of undue hardship considerations may be relevant to determine if a requested accommodation poses "significant expense" during the COVID-19 pandemic?**

Prior to the COVID-19 pandemic, most accommodations did not pose a significant expense when considered against an employer's overall budget and resources (always considering the budget/resources of the entire entity and not just its components). But, the sudden loss of some or all of an employer's income stream because of this pandemic is a relevant consideration. Also relevant is the amount of discretionary funds available at this time - when considering other expenses - and whether there is an expected date that current restrictions on an employer's operations will be lifted (or new restrictions will be added or substituted). These considerations do not mean that an employer can reject any accommodation that costs money; an employer must weigh the cost of an accommodation against its current

budget while taking into account constraints created by this pandemic. For example, even under current circumstances, there may be many no-cost or very low-cost accommodations.

B.20. **Do the ADA and the Rehabilitation Act apply to applicants or employees who are classified as "critical infrastructure workers" or "essential critical workers" by the CDC?**

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

C. Families First Coronavirus Response Act (FFCRA)

C.1. **What is the effective date of the Families First Coronavirus Response Act (FFCRA), which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act?**

The FFCRA's paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020.

C.2. **As an employer, how do I know if my business is under the 500-employee threshold and therefore must provide paid sick leave or expanded family and medical leave?**

You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.

Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. Where a corporation has an ownership interest in another corporation, the two corporations are separate employers unless they are joint employers under the FLSA with respect to certain employees. If two entities are found to be joint employers, all of their common employees must be counted in determining whether paid sick leave must be provided under the Emergency Paid Sick Leave Act and expanded family and medical leave must be provided under the Emergency Family and Medical Leave Expansion Act.

In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). If two entities are an

integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of paid sick leave under the Emergency Paid Sick Leave Act and expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.

C.3. **If an employer is a private sector employer and have 500 or more employees, do the Acts apply?**

No. Private sector employers are only required to comply with the Acts if they have fewer than 500 employees.

C.4. **If providing childcare related paid sick leave and expanded family and medical leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how does an employer take advantage of the small business exemption?**

To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department.

C.5. **How does an employer count hours worked by a part-time employee for purposes of paid sick leave or expanded family and medical leave?**

A part-time employee is entitled to leave for his or her average number of work hours in a two-week period. Therefore, you calculate hours of leave based on the number of hours the employee is normally scheduled to work. If the normal hours scheduled are unknown, or if the part-time employee's schedule varies, you may use a six-month average to calculate the average daily hours. Such a part-time employee may take paid sick leave for this number of hours per day for up to a two-week period and may take expanded family and medical leave for the same number of hours per day up to ten weeks after that.

If this calculation cannot be made because the employee has not been employed for at least six months, use the number of hours that you and your employee agreed that the employee would work upon hiring. And if there is no such agreement, you may calculate the appropriate number of hours of leave based on the average hours per day the employee was scheduled to work over the entire term of his or her employment.

C.6. **When calculating pay due to employees, must overtime hours be included?**

Yes. The Emergency Family and Medical Leave Expansion Act requires you to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week.

However, the Emergency Paid Sick Leave Act requires that paid sick leave be paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80.

If the employee's schedule varies from week to week, please see the answer to Question 5, because the calculation of hours for a full-time employee with a varying schedule is the same as that for a part-time employee.

Please keep in mind the daily and aggregate caps placed on any pay for paid sick leave and expanded family and medical leave as described in the answer to Question 7.

Please note that pay does not need to include a premium for overtime hours under either the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act.

C.7. **How much will an employee be paid while taking paid sick leave or expanded family and medical leave under the FFCRA?**

If an employee is taking paid sick leave because they are unable to work or telework due to a need for leave because they are: are subject to a Federal, State, or local quarantine or isolation order related to COVID-19; have been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or are experiencing symptoms of COVID-19 and are seeking medical diagnosis, they will receive for each applicable hour the greater of: their regular rate of pay; the federal minimum wage in effect under the FLSA; or the applicable State or local minimum wage. In these circumstances, the employee is entitled to a maximum of $511 per day, or $5,110 total over the entire paid sick leave period.

If an employee is taking paid sick leave because they are: caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or are an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; caring for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services, they are entitled to compensation at 2/3 of the greater of the amounts above. Under these circumstances, the employee is limited to a maximum of $200 per day, or $2,000 over the entire two-week period.

If an employee is taking expanded family and medical leave, they may take paid sick leave for the first two weeks of that leave period, or they may substitute any accrued vacation leave, personal leave, or medical or sick leave available under the employer's policy. For the following ten weeks, they are to be paid for their leave at an amount no less than 2/3 of their regular rate of pay for the hours they would be normally scheduled to work. If the employee takes paid sick leave during the first two weeks of unpaid expanded family and medical leave, they will not receive more than $200 per day or $12,000 for the twelve weeks that include both paid sick leave and expanded family and medical leave when the leave is to care for a child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons. If the employee takes employer-provided accrued leave during those first two weeks, they are entitled to the full amount for such accrued leave, even if that is greater than $200 per day.

To calculate the number of hours for which an employee is entitled for paid leave, please see the answers to Questions C5 and C6 above.

C.8. **What is an employee's regular rate of pay for purposes of the FFCRA?**

For purposes of the FFCRA, the regular rate of pay used to calculate an employee's paid leave is the average of their regular rate of pay over a period of up to six months prior to the date on which they take the leave. If the employee has not worked employer for six months, the regular rate used to calculate the paid leave is the average of their regular rate of pay for

each week they have worked for the employer. If employees are paid with commissions, tips, or piece rates, these amounts will be incorporated into the above calculation to the same extent they are included in the calculation of the regular rate under the FLSA. This amount can also be computed for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

C.9. **May an employee take 80 hours of paid sick leave for self-quarantine and then another amount of paid sick leave for another reason provided under the Emergency Paid Sick Leave Act?**

No. An employee may take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons. However, the total number of hours for which an employee receives paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.

C.10. **If an employee is home with his or her child because his or her school or place of care is closed, or child care provider is unavailable, does the employee get paid sick leave, expanded family and medical leave, or both—how do they interact?**

Employees may be eligible for both types of leave, but only for a total of twelve weeks of paid leave. Employees may take both paid sick leave and expanded family and medical leave to care for your child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons. The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of expanded family and medical leave, which are otherwise unpaid under the Emergency and Family Medical Leave Expansion Act unless you elect to use existing vacation, personal, or medical or sick leave under your employer's policy. After the first ten workdays have elapsed, you will receive 2/3 of your regular rate of pay for the hours you would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.

Please note that employees can only receive the additional ten weeks of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act for leave to care for a child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons.

C.11. **Can an employer deny an employee paid sick leave if the employer gave the employee paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect?**

No. The Emergency Paid Sick Leave Act imposes a new leave requirement on employers that is effective beginning on April 1, 2020.

C.12. **Is all leave under the FMLA now paid leave?**

No. The only type of family and medical leave that is paid leave is expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act when such leave exceeds ten days. This includes only leave taken because the employee must care for

a child whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 related reasons.

C.13. **Are the paid sick leave and expanded family and medical leave requirements retroactive?**

No.

C.14. **What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?**

Regardless of whether you grant or deny a request for paid sick leave or expanded family and medical leave, you must document the following:

- The name of your employee requesting leave;
- The date(s) for which leave is requested;
- The reason for leave; and
- A statement from the employee that he or she is unable to work because of the reason.

If your employee requests leave because he or she is subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally document the name of the government entity that issued the order. If your employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you should additionally document the name of the health care provider who gave advice.

If your employee requests leave to care for his or her child whose school or place of care is closed, or childcare provider is unavailable, you must also document:

- The name of the child being cared for;
- The name of the school, place of care, or childcare provider that has closed or become unavailable; and
- A statement from the employee that no other suitable person is available to care for the child.

Private sector employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

C.15. **What documents does an employee need to give his or her employer to get paid sick leave or expanded family and medical leave?**

When requesting paid sick leave or expanded family and medical leave, the employee must provide his or her employer either orally or in writing the following information:

- The employee's name;
- The date(s) for which the employee requests leave;

- The reason for leave; and
- A statement that the employee is unable to work because of the above reason.

If an employee requests leave because he or she is subject to a quarantine or isolation order or to care for an individual subject to such an order, the employee should additionally provide the name of the government entity that issued the order. If the employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, the employee should additionally provide the name of the health care provider who gave advice.

If an employee request leave to care for his or her child whose school or place of care is closed, or childcare provider is unavailable, the employee must also provide:

- The name of the employees child;
- The name of the school, place of care, or childcare provider that has closed or become unavailable; and
- A statement that no other suitable person is available to care for the employee's child.

In addition to the above information, employees must also provide to their employer written documentation in support of his or her paid sick leave as specified in applicable IRS forms, instructions, and information.

Please also note that all existing certification requirements under the FMLA remain in effect if you are taking leave for one of the existing qualifying reasons under the FMLA. For example, if an employee is taking leave beyond the two weeks of emergency paid sick leave because your medical condition for COVID-19-related reasons rises to the level of a serious health condition, the employee must continue to provide medical certifications under the FMLA if required by your employer.

C.16. **When is an employee able to telework under the FFCRA?**

An employee may telework when the employer permits or allows the employee to perform work while he or she is at home or at a location other than his or her normal workplace. Telework is work for which normal wages must be paid and is not compensated under the paid leave provisions of the FFCRA.

C.17. **What does it mean to be unable to work, including telework for COVID-19 related reasons?**

The employee is unable to work if his or her employer has work for the employee and one of the COVID-19 qualifying reasons set forth in the FFCRA prevents the employee from being able to perform that work, either under normal circumstances at his or her normal worksite or by means of telework.

If an employee and his or her employer agree that the employee will work normal number of hours, but outside of his or her normally scheduled hours (for instance early in the morning or late at night), then the employee is able to work and leave is not necessary unless a COVID-19 qualifying reason prevents the employee from working that schedule.

C.18. **If an employee is or becomes unable to telework, is the employee entitled to paid sick leave or expanded family and medical leave?**

If the employer permits teleworking—for example, allows employees to perform certain tasks or work a certain number of hours from home or at a location other than the normal workplace—and the employee is unable to perform those tasks or work the required hours because of one of the qualifying reasons for paid sick leave, then the employee is entitled to take paid sick leave.

Similarly, if an employee is unable to perform those teleworking tasks or work the required teleworking hours because he or she needs to care for his or her child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, then the employee is entitled to take expanded family and medical leave. Of course, to the extent an employee is able to telework while caring for his or her child, paid sick leave and expanded family and medical leave is not available.

C.19. **May an employee take my paid sick leave or expanded family and medical leave intermittently while teleworking?**

Yes, if the employer allows it and if the employee is unable to telework the normal schedule of hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act. In that situation, the employee and his or her employer may agree that the employee may take paid sick leave intermittently while teleworking. Similarly, if an employee is prevented from teleworking normal schedule of hours because he or she need to care for his or her child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, the employee and his or her employer may agree that the employee can take expanded family medical leave intermittently while teleworking.

An employee may take intermittent leave in any increment, provided that the employee and employer agree. For example, if you agree on a 90-minute increment, the employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

The Department encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.

C.20. **If the employer closed my worksite before April 1, 2020 (the effective date of the FFCRA), can employees still get paid sick leave or expanded family and medical leave?**

No. If, prior to the FFCRA's effective date, the employer sent an employee home and stops paying him or her because it does not have work for the employee to do, the employee will not get paid sick leave or expanded family and medical leave but he or she may be eligible for unemployment insurance benefits. This is true whether the employer closes the employee's worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.

It should be noted, however, that if the employer is paying an employee pursuant to a paid leave policy or State or local requirements, the employee are not eligible for unemployment insurance.

D. FAMILY MEDICAL LEAVE ACT (FMLA)

D.1. **Is COVID-19 an FMLA-covered serious health condition?**

- Not necessarily. If COVID-19 does not satisfy the regulatory definition of a "serious health condition," employers should not count the absence against the employee's 12 weeks of FMLA leave. An example of a situation in which the leave may not be FMLA-qualify is when an employee is required by the employer to stay home but is asymptomatic. Employers should evaluate any applicable state mini-FMLA laws to ensure they do not contain different or additional requirements or provisions. For employers with fewer than 500 employees, certain types of leave may qualify as EFMLEA leave under the FFCRA. See our ***State Specific Orders/Requirements*** Articles:

  CALIFORNIA
  - 5 Tips for California Employers Facing COVID-19 Concerns, *SHRM*; https://www.kdvlaw.com/news-resources/5-tips-for-california-employers-facing-covid-19-concerns-shrm/

  FLORIDA
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D.2. **What are the requirements for an FMLA-covered serious health condition?**

The portions of the regulatory definitions (29 C.F.R. § 824.102) that most likely apply in the COVID-19 context are the following:

1) More than three calendar – not work – days of incapacity plus two treatments by a healthcare provider (the first of which must occur within seven (7) days of the first day of incapacity and the second within thirty (30) days of the first day of incapacity.
2) More than three calendar – not work – days of incapacity plus one treatment by a healthcare provider (which must occur within seven (7) days of the first incapacity) plus continuing treatment (including prescription medication) under the supervision of a healthcare provider.

Note: Some cases of COVID-19 will not qualify as a "serious health condition" simply because the employees will not have visited a doctor/healthcare provider for any treatment. This issue should not be as common given the recent increase in Telehealth Services.

E. FAIR LABOR STANDARDS ACT (FLSA)

E.1. **Under the FLSA, can an employer reduce an hourly nonexempt employee's hours as an alternative to a layoff?**

Generally, under the Fair Labor Standards Act (FLSA), employers may prospectively reduce an hourly nonexempt employee's hours provided the employee is paid at least the applicable minimum wage for all hours worked and paid overtime at the proper rate when overtime is due. Employers should consult state law regarding whether any further limitations exist regarding a reduction of hours and/or whether notice is required when reducing hours. Contracts, collective bargaining agreements, and/or employer policies may also limit an employer's ability to reduce a nonexempt employee's hours.

E.2. **Under the FLSA, can an employer reduce an hourly nonexempt employee's hourly rate of pay as an alternative to layoff in light of issues the employer is experiencing due to the COVID-19 pandemic?**

Generally, the Fair Labor Standards Act (FLSA) does not prevent an employer from reducing an hourly nonexempt employee's hourly rate as long as the employee is paid at least the applicable minimum wage for all hours worked and paid overtime at the proper rate if overtime work is performed. Employers should consult state law to determine whether it imposes any limitations on changing an hourly rate and/or whether and when any notice should be provided to the employee. The existence of a contract, policy, or collective bargaining agreement may also prevent such a reduction in hourly wages.

E.3. **Under the FLSA, can an employer reduce an exempt employee's salary as an alternative to layoff in light of issues the employer is experiencing due to the COVID-19 pandemic?**

It depends. Generally, if an exempt employee, who is required to be paid on a salary basis, performs any work during a workweek, the individual should be paid the predetermined, fixed salary regardless of the number of hours or days worked in the week. "[S]hort-term, day-to-day or week-to-week deduction[s] from the fixed salary for absences from scheduled work occasioned by the employer or its business operations" are not permitted.

However, the Department of Labor has indicated that, during an economic or business slowdown, an employer can make a prospective reduction to a predetermined salary that is to be paid regularly to an employee who is exempt under part 541 of the code of federal regulation if the reduction is bona fide and not used to undermine the salary basis requirements. This means that the reduced salary still must continue to satisfy the salary

basis test and the reduction cannot be related to the quantity or quality of work the employee performs. The DOL also has indicated that because physicians, lawyers, outside salespersons, and teachers in bona fide educational institutions are not subject to salary requirements, deductions from their salary or pay will not defeat the exemption.

A different analysis may apply to an employee of a public agency. Employers should also consult state law to determine whether it imposes any additional limitations and/or whether any notice should be provided to the employee. The existence of a contract or policy may also prevent a reduction in salary. Employers should consult with counsel if contemplating reductions to an exempt employee's salary.

E.4. **What is a furlough?**

A furlough typically refers to a temporary layoff without formal termination of the employment relationship, with the expectation that the employee will be brought back to work when economic conditions improve. Some states may have their own definition. For more information, see our State Specific Orders Requirements articles.

E.5. **What benefits can employees receive during a furlough?**

If there has not been a termination of employment, not only can employees continue to receive their normal employee benefits, but in most situations their benefits should remain unchanged. However, employers must consult the terms of their plan documents to determine next steps.

Under the Families First Coronavirus Response Act, furloughed employees are not eligible for expanded family and medical leave or emergency sick leave. Please also consult any applicable local ordinances that may provide other leave, as those provisions may extend to furloughed employees.

E.6. **Can employees keep their health insurance during a furlough?**

If an employer wishes to stop subsidizing benefits, or wants to modify eligibility for certain health benefits, there may be implications and potential penalties under the Patient Protection and Affordable Care Act, also commonly referred to as Health Care Reform. If employees experience a reduction in pay in connection with the furlough, they may be eligible to make changes to their benefit elections if the cafeteria plan allows for that type of mid-year change-in-status event. Employers should consult with counsel to review not only their health and welfare benefit plans but also their retirement plans prior to making or communicating any changes with respect to benefits eligibility or contributions.

E.7. **How many hours is an employer obligated to pay an hourly-paid employee who works a partial week because the employer's business closed?**

The FLSA generally applies to hours actually worked. It does not require employers who are unable to provide work to non-exempt employees to pay them for hours the employees would have otherwise worked.

E.8. **If an employer directs salaried, exempt employees to take vacation (or leave bank deductions) or leave without pay during office closures due to influenza, pandemic, or other public health emergency, does this impact the employee's exempt status?**

Exempt, salaried employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. The FLSA does not require employer-provided vacation time. Where an employer offers a bona fide benefits plan or vacation time to its employees, there is no prohibition on an employer requiring that such accrued leave or vacation time be taken on a specific day(s). Further, this will not affect the employee's salary basis of payment so long as the employee still receives in payment an amount equal to the employee's guaranteed salary. However, an employee will not be considered paid "on a salary basis" if deductions from the predetermined compensation are made for absences occasioned by the office closure during a week in which the employee performs any work. Exempt salaried employees are not required to be paid their salary in weeks in which they perform no work.

Therefore, a private employer may direct exempt staff to take vacation or debit their leave bank account in the case of an office closure, whether for a full or partial day, provided the employees receive in payment an amount equal to their guaranteed salary. In the same scenario, an exempt employee who has no accrued benefits in the leave bank account, or has limited accrued leave and the reduction would result in a negative balance in the leave bank account, still must receive the employee's guaranteed salary for any absence(s) occasioned by the office closure in order to remain exempt.

E.9. **Do employers have to pay employees their same hourly rate or salary if they work at home?**

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

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

E.10. **In the event an organization bars employees from working from their current place of business and requires them to work at home, will employers have to pay those employees who are unable to work from home?**

Under the FLSA, employers generally only have to pay employees for the hours they actually work, whether at home or at the employer's office. However, employers must pay at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried exempt employees must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.

F. OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

F.1. **How can an employer protect its workers from exposure to COVID-19?**

Recommended guidelines include, but are not limited to, the following:

- Promote frequent and thorough hand washing, including by providing workers, customers, and worksite visitors with a place to wash their hands. If soap and running water are not immediately available, provide alcohol-based hand rubs containing at least 60% alcohol;
- Encourage workers to stay home if they are sick;
- Encourage respiratory etiquette, including covering coughs and sneezes;
- Provide customers and the public with tissues and trash receptacles;
- Employers should explore whether they can establish policies and practices, such as flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts), to increase the physical distance among employees and between employees and others if state and local health authorities recommend the use of social distancing strategies;
- Discourage workers from using other workers' phones, desks, offices, or other work tools and equipment, when possible; and
- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment. When choosing cleaning chemicals, employers should consult information on Environmental Protection Agency (EPA)-approved disinfectant labels with claims against emerging viral pathogens. Products with EPA-approved emerging viral pathogens claims are expected to be effective against SARS-CoV-2 based on data for harder to kill viruses. Follow the manufacturer's instructions for use of all cleaning and disinfection products (e.g., concentration, application method and contact time, PPE).

F.2. **What preemptive actions can an employer take to prevent an OSHA violation?**

Develop, implement, and communicate about workplace flexibilities and protections. Recommended courses of action include, but are not limited to, the following:

- Actively encourage sick employees to stay home;
- Ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies;
- Talk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies;
- Do not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way;
- Maintain flexible policies that permit employees to stay home to care for a sick family member. Employers should be aware that more employees may need to stay at home to care for sick children or other sick family members than is usual;
- Recognize that workers with ill family members may need to stay home to care for them; See CDC's Interim Guidance for Preventing the Spread of COVID-19 in Homes and Residential Communities: www.cdc.gov/coronavirus/2019ncov/hcp/guidance-prevent-spread.html.
- Be aware of workers' concerns about pay, leave, safety, health, and other issues that may arise during infectious disease outbreaks. Provide adequate, usable, and appropriate training, education, and informational material about business-essential job functions and worker health and safety, including proper hygiene practices and

the use of any workplace controls (including PPE). Informed workers who feel safe at work are less likely to be unnecessarily absent; and

- Work with insurance companies (e.g., those providing employee health benefits) and state and local health agencies to provide information to workers and customers about medical care in the event of a COVID-19 outbreak.

F.3. **What OSHA standards apply to workplace exposure to COVID-19?**

While there are no specific OSHA standards for COVID-19, some existing OSHA standards may be applicable. The OSHA standards that are most likely relevant are the personal protective equipment (PPE) standard, the injury and illness recordkeeping and reporting requirements, and OSHA's general duty clause. The general duty clause serves as a "catch all" provision and requires an employer to take preventive measures to protect employees even though a specific OSHA standard does not apply to the situation. It requires an employer to provide its employees with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees."

F.4. **When must an employee's COVID-19 illness be recorded on the OSHA 300 log?**

COVID-19 is a recordable illness if the employee's case (a) is a confirmed case as defined by the CDC; (b) is work-related (the employee was infected as a result of performing their work-related duties); and (c) meets one of the recording criteria (death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness, or involves a significant injury or illness diagnosed by a healthcare provider).

Once an employee's COVID-19 case is confirmed, the employer must investigate whether the illness is work-related. While this will be challenging in most cases given the community spread of COVID-19, an employer is still required to make this assessment. Under its current guidance, OSHA recognizes that there are employee privacy concerns with employers conducting an extensive medical inquiry and most employers lack expertise in this area, but OSHA still expects employers to engage in a reasonable investigation into the work-relatedness. While the reasonableness of the investigation will likely be fact-specific, an employer should undertake a good faith investigation of the available evidence while keeping employee privacy concerns in mind. This should include an interview of the employee, to ask the employee how they believe they acquired COVID-19, and discuss the employee's activities that may have led to the employee contracting COVID-19. The employer should also review the employee's work environment for potential exposure, including other instances of employees contracting COVID-19.

F.5. **When must an employer report an employee's COVID-19 illness to OSHA?**

All employers are required to report work-related deaths within eight (8) hours, and work-related in-patient hospitalizations that involve care or treatment within twenty-four (24) hours.

G. RETURN TO WORK

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

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

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

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

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

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

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

However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), the employer should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the employer's business under the ADA or Title VII.

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

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

The employee or her representative should communicate that she has a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a

disability and if there is a reasonable accommodation, barring undue hardship, that can be provided.

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

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

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

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to his own health under 29 C.F.R. section 1630.2(r). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

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

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

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

H. WORKPLACE PRIVACY

H.1. **In light of the COVID-19 pandemic, what health-related information can employers ask employees to provide?**

Employers can ask employees to provide the following information:

- A positive result for, or other diagnosis with, COVID-19;
- Symptoms of infection with COVID-19, e.g., fever of or over 100.4°F, cough, shortness of breath, sore throat;
- "Close contact" (as defined by the Centers for Disease Control) with any person who has tested positive for, or has otherwise been diagnosed with, COVID-19 infection within the preceding 14 days;
- Whether the employee has been asked to self-quarantine by a health official within the preceding 14 days;
- Whether the employee has traveled to, or stopped over in, a country for which the CDC has issued a Level 3 travel health notice; and
- Depending on geographic location, whether the employee is considered "high risk" for COVID-19 infection, meaning over age 60, pregnant, or suffering from diabetes, lung disease, heart disease, asthma, HIV, or similar conditions.

H.2. **Can employers require employees to check their own temperatures?**

Yes. Any policy on "self-checking" should be designed to address the threat to the workplace in a consistent manner. For example, only employees who interact with co-workers, customers or the general public on behalf of the employer may need to check their own temperature. Employers also can require employees to stay home from work if their temperature equals or exceeds 100.4°F and to report this symptom of COVID-19 to the employer.

H.3. **Can employers take employees' temperature before permitting them to enter the employer's facilities?**

Yes. However, employers should implement a temperature check protocol to ensure that temperature checks are designed to reduce the threat that an employee with COVID-19

poses to the workplace. In particular, temperature checks should be reliable, effective, performed consistently, and respect employees' privacy. For example, all employees entering facilities should be checked only by trained personnel and the results should be treated as confidential.

H.4. **Can employers require employees to be tested for COVID-19?**

Employers may be able to require employees to be tested if they have symptoms of COVID-19 and, nonetheless, assert that they are fit for work.

H.5. **Can health care employers with access to COVID-19 test kits require employees to be tested?**

Guidance issued by the Equal Employment Opportunity Commission on March 21, 2020, suggests that employers may be able to require testing of all employees, regardless as to whether the employee shows symptoms of COVID-19, based on the fact that COVID-19 poses a "direct threat" to the workforce. This is an aggressive approach, and should not be undertaken without first consulting with counsel.

H.6. **Does the Health Insurance Portability and Accountability Act (HIPAA) apply to the health information collected by employers?**

Generally, no. HIPAA imposes obligations to safeguard protected health information (PHI) only on covered entities, which are defined to include health plans, health care clearinghouses, and health care providers. An employer acting in its capacity as an employer is not subject to HIPAA. Other laws, such as the Americans with Disabilities Act (ADA) or state confidentiality laws, may apply.

H.7. **Can an employer disclose the identity of an employee who has tested positive for, or otherwise been diagnosed with, COVID-19 to co-workers who were in close contact with the infected employee during the relevant 14-day period?**

No. The ADA prohibits such a disclosure. However, the employer can provide co-workers with information that would help them evaluate the risk of infection.

H.8. **Can an employer disclose COVID-19 related health information to customers or vendors?**

No. The ADA does not permit employers to disclose an employee's medical information to an employer's customers or vendors. Employers can generally inform customers or vendors that an "employee has tested positive for COVID-19" or that an employee "has been exposed to COVID-19," but the employee(s) should not be identified.

H.9. **Can employers ask employees to consent to the disclosure to others of their identity and positive test for COVID-19 infection?**

The ADA's confidentiality provision does not have an express exception for disclosures with the employee's consent. Although there may be risk in relying on an employee's consent, that risk could be mitigated by taking steps, such as:

1) obtaining the employee's written consent;
2) informing the employee that consent is purely voluntary and may be revoked at any time; and

3) limiting the disclosure that is the subject of the consent to specifically identified employees who were in close contact with the infected employee during the relevant 14-day period.

H.10. **Can employers perform temperature checks on, or provide questionnaires inquiring about, the medical health of their customers?**

Yes. However, any inquiry should be narrowly tailored to reduce the threat of COVID-19 infection, and employers should ensure that medical information received from customers is stored in accordance with any applicable state information security law.

KDV IS HERE TO HELP

The experienced Labor & Employment attorneys at Kaufman Dolowich & Voluck are available to assist. We will continue to keep you apprised of any further developments impacting the workplace, and are available to answer any questions and provide additional guidance to help you navigate the ever-changing landscape of the laws during the COVID-19 pandemic and its interplay with any other local, state or federal laws. For more information, please contact an experienced member of KDV's Labor & Employment Law Practice Group.