



FP Beyond the Curve



FP BEYOND THE CURVE: Back-To-Business FAQs For Employers

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As we continue to adjust to life during the COVID-19 coronavirus pandemic, business recovery remains a constant challenge. For some businesses, this includes assessing business operations and bringing employees back to work. For all businesses, this means ensuring a safe workplace. All of these steps come with a whole new set of labor and employment challenges.

The same workplace law firm that helped navigate you through the initial stages of the COVID-19 crisis is here to assist your business as you get back to full strength. The FP Post-Pandemic Strategy group, comprised of a cross-disciplinary group of Fisher Phillips workplace attorneys, has assembled the following comprehensive set of FAQs that will be continually updated throughout the recovery period.

*Note: If you are still dealing with issues related to the front side of the COVID-19 curve, we recommend you review our **Comprehensive And Updated FAQs For Employers On The COVID-19 Coronavirus**, containing a comprehensive review of the many issues you may still continue to face.*

TABLE OF CONTENTS

- **WORKPLACE SAFETY**
 - General Workplace Safety Considerations
 - Relaxed Shelter-In-Place Order Issues
 - Taking Employee Temperatures And Other Medical Tests
 - Masks In The Workplace
 - Miscellaneous Safety Considerations
- **WORKPLACE PRIVACY**
- **HUMAN RESOURCES CONSIDERATIONS**



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

- General H.R. Strategy
- Policies And Best Practices
- Hiring Strategies
- Reasonable Accommodations
- Remote Work Considerations
- Business Continuity And Crisis Management
- Paid Sick Leave
- Pay Equity
- OFCCP/Affirmative Action
- **SBA LOANS**
- **FFCRA PAID LEAVE AND EMERGENCY FMLA**
- **WAGE AND HOUR ISSUES**
- **LABOR ISSUES FOR NON-UNION EMPLOYERS**
- **LABOR ISSUES FOR UNIONIZED EMPLOYERS**
- **UNEMPLOYMENT COMPENSATION**
- **BENEFITS/TAXES**
- **IMMIGRATION**
- **INTERNATIONAL LAW**
- **WRONGFUL DEATH/PERSONAL INJURY/WORKERS' COMPENSATION**
- **CONFLICTING DIRECTION FROM VARYING GOVERNMENT OFFICIALS**
- **TRADE SECRETS, NON-COMPETITION, AND DUTY OF LOYALTY ISSUES**
- **USERRA/MILITARY LEAVE**
- **FP POST-PANDEMIC STRATEGY GROUP ROSTER**

WORKPLACE SAFETY

General Workplace Safety Considerations

UPDATED ANSWER (May 8, 2020)

After shelter-in-place orders are lifted, how should we decide when to reopen?

The Centers for Disease Controls and Prevention (CDC) recently released [guidance](#) to assist employers in making decisions regarding reopening during the COVID-19 pandemic. You should continue to follow the recommendations issued by state and local health departments when determining the most appropriate actions to take. According to the CDC guidance, you should



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

consider three questions when deciding whether to reopen:

1. Are you in a community no longer requiring significant mitigation?
2. Will reopening be in compliance with state and local orders?
3. Will you be ready to protect employees at higher risk for severe illness?

You should only consider reopening if you can answer “yes” to each of the three questions. Even if you can satisfy the three preliminary questions, you should only reopen if recommended safety actions are in place. The CDC’s recommended safety actions include:

- Promoting healthy hygiene practices;
- Intensifying cleaning, disinfection (e.g., small static groups, no large events);
- Canceling non-essential travel, and encouraging alternative commuting and telework;
- Spacing out seating (more than 6 feet) and staggering gathering times;
- Restricting use of any shared items and spaces; and
- Training all staff in above safety-actions.

The CDC also recommends that you only reopen after you have implemented safeguards for the ongoing monitoring of employees, including:

- Encouraging employees who are sick to stay home;
- Establishing routine, daily employee health checks;
- Monitoring absenteeism and having flexible time off policies;
- Having an action plan if a staff member gets COVID-19;
- Creating and testing emergency communication channels for employees; and
- Establishing communication with state and local health authorities.

What workplace safety concerns should I anticipate when employees return?

In addition to the Occupational Safety and Health Administration (OSHA) requirements that applied to your workplace previously, you should expect additional employee concerns related to the coronavirus to continue for some time. This may vary depending on the location and the level of community transmission still active.

Employees, and their family members, are likely to be anxious about returning to the public, including the workplace. There likely will be a need to follow some of the CDC and OSHA Guidelines, depending on the determined level of risk at the workplace and guidance from local, state, and federal authorities. This includes social distancing, frequent handwashing, cleaning and disinfecting work areas, adjusting the workplace to separate employees (including split-shifts, staggered breaks,



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

and altering work stations), and appropriate personal protective equipment (PPE).

You may still need to monitor employee health, including asking about symptoms and taking temperatures, in the near future. Some of the newer safety practices put into place at the outset of the pandemic – prior to the shelter-in-place orders or the ongoing practices by essential businesses – may need to continue until the virus has been more completely controlled through robust testing and contact tracing capabilities, vaccines, and other treatments.

You should also plan on training employees and demonstrating the new safety measures in place to protect them from further spread of the virus. The more employees understand about what safety measures are being taken, and why, the more likely there is to be employee buy-in, and the less likely that employees may make complaints to OSHA or other third parties regarding perceived risk in the workplace. To be clear, employee complaints about perceived safety issues should be taken seriously and investigated, and you should not take any retaliatory action against employees who make such claims in good faith.

In addition to offering training to your workforce, make it a habit to check in with employees as often as possible to ensure they are comfortable with their work environment and the changes associated with returning to the workplace.

Should we continue to engage in social distancing?

Yes. Employees should continue to maintain a six-foot distance from others and otherwise observe social distancing in the workplace as work duties permit.

UPDATED QUESTION & ANSWER (June 15, 2020)

What kind of cleaning should we undertake at our facility prior to reopening and once we have reopened?

The CDC released [guidance](#) for cleaning and disinfecting public spaces, workplaces, businesses, schools, and homes. You should review this guidance when implementing your cleaning procedures. The CDC's guidance provides that for outdoor areas, you should maintain existing cleaning practices because viruses are killed more quickly by warmer temperatures and sunlight.

For indoor areas, the CDC recommends normal, routine cleaning for areas that have been unoccupied within the last seven days. For indoor areas that have been occupied within the last seven days, the CDC recommends that frequently touched surfaces and objects made of hard and non-porous materials (glass, metal, or plastic) be cleaned and disinfected more frequently.

Frequently touched surfaces and objects made of soft and porous materials, such as carpet, rugs, or material in seating areas, should be thoroughly cleaned or laundered. If possible, the CDC recommends considering removing soft and porous materials in high-traffic areas. Surfaces and



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

objects that are not frequently touched should be cleaned on a routine basis.

To clean and disinfect:

- If surfaces are dirty, they should be cleaned using a detergent or soap and water prior to disinfection (Note: “cleaning” will remove some germs, but “disinfection” is also necessary).
- For disinfection, diluted household bleach solutions, alcohol solutions with at least 70% alcohol, and most common EPA-registered household disinfectants should be effective.
- Diluted household bleach solutions can be used if appropriate for the surface. Follow manufacturer’s instructions for application and proper ventilation. Check to ensure the product is not past its expiration date. Never mix household bleach with ammonia or any other cleanser. Unexpired household bleach will be effective against coronaviruses when properly diluted.
- Cleaning staff should wear disposable gloves and gowns for all tasks in the cleaning process, including handling trash.
- Gloves and gowns should be compatible with the disinfectant products being used.
- Additional PPE might be required based on the cleaning/disinfectant products being used and whether there is a risk of splash. Follow the manufacturer’s instructions regarding other protective measures recommended on the product labeling.
- Gloves and gowns should be removed carefully to avoid contamination of the wearer and the surrounding area. Be sure to clean hands after removing gloves.
- Employers should develop policies for worker protection and provide training to all cleaning staff on site prior to providing cleaning tasks. Training should include when to use PPE, what PPE is necessary, how to properly don (put on), use, and doff (take off) PPE, and how to properly dispose of PPE.
- If you require gloves or masks or other PPE, prepare a simple half-page Job Safety Analysis (JSA): list the hazards and the PPE (gloves, masks, etc., as needed), and the person who drafts the JSA should sign and date it.

If you are using cleaners other than household cleaners with more frequency than an employee would use at home, you must also ensure workers are trained on the hazards of the cleaning chemicals used in the workplace and maintain a written program in accordance with OSHA’s Hazard Communication standard (29 CFR 1910.1200). Simply download the manufacturer’s Safety Data Sheet (SDS) and share with employees as needed, and make sure the cleaners used are on your list of workplace chemicals used as part of the Hazard Communication Program (which almost all employers maintain).

You should maintain routine cleaning and disinfection procedures after reopening to reduce the potential for exposure.



What spatial changes should we consider making in the workplace?

You should consider adapting the physical workplace to permit social distancing to be implemented to the extent feasible. If you have shared office arrangements, open floor work sites, or close common areas where employees are likely to congregate and interact, consider reconfiguring these spaces. You also should continue to encourage telework whenever possible and feasible with business operations.

Additional considerations for soft, nonpermanent, spatial changes in the workplace prior to reopening including the following:

- Partitions between receptionists and others that may directly interact with the employees;
- Separating employees who work in adjacent cubicle spaces;
- Removing every other chair in break areas and lunchrooms;
- Adding partitions to tables where employees congregate during breaks;
- Requiring employees to walk in designated one-way lanes in hallways and corridors to avoid “head-on” pedestrian traffic;
- Consulting with landlords about converting communal restrooms to single-seat bathrooms to avoid close contact between users;
- Utilizing HVAC contractors to increase the number of air changes in your workplace;
- Arrange for food trucks or other food delivery services to serve employees outside to separate employees during lunch breaks;
- Providing hand sanitizer stations outside each restroom and each door that is commonly touched or used;
- Upgrading your teleconference equipment to allow for more teleconferences; and
- If possible, arrange for pick-up and drop-off delivery of packages to be done outside.

Spatial requirements vary widely based upon the location at issue. Seek guidance from counsel about each particular area prior to reopening.

Should I prohibit visitors from visiting my reopened facility if they are sick?

Yes, a key aspect of keeping your employees safe is to ensure that all visitors at the site are healthy. Here’s a model notice you can display at your entrance to discourage sick visitors from entering.

What can you do to ensure that a contractor or vendor is not exposing your employees to a hazard?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

If your employees are required to work at a third-party's site, ask them to confirm in writing that CDC and OSHA COVID-19 guidelines are being followed prior to allowing your employees to work there.

UPDATED QUESTION & ANSWER (April 27, 2020)

What steps should we take when an employee tests positive for or is diagnosed with COVID-19?

You should follow this four-step plan when addressing a confirmed COVID-19 case in your workplace:

1. Isolate/Quarantine Confirmed Employees

The infected employee should remain at home until released by a physician or public health official. If a medical note releasing the employee is unavailable, follow the CDC guidelines on when an employee may discontinue self-isolation, which contain specific requirements dependent upon whether the employee tested positive for COVID-19 and the symptoms exhibited.

2. Address And Isolate Employees Working Near An Infected Co-Worker

When engaging in contact tracing, conduct a **6-15-48 review**. You should ask infected employees to identify all individuals who worked in close proximity (within **six** feet) for a prolonged period of time (the current CDC guidance states that "recommendations vary on the length of time of exposure, but **15** minutes of close exposure can be used as an operational definition") with them from the **48**-hour period before the onset of symptoms until the infected employee is cleared to discontinue self-isolation.

Send home all employees who worked closely with the infected employee for 14 days after last exposure under CDC Guidance to ensure the infection does not spread. While quarantined, those employees should self-monitor for symptoms (check temperature twice a day, watch for fever, cough, or shortness of breath), avoid contact with high-risk individuals, and follow CDC guidance if symptoms develop.

3. Clean And Disinfect Your Workplace

After a confirmed COVID-19 case, follow the CDC guidelines for cleaning and disinfecting the workplace. Your cleaning staff or a third-party sanitation contractor should clean and disinfect all areas (e.g., offices, bathrooms, and common areas) used by the ill person, focusing especially on frequently touched surfaces.

If using cleaners other than household cleaners with more frequency than an employee would



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

use at home, ensure workers are trained on the hazards of the cleaning chemicals used in the workplace and maintain a written program in accordance with OSHA's Hazard Communication standard. Simply download the manufacturer's Safety Data Sheet (SDS) and share with employees as needed, and make sure the cleaners used are on your list of workplace chemicals used as part of a Hazard Communication Program.

4. Notify Your Employees

Following a confirmed COVID-19 case, and as recommended by the CDC, notify all employees who work in the location or area where the employee works of the situation. You can use this model notification to assist with the process. You will want to do so without revealing any confidential medical information such as the name of the employee, unless the employee has signed an authorization to disclose their diagnosis; see samples available in our FP Data Bank). Inform employees of the actions you have taken, including requiring employees who worked closely to the infected worker to go home. Let employees know about your sanitizing and cleaning efforts and remind them to seek medical attention if they exhibit symptoms. The failure to notify employees at your location of a confirmed case may be a violation of OSHA's general duty clause, which requires all employers to provide employees with a safe work environment.

UPDATED QUESTION & ANSWER (April 21, 2020)

What if we have an employee with a suspected case of COVID-19?

You should follow the same steps above as if you had a confirmed case in your workplace.

UPDATED QUESTION & ANSWER (June 18, 2020)

Can an employee who is directly exposed to COVID-19 return to work before the expiration of the recommended 14-day isolation period if they test negative for COVID-19?

No, the 14-day isolation period cannot be cut short by a negative test for those with direct exposure. It takes up to 14 days after exposure to develop the virus if exposed, so a negative test prior to the expiration of the 14-day period does not release an employee to return to work. An employee could be positive for COVID-19 at any time between the time of a negative test and the end of the 14-day period. It is possible that a person known to be infected could return to work earlier than a person who is quarantined due to direct exposure if the infected worker meets the criteria for ending self-isolation.

UPDATED QUESTION & ANSWER (May 29, 2020)

Can we use COVID-19 waivers to limit our liability with respect to employees or guests?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

Waivers are limited in their effectiveness and you should consider the pros and cons before attempting to implement them. Employee waivers are usually unenforceable. Customer waivers cannot prevent government enforcement actions or claims including gross negligence and may scare or anger customers. Evaluating whether to implement customer waivers requires you to consider your industry, business, geographic area, and how your customers or the public will react.

Using questionnaires or notices may be more beneficial than waivers for many businesses. Questionnaires or notices communicate your reasonable actions to comply with government guidelines for sanitation, social distancing, mask wearing, and other efforts that you use to keep your guests and employees safe. Additionally, a questionnaire asks entrants to the premises questions about whether they have COVID-19 symptoms or exposure. This strategy allows you to show that you took affirmative steps to maintain workplace safety.

No waiver or other attempt at limiting liability can replace maintaining a safe workplace. You should strictly comply with local orders, state regulations, and guidance from government agencies. A more detailed discussion of waivers and limiting liability is available [here](#).

Relaxed Shelter-In-Place Order Issues

After shelter-in-place orders are lifted, can we ask an employee to stay home or leave work if they exhibit symptoms of the COVID-19 coronavirus or the flu?

Yes. You should continue to monitor your workforces for indicative symptoms, and not allow symptomatic individuals to physically return to work until cleared by a medical provider.

Further, shelter-in-place orders being lifted does not mark the end of the pandemic. The CDC states that employees who exhibit symptoms of influenza-like illness at work during a pandemic should leave the workplace.

As noted, check in with all employees on a regular basis to ask about their well-being. This is especially important for those who are home sick or in self-isolation. Your efforts to engage employees will prove beneficial during this time.

UPDATED ANSWER (June 15, 2020)

Can an employee refuse to return to work if a shelter-in-place order is lifted?

Employees are only entitled to refuse to work if they believe they are in imminent danger. Section 13 (a) of the Occupational Safety and Health Act (OSH Act) defines “imminent danger” to include “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.” OSHA describes imminent danger as where there is “threat of death or serious



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

physical harm,” or “a reasonable expectation that toxic substances or other health hazards are present, and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency.”

The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. Requiring employees to work with patients in a medical setting without PPE at this time may rise to this threshold. Most work conditions in the United States, however, do not meet the elements required for an employee to refuse to work.

You should follow guidance issued by the CDC and OSHA to ensure employees are not in imminent danger. Once again, this guidance is general, and you must determine when this unusual state exists in your workplace before determining whether it is permissible for employees to refuse to work.

In addition, Section 7 of the National Labor Relations Act (NLRA) extends broad statutory protection to those employees (in union and non-union settings alike) to engage in “protected concerted activity for mutual aid or protection.” Such activity has been defined to include circumstances in which two or more employees act together to improve their employment terms and conditions, although it has been extended to individual action expressly undertaken on behalf of co-workers.

On its own website, the National Labor Relations Board (NLRB) offers a number of examples, including, “talking with one or more employees about working conditions,” “participating in a concerted refusal to work in unsafe conditions,” and “joining with co-workers to talk to the media about problems in your workplace.” Employees are generally protected against discipline or discharge for engaging in such activity.

Keep in mind that if you terminate an employee who refuses to work, even where there is no imminent danger to your employees, the employee may still file an OSHA whistleblower claim. If you can establish that there was no hazard to your employees by your company’s compliance with OSHA and CDC guidelines, the whistleblower claim likely will be dismissed.

UPDATED ANSWER (June 15, 2020)

Can an employee refuse to return to work if they are above 65 years old and feel unsafe?

Only if they reasonably believe they will be in imminent danger as provided under the OSH Act.

UPDATED QUESTION & ANSWER (May 8, 2020)

Can we ban employees with an underlying condition from coming to work due to their enhanced vulnerability to COVID-19?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

The EEOC has clarified that the ADA does not allow employers to ban employees “unless the employee’s disability poses a ‘direct threat’ to his health that cannot be eliminated or reduced by reasonable accommodation.”

UPDATED QUESTION & ANSWER (May 8, 2020)

What constitutes a “direct threat” under the ADA that would permit us to ban an employee from the workplace?

While the CDC has identified medical conditions that may place individuals at a higher risk for severe illness, a direct threat assessment must involve more than noting that the employee has one of those medical conditions. You must make an individualized assessment for each employee and should 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. The individual assessment should consider the severity of the pandemic in your area, the employee’s overall health, and the employee’s job duties.

Even if the individualized assessment concludes that the employee’s disability poses a direct threat to their own health, you must also consider reasonable accommodations before excluding the employee from the workplace.

UPDATED QUESTION & ANSWER (May 8, 2020)

What accommodations should we consider to eliminate or reduce a direct threat to self?

It is important to remember that you may not have to provide a reasonable accommodation unless the employee requests one. Possible accommodations may include something as simple as additional or enhanced personal protective equipment. You may also consider the possibility of erecting a barrier that provides separation between an at-risk employee and others or increasing the distance between an at-risk employee and others. You may need to temporarily modify the work schedules of at-risk employees to decrease their contact with others.

UPDATED QUESTION AND ANSWER (June 15, 2020)

Can we ask older workers, such as those age 65 and over, not to come into work because they are at higher risk for a severe case of COVID-19 if they contract the virus?

No – the EEOC has indicated this would be improper age discrimination. The Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against those 40 and older, and therefore the law prohibits you from involuntarily excluding an individual from the workplace based on their being 65 or older – even if you are acting for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

UPDATED QUESTION & ANSWER (June 15, 2020)

What about pregnant employees? Can we ask them not to come to work to protect them?

Just as with older workers, you may not involuntarily exclude an employee from the workplace due to pregnancy. “Even if motivated by benevolent concern,” the EEOC says, “an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.” You may also have an obligation to accommodate a pregnant worker under the ADA (if a pregnancy-related medical condition arises) or through the Pregnancy Discrimination Act (which requires you to treat women affected by pregnancy and childbirth the same as others who are similar in their ability or inability to work, which may entitle them to job modifications including telework, changes to work schedules or assignments, and leave).

What actions can we take if an employee is exhibiting flu-like or COVID-19-like symptoms but refuses to leave the workplace?

You should first take a collaborate approach. Remind the employee that you are asking them to leave. Try to make them understand the reasons why their departure is necessary to maintain the health and safety of the entire workplace. If there are benefits available — such as paid sick leave, use of accrued vacation, or something else that may appease them — you should explain these benefits and how the employee can use them.

If the employee still refuses to leave the workplace, you can consider (a) explaining that the employee is now trespassing on private property and if they do not leave you will be forced to call local law enforcement to escort them off the premises; or (b) terminating the employee for insubordination. Termination of the employee, however, should be considered a last resort. Given the current climate, you will need to also consider public perception related to taking overly strong adverse action against an employee expressing concerns or apprehension related to the coronavirus.

UPDATED ANSWER (May 6, 2020)

After shelter-in-place orders are lifted, can we require an employee to notify the company if they have been exposed, have symptoms, and/or have tested positive for the COVID-19 coronavirus?

Yes. If an employee begins experiencing COVID-19 symptoms at work, you should require the employee to notify their supervisor. If an employee begins experiencing symptoms while not at work, has been exposed to someone that is exhibiting symptoms, or has tested positive, the employee should contact your company by telephone or email and should not report to work.

Employees who are suffering from symptoms should be directed to remain at home until they are they are released by a medical provider or, if that is not an option, symptom-free for at least three days without fever, achieved without medication, and no respiratory issues, and 10 days after



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

symptoms first appeared.

The CDC recommendations for discontinuing isolation in persons known to be infected with COVID-19 may appear to conflict with recommendations on when to discontinue quarantine for persons known to have been **exposed** to COVID-19. The CDC recommends 14 days of quarantine **after exposure** based on the pertinent incubation period. Thus, an employee known to be infected could leave isolation earlier than an employee who has been quarantined because of the possibility they are or may still become infected.

Taking Employee Temperatures And Other Medical Tests

UPDATED QUESTION & ANSWER (April 24, 2020)

When returning employees to work, may we administer a COVID-19 test before permitting employees to enter the workplace?

Yes. According to the EEOC's Technical Assistance Questions and Answers, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

The Americans with Disabilities Act (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. That's because an individual with the virus will pose a direct threat to the health of others.

Consistent with the ADA standard, you should ensure that any tests you administer are accurate and reliable. For example, you may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Make sure to check for updates, as this is a rapidly developing field.

You may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Remember 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.

Keep in mind, also, that these are medical exams that must be conducted in a confidential way and the results need to be maintained in a separate medical file. Further, PPE should be provided to employees administering the test, as well as training on how to properly use the PPE. For those that may have an exposure to bodily fluids as part of their job, you should provide proper training on blood borne pathogens.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

After shelter-in-home orders are lifted, can I take an employee's temperature at work to determine whether they might be infected?

Yes. Until further notice, you may continue to operate under the EEOC's guidance, which confirms that measuring employees' body temperatures is permissible.

Note: If your company does business in the State of California (e.g., if you have one or more locations, employees, customers, suppliers, etc. in the state), and your business is subject to the California Consumer Privacy Act (CCPA), then you must provide employees a CCPA-compliant notice prior to or at the same time as your collection of this information. For advice on CCPA compliance, please reach out to any member of our Data Security and Workplace Privacy Practice Group at any of our California offices.

UPDATED QUESTION & ANSWER (May 5, 2020)

If we are not required to do so, *should* we take our employees' temperatures?

Unless required by a local or state order, taking temperatures is not required in most workplaces. Doing so will require extensive planning, training, and could even be quite expensive. In addition, many individuals infected with COVID-19 won't exhibit any symptoms, and thus temperature screening likely won't prevent all workers who can transmit the disease from entering your worksite. Although the CDC recommends screening employees for fevers of more than 100.4 degrees Fahrenheit, keep in mind some states may recommend different thresholds. If you decide to screen your employees, also plan to check the temperatures of guests, clients, vendors, and contractors to ensure a safe work environment.

UPDATED ANSWER (April 21, 2020)

Should we collect medical information from employees when taking their temperatures?

No, unless required by local or state law. While taking temperatures or conducting other screening of employees prior to their shift, if you collect or distribute any medical information about an employee, it makes the likelihood of a privacy-related claim concerning the storage of the information more likely. Maintaining documents with this information increases the likelihood of such a claim. Instead, use a real-time thermometer and immediately inform employees if their temperature is above 100.4 degrees Fahrenheit in a private setting.

What precautions are needed for individuals who are taking the temperatures of employees, applicants, or customers?

To protect the individual who is taking the temperature, you must first conduct an evaluation of reasonably anticipated safety and health hazards and assess the risk to which the individual may be exposed. The safest thing to do would be to assume the testers are going to be exposed potentially to someone who is infected who may cough or sneeze during their interaction.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

Based on that anticipated exposure, you must then determine what mitigation efforts can be taken to protect the employee by eliminating or minimizing the hazard, including PPE. Different types of devices can take temperature without exposure to bodily fluids. Further, the tester could have a face shield in case someone sneezes or coughs. Further information can be found at OSHA's website, which provides additional guidance for healthcare employees (including recommendations on gowns, gloves, approved N95 respirators, and eye/face protection).

UPDATED QUESTION & ANSWER (May 5, 2020)

What else should we keep in mind if we decide to take our employees' temperatures?

Besides ensuring that you have provided your workers with proper training and PPE, and have considered the relevant privacy aspects of the process (both of which are noted and discussed above), you should consider the following factors:

- **Maintaining Proper Social Distancing** – Not only should screening employees be protected, you should ensure safety measures are taken for workers waiting in line to be screened. This includes ensuring employees stand six feet or more from each other while they wait to have their temperature taken.
- **Logistics** – You may have to screen 50 or more employees prior to the beginning of each shift. This likely will cause delays and create disruption to normal production activities. Be prepared to create outdoor waiting areas (e.g. tents and other temporary structures) where employees must be in lengthy lines prior to entering the facility. Employee privacy, especially where screening takes place and results are announced, should be accounted for during this time.
- **Wage Issues** – Keep in mind that employees may claim that their time waiting in line or being screened for a fever before their shift is compensable and thus they should be paid for it. Although no case law or Department of Labor guidance on point currently exists on this topic, we recommend that you err on the side of paying employees throughout the screening process. This also requires you to implement a system to have employees "clock in" when they get in line for screening and to document their time.

UPDATED ANSWER (May 8, 2020)

Can we require a fitness-for-duty exam before returning the employee to work?

The EEOC has clarified that employers may require a doctor's note certifying an employee's fitness for duty. However, you should be mindful that doctors and health care professionals may be too busy during the pandemic outbreak to provide fitness-for-duty documentation and be prepared to adjust your expectations accordingly.

Masks In The Workplace



UPDATED ANSWER (July 7, 2020)

Can employers in the United States refuse an employee's request to wear a medical mask or respirator?

Yes, unless it is required by state or local ordinance– but you should consider allowing your workers to wear them if it makes them feel safe, even if they are not required.

The CDC recommends wearing cloth face coverings in public settings where other social distancing measures are difficult to maintain, especially in areas of significant community-based transmission. The CDC recommends the use of simple cloth face coverings to slow the spread of the virus, given that a significant portion of individuals with COVID-19 lack symptoms. The simple cloth face coverings recommended by the CDC can be made at home from common household materials. The CDC made clear that the cloth face coverings being recommended are not surgical masks or N-95 respirators, which it recommends reserving for healthcare workers. The cloth face coverings are not subject to OSHA's respiratory protection standard.

Given this guidance from the CDC, it is recommended that you do not refuse an employee's request to wear a mask. However, you should recommend that the employee use a cloth face covering, as suggested by the CDC, instead of a surgical mask. You may also want to require cloth face coverings where employees cannot avoid working within six feet of others. If you are located in a jurisdiction where masks are required to be worn, follow the provisions of the order to avoid claims from employees.

What should you do if an employee claims they have a medical condition that prevents them from wearing a mask or face covering?

You should engage in the ADA required interactive process with this employee. The interactive process should use a medical questionnaire to the person's treating physician asking about other options or whether the condition precludes the person from wearing any kind of face covering that would achieve the goal.

UPDATED QUESTION & ANSWER (May 21, 2020)

A customer or guest has indicated that they are exempt from any facemask requirement due to an underlying medical condition, and refuse to provide any further information. What should we do?

First, you should post a notice at your entrance and on your website that you require patrons to wear a facemask to enter your place of business, and reserve the right to refuse service to anyone not complying with the requirement. Also, if your business is by reservation only, you should train staff to advise individuals making reservations of the requirement.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

Although an individual may have an underlying medical condition that makes it difficult to wear a mask (e.g., a pulmonary condition), it is highly unlikely the person is carrying a doctor's note to that effect. Further, some state public health orders prohibit you from requiring medical documentation when this type of exemption is claimed. For these reasons, it is probably not best to require documentation from this individual to support their request.

This isn't to say that you need to let them into your establishment, however. Instead of engaging in a discussion with the customer or guest about whether they are exempt from your rule, consider whether you can offer an accommodation that would allow them to either access your business or your products/services, such as through curbside service, or by letting them know they can enter at another time if they are wearing a full clear face shield. Remember, although you may have a policy or be subject to a state-ordered obligation to require facemasks, you may also have an obligation to accommodate the individual if doing so is possible. If that is not reasonably possible, you may advise the individual that they may not enter at that time but they may in the future if wearing a full clear face shield.

UPDATED QUESTION AND ANSWER (July 14, 2020)

Can an employee refuse to work without a mask?

Unless you are required to provide a mask or respirator as PPE to your employees, in most cases, an employee does not have the right to refuse to work without a mask. OSHA's respiratory protection standard makes it clear that when a respirator is not necessary to protect the health of an employee, it is within the discretion of the employer to allow employees to use a respirator. Accordingly, you are well within the applicable OSHA standard to deny an employee's request to wear a surgical mask or a respirator in almost all situations.

OSHA also has addressed the common question of whether an employee can simply refuse to work in unsafe conditions. The safety agency provides the following guidance, which wouldn't require the use of a mask or respirator in most situations. An employee's right to refuse to do a task is protected if all of the following conditions are met:

1. Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so;
2. The employee refused to work in "good faith." This means that the employee must genuinely believe that an imminent danger exists;
3. A reasonable person would agree that there is a real danger of death or serious injury; and
4. There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

In light of the CDC's guidance recommending that people wear cloth face coverings in public settings (these coverings are not subject to OSHA's respirator regulation), however, it is not recommended that you refuse an employee's request to wear a mask at work.

UPDATED QUESTION AND ANSWER (July 14, 2020)

Can we require employees and customers to wear masks?

Yes, employers may require employees and customers to wear masks. Although ADA considerations exist, the CDC recommends that all individuals wear cloth face coverings in public settings, OSHA recommends that workers wear cloth face coverings, an increasing number of states have face covering requirements for certain sectors or the public, and many cities and counties require or highly recommend face masks.

EEOC guidance states that employers may require employees to wear personal protective equipment including gloves and masks during a pandemic. Although employers must use an interactive process to find reasonable accommodations for employees who claim that they cannot wear masks, employers should not grant any accommodation that poses an undue hardship or a direct threat to employee health—both of which are fact-specific determinations that an interactive process can preclude or develop. Possible accommodations include reassigning employees to where they are not near other employees or working from home if the employee can perform all their essential functions remotely.

Social or political objections do not allow customers to refuse to wear masks, and neither do ignorance or idleness. But CDC guidance provides several exemptions indicating who should not wear masks: "Cloth face coverings should not be placed on young children younger than 2 years of age, anyone who has trouble breathing, or is unconscious, incapacitated or otherwise unable to remove the cover without assistance." And, although you may have a policy or be subject to a state-ordered obligation to require facemasks, you may also have an obligation to accommodate the individual if doing so is possible. Taking a few precautions allows employers to refuse entry to customers without masks.

Posting signage that customers must wear masks and the business will refuse entry to those who do not is vital. Signs should include a statement about requests for accommodation to avoid ADA-related violations. Employers can also offer accommodations including curbside service, phone or internet ordering, personal shoppers, wearing full clear face shield or helmets, providing special hours, and other business-specific strategies to provide equal access to anyone with disabilities that prevent mask use. Businesses should not require customers to carry medical documentation.

Finally, while not an ADA concern, employers should offer the same business-specific accommodations where possible to employees and customers who object to wearing a mask based on religious beliefs.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

UPDATED QUESTION AND ANSWER (July 14, 2020)

Are face shields an acceptable alternative to masks?

Sometimes. Both OSHA and the CDC allow the use of face shields when masks are not practicable for COVID-19 source control. Recognizing that specific tasks may preclude masks, OSHA states:

Where cloth face coverings are not appropriate in the work environment or during certain job tasks (e.g., because they could become contaminated or exacerbate heat illness), employers can provide PPE, such as face shields and/or surgical masks, instead of encouraging workers to wear cloth face coverings. Like cloth face coverings, surgical masks and face shields can help contain the wearer's potentially infectious respiratory droplets and can help limit spread of COVID-19 to others.

Although the CDC endorses face shields only when masks are unavailable, it advises that face shields should wrap around the sides of the wearer's face and extend to below the chin. Either disposing of face shields or cleaning and decontaminating after each use is also the CDC's guidance.

Masks should be an employer's first choice, but they have limitations including flammability and heat. When masks aren't available or when an employee is unable to wear a face mask, consult state and local orders, maintain social distance, and consider face shields.

UPDATED ANSWER (June 15, 2020)

Should you pay for face coverings that employees wear?

If you require employees to wear face coverings, you should pay for them. Many state and local orders specifically require that employers pay for face coverings that employees wear. Consult your state and local orders.

UPDATED ANSWER (June 11, 2020)

Do any OSHA requirements apply when employees wear face coverings?

Even though OSHA's latest guidance indicates that OSHA's PPE standard does not apply to cloth face coverings, before you require cloth face coverings to comply with a state or local order or your obligations under the OSH Act's General Duty Clause, you should:

- Perform a hazard assessment;
- Consider other alternative options to protect employees;
- Identify and provide cloth face coverings for employees as appropriate;
- Train employees in the use and care of cloth face coverings;
- Train employees how to clean and maintain cloth face coverings, including replacing worn or damaged cloth face coverings; and



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

- Revisit your hazard assessment periodically to ensure you are adequately protecting your workers through the proper selection of masks or, where appropriate, PPE.

Miscellaneous Safety Considerations

UPDATED QUESTION & ANSWER (April 24, 2020)

If we require an employee to wear PPE and engage in infection control practices, do we have to consider requests for accommodation?

Yes. While you can require such gear and practices, employees may request accommodations based on a disability or religious belief and you must engage in the interactive process to determine if reasonable accommodations can be provided.

What other OSHA standards apply to reopening our facility?

The most important standards to consider, in addition to the PPE regulation referenced above, are OSHA's bloodborne pathogen standard, which applies when employees work near human bodily fluids as part of their job and requires an exposure control plan and training, among other things, and the agency's hazard communication standard, which governs employee exposure to chemicals. The "HazComm" standard is especially important to follow when employees work with sanitizers and cleaning agents to help disinfect the workplace. It also requires training and other considerations with which employers should familiarize themselves.

Finally, if there is no OSHA standard directly on point, the agency can resort to the catch-all general duty clause, which requires all employers to provide employees with a safe work environment. The agency will use this standard to cite employers in unusual situations, like the COVID- pandemic, when hazards are present.

Are we required to develop a written infectious disease preparedness and response plan?

While you are not required to do so, it is a prudent course of action and highly recommended by OSHA. The elements of such a plan can be found here. OSHA's Bloodborne Pathogens standard (29 CFR 1910.1030) applies to occupational exposure to human blood and other potentially infectious materials. While the Bloodborne Pathogens standard does not apply to all workplaces, the provisions may be helpful in controlling some sources of the virus. A good way to satisfy your obligations under these conditions is to prepare the hazard assessment required by OSHA's standards.

UPDATED ANSWER (May 27, 2020)

Is COVID-19 a recordable illness for purposes of OSHA Logs?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

OSHA has published guidance on this issue. OSHA recordkeeping requirements mandate covered employers record certain work-related injuries and illnesses on their OSHA 300 log. You must record instances of workers contracting COVID-19 if the worker contracts the virus while on the job. The illness is not recordable if worker was exposed to the virus while off the clock. You are responsible for recording cases of COVID-19 if:

1. The case is a confirmed case of COVID-19 (meaning an individual has at least one respiratory specimen that tests positive for SARS-CoV-2, the virus that causes COVID-19);
2. The case is work-related (as defined by 29 CFR § 1904.5); and
3. The case involves one or more of the general recording criteriaas outlined by OSHA: if it results in death, days away from work, restricted work or transfer to another job, medical treatment beyond “first aid,” or loss of consciousness (OSHA provides a specific and complete definition of “first aid” in 29 CFR § 1904.7(b)(5)(ii)).

OSHA recently published revised guidance for enforcing its recordkeeping requirements for cases of COVID-19. OSHA is now taking the position that employers in all industries should determine whether employee COVID-19 illnesses are work-related and thus recordable. The agency has provided some leeway, indicating that it understands that certain small employers lack access to employees’ medical information. For this reason, OSHA said it will not aggressively enforce the requirement against those employers.

The new guidance directs agency Compliance Safety and Health Officers (CSHOs) to consider a variety of factors when determining whether an employer has complied with the obligation to make a **reasonable determination of work-relatedness**. These factors include:

- The reasonableness of the employer’s investigation into work-relatedness;
- The evidence available to the employer; and
- The evidence that COVID-19 was contracted at work.

If an employer makes a reasonable and good faith inquiry but cannot determine whether it is more likely than not that exposure in the workplace played a role in the confirmed case of COVID-19, OSHA says that the employer does not need to record the illness.

Who should notify OSHA of a workplace injury during multi-employer work?

OSHA standard 29 CFR 1904.31(b)(4) provides that companies and their subcontractors, including staffing agencies, must coordinate their efforts to ensure that each injury and illness is recorded only once on an OSHA 300 log – by the employer who provides day-to-day supervision. Only one employer can actually provide day-to-day supervision under OSHA’s recordkeeping regulations.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

The determination regarding which entity must record the injuries and illnesses must be based on the facts concerning day-to-day supervision at the worksite. OSHA has clarified that day-to-day supervision occurs when “in addition to specifying the output, product or result to be accomplished by the person’s work, the employer supervises the details, means, methods and processes by which the work is to be accomplished.” This could be a host employer or staffing agency, depending upon the circumstances.

Similarly, 29 CFR 1904.39 provides that “within 24 hours after the in-patient hospitalization of one or more employees...as a result of a work-related incident, you must report the in-patient hospitalization....” The standard does not define “you.” Presumably, it refers to “employer,” based on the preceding use of the term “employee.”

Further, the particular standard does not provide a definition of the employer-employee relationship. OSHA recognizes this ambiguity and provides clarification on its website, stating that it applies the same requirements for recording injuries and illnesses on an OSHA 300 log apply to reporting reportable work-related incidents. Therefore, the employer that provides the day-to-day supervision of the worker is responsible for reporting the incident to OSHA.

UPDATED QUESTION & ANSWER (July 7, 2020)

We are concerned employees are increasing our company’s risk of workplace exposures because they are not following CDC recommendations while off-duty, away from the work site. How can we safeguard our workplace against this risk?

Employers generally cannot control employees’ actions away from the workplace and some states expressly prohibit disciplining an employee based upon their legal off-duty conduct. Obviously, however, the COVID-19 crisis presents very unusual circumstances. Specifically, employers have a compelling interest in keeping the workplace free from the coronavirus. In fact, OSHA’s General Duty Clause *requires* employers to keep employees and the workplace free from “recognized hazards” that could cause death or physical harm. COVID-19 presents such risks, thus triggering employers’ duty. To fulfill this duty, employers must avoid overreaching and stay focused on specific risks and effective ways to reduce or eliminate them.

For example, employers may require medical testing that is “job related and consistent with business necessity.” The EEOC does not object to temperature checks or COVID-19 *virus* testing during this pandemic, as long as the screening or testing methods are safe, accurate and consistently applied. *Antibody* testing cannot be used as a basis decide whether to return an employee to the workplace, however, because those test results do not reveal whether an individual currently has the virus.

The majority of employers must also adopt and enforce policies to ensure social separation, which includes re-engineering spacing and foot traffic in the workplace; require and support regular handwashing and sanitization; and enforce appropriate face covering requirements at work. The



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

CDC, OSHA, and many state and local authorities recommend or require these and other safeguards in the workplace and beyond. Employers must therefore embrace policies and a mindset that keeps employees and others from entering the premises if they are sick, experiencing COVID-19 symptoms or have been exposed to someone exhibiting symptoms or who has a confirmed case of coronavirus.

Thus, under the current circumstances, company policies should make clear that employees must not enter the workplace without certifying, in connection with daily temperature and other symptom screening, that they have continued to follow fundamental safety practices, such as maintaining social distancing from individuals who are not members of their household; practicing frequent handwashing; and avoiding close contact with anyone exhibiting symptoms or with a confirmed case of coronavirus since last being screened. These policies and screenings may also address travel from domestic and international areas that have been identified as high-risk or COVID-19 “hot spots” by federal, state or local authorities. These designations can, of course, change quickly.

All these practices must be consistent with official health mandates applicable to the location and employers must of course stay abreast of continually evolving guidance.

UPDATED QUESTION & ANSWER (July 7, 2020)

Due to nature of air travel, which tends to make it very difficult to maintain social distancing and to avoid frequently touched surfaces, can our company enforce a 14-day quarantine of all employees who travel on commercial airlines?

Initially, it is important to note that most companies have stopped or drastically reduced business travel. International travel is highly discouraged and restricted. So the answer to this question generally focuses on employees’ personal domestic air travel.

Even though air circulation and filtering systems on commercial aircraft are quite effective, there is no escaping the possibility that security lines, airport terminals, and relatively crowded flights can result in closer-than-six-foot contact with others, contact that possibly lasts for hours. This causes employers to have legitimate workplace safety concerns. Their options in this situation may vary, however, especially as more businesses reopen and it becomes more difficult to distinguish the risk of commercial airline travel from risks that exist in employees’ own neighborhoods.

Employers have more flexibility in some states than in others. Some state laws, for example, prohibit employers from taking adverse action against an employee for engaging in any legal activity while off-duty. Thus, employers must consider the particulars of their state’s laws and whether a 14-day post-travel quarantine would be considered a prohibited action. The analysis can be further nuanced because permitting an employee to work remotely would likely be viewed much differently than requiring an employee to take time off without pay.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

This mandatory quarantine scenario raises more issues to consider. For example, an employee who took a commercial flight for personal reasons and has subsequently been advised by a health care provider to self-quarantine due to concerns related to COVID-19 may be eligible for Emergency Paid Sick Leave pursuant to the FFCRA, *if* the advice from a health care provider is the reason the employee cannot work or telework. In this context, it will also be important to consider whether any state or local orders *require* the traveler to quarantine.

Federal and state laws that prohibit discrimination because of an actual or perceived disability may also be relevant. Even though COVID-19 by itself may not be a covered disability, especially if it has not even been diagnosed yet, the *perception* of a disability could still trigger legal claims. Thus, a policy requiring a 14-day quarantine after commercial air travel is riskier in some places than in others, depending upon state and local law.

[Return to Table of Contents](#)

WORKPLACE PRIVACY

UPDATED QUESTION & ANSWER (June 18, 2020)

Can we maintain information collected about employees' temperature checks and/or COVID-19 diagnosis? If so, what should we consider in determining how this information should be maintained?

To the extent you are taking employees' temperatures and collecting information from employees regarding testing for COVID-19, you should consider the applicable data privacy statutes that may impose requirements for maintaining the security of this data. A number of states' data breach notification statutes define protected personal information as including medical or health information, which could include temperature and/or testing results.

These statutes not only impose notification requirements in the event of a data breach, but some also impose requirements for maintaining the security of this data, and potential penalties and private rights of action for failure to do so. This includes California, which, pursuant to the CCPA, permits recovery of damages of \$100 to \$750 per person, per incident, or actual damages, whichever is greater. The California Attorney General may also prosecute companies for violations of the CCPA, and may impose civil penalties of up to \$2,500 per violation, or \$7,500 for each intentional violation. Additionally, some states have Medical Information breach notification statutes that apply their own requirements. These statutes typically apply to health care providers. In California, for example, this includes clinics, home health agencies, health facilities, and hospices.

If you maintain temperature or testing information for employees, you should take care to strictly limit access to this information to limited employees who have a need to know the information for personnel management purposes. You should also ensure that appropriate security measures are taken to avoid inadvertent or malicious access to the information by third parties, or other



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

employees.

To the extent testing results suggest or confirm a positive diagnosis for COVID-19 and lead to a decision to send an employee home, you should maintain a record of the testing results and treat the record as an employment medical record. All other information should only be retained as long as necessary to manage risk during the COVID-19 crisis and should be permanently deleted once it is no longer needed.

UPDATED ANSWER (June 18, 2020)

Can we perform on-site antibody testing to determine whether employees should be permitted to work?

No. The EEOC released guidance informing employers that requiring antibody testing before allowing employees to re-enter the workplace is not allowed under the ADA. The EEOC specified that an antibody test constitutes a medical examination under the ADA and, given the CDC's guidelines that antibody test results "should not be used to make decisions about returning persons to the workplace," antibody tests do not meet the ADA's "job related and consistent with business necessity" standard for medical examinations.

UPDATED QUESTION AND ANSWER (June 18, 2020)

If we collect and maintain information about employees' temperature checks and/or COVID-19 diagnosis, will such collection or disclosure of this information trigger any HIPAA obligations?

The privacy restrictions mandated by HIPAA only apply to "covered entities" such as medical providers or employer-sponsored group health plans, and then only in connection with individually identifiable health information. Employers are not covered entities, so if you have medical information in your employment records, it is not subject to HIPAA restrictions.

Nevertheless, disclosures should be made only to authorized personnel, and care should be taken even in disclosures to government personnel or other groups such as the Red Cross. Further, you should be careful not to release information to someone until you have properly identified them.

UPDATED QUESTION & ANSWER (June 18, 2020)

Will the collection of information regarding employees' temperature checks and/or COVID-19 diagnosis trigger any special obligations under the Illinois Biometric Information Privacy Act or other state-specific biometric information privacy laws?

For purposes of the Illinois Biometric Information Privacy Act (BIPA), a biometric identifier is defined as including "retina or iris scans, fingerprints, voiceprints, or hand scans or face geometry." The definition expressly excludes "human biological samples used for valid scientific testing or screening," "information captured from a patient in a health care setting or information collected, used, or stored for health care treatment," or an "image or film of the human anatomy used to



diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening.”

The recently amended New York SHIELD Act similarly defines “biometric information” as including “data generated by electronic measurement of an individual’s unique physical characteristics, such as a fingerprint, voice print, retina or iris image, or other unique physical representation or digital representation of biometric data which are used to authenticate or ascertain the individual’s identity.” These definitions would not appear to include testing results or the results of a temperature test performed by an employer, which is used to screen for possible illness and not to authenticate an individual’s identity.

As the methods and means for testing evolve, and to the extent you may eventually have the ability to perform antibody or other testing directly on employees, you should seek advice regarding whether information collected to perform the tests could bring them within the ambit of any applicable biometric information privacy laws.

[Return to Table of Contents](#)

HUMAN RESOURCES CONSIDERATIONS

General H.R. Strategy

What steps can we take to prepare for employees to return to the worksite?

Preparation and communication are of utmost importance as crisis like COVID-19 are anxiety and stress ridden. Having a thorough plan in place to establish a safe and healthy workplace and sharing that plan provides peace of mind for your employees and their families. In addition, it establishes credibility for you, your function and your company as you will be organized, competent and prepared.

Some factors to consider include:

- **Structure:** Implement a structure to ensure a high degree of preparedness for every possible scenario to ensure a safe workplace and the ability to deliver products and services to your customers. This is especially important to ensure consistency within each worksite and across multiple worksites. Consider developing:
 - Strategy and response committees with clear roles and responsibilities which includes members from key functions;
 - Decision-making matrices to address key decisions such as closure, travel, positive case response, who should be consulted and who is final decision-maker;



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

- Protocols and procedures; and
- Policies.
- **Communication/Education/Training:** Establish clear communications to employees and management about new processes and expectations for their return to work. This includes addressing:
 - Timing (before return to work, pre-shift, and during shift);
 - Signage posted at all points of entry and key locations to effectively share and remind employees of the new requirements;
 - Communications drafted and ready to go in the event of a positive COVID-19 case within the workplace; and
 - Business plans and impact.
- **Safe Workplace Protocols:** Establish processes to prevent potential infection in accordance with WHO/CDC/OSHA guidelines. This includes addressing:
 - Social distancing rules for work areas and common areas such as restrooms, employee entrances and exits, vending/food service, conference rooms, and break areas;
 - PPE and other mitigation measures if social distancing is not possible;
 - Visitor, contractor and vendor access; and
 - Positive case response and management.
- **Cleaning/Disinfection:** Create protocols including frequency of cleaning of work stations and common areas, increased sanitizing stations, inventory and restocking requirements, and disposal of PPE in accordance with WHO/CDC/OSHA guidelines. Besides routine cleaning and disinfection procedures, you should address deep cleaning and disinfection after a potential or confirmed exposure.
- **Healthy Workforce:** Implement daily health/risk screenings to confirm the health and exposure of employees and anyone entering the work site. This could include screening measures at home and at the workplace.

When employees trust that you are being honest and transparent in your communications, and that you are taking every step possible to ensure their safety, they will be more likely to return to work and perform their jobs as required. Frequent and strategic communications are a necessity until the fear of coronavirus is behind us.

What key stakeholders should we communicate with as we scale up to return to work?

This pandemic has shown that a robust communications strategy and action plan are more important than ever. During a crisis like this, people generally want to know how it affects them and their jobs, what they need to do at home and at work, and how the organization is impacted by and



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

handling the crisis. Many organizations develop key messages, talking points and holding statements to be utilized for a number of different scenarios that may occur including return to work, response to positive COVID-19 cases, reduced operations, temporary closure, etc.

Determine your audience, their concerns, the avenues you will use to communicate with them, the frequency of communication and who will provide the communications. In addition, there are a number of key stakeholders to consider, both internally and externally:

- **Employees:** Your goal is to ensure employees that you have a solid plan in place to maintain a safe workplace and a healthy workforce. Consider your communication to them in advance of their return to work, e.g. virtual town hall or webinars, and while at work. Key points will include date(s) to reopen/scale up operations, proactive measures to ensure a safe workplace, new protocols, pre-screening, etc. Keep your signage, procedures and messaging simple. Do not fear over communicating.
- **Management and supervisors:** Special attention should be given to preparing members of this team as they are on the front lines when responding to employees during this pandemic. Conduct advance training sessions for management and supervisors to prepare them on all new policies and protocols and how to respond to employees with questions or concerns. An emphasis on active listening, two-way communications, quickly identifying and resolving employee issues, and being proactive in checking in with employees are all good practices to ensure a positive employee relations environment in your organization. Once back to work, ensure timely updates are shared with them on an ongoing basis regarding impact to the business, e.g., customers, supply chain issues, staffing status, positive cases within the workplace, policy and protocol changes, and FAQs.
- **Contractors, vendors and on-site visitors:** They will need to understand protocol for access to your workplace as well as new rules that impact them.
- **Suppliers and Customers:** Your start-up plan may need to be coordinated with your customers and suppliers. In some cases, discussions on risk mitigation, inventory management and capital may be necessary so you can prioritize accordingly.
- If you are a large employer, consider if pro-active outreach and periodic updates to community VIPs or the local health department would be helpful as your workforce returns en masse in the coming weeks.

How can we ensure engagement at the workplace in the new world of social distancing?

Some communication and recognition activities that were common before COVID-19, such as large employee meetings or company events such as picnics, can't take place now in the same manner as they were pre-pandemic. You will need to evaluate "cultural activities" that were in place, if they can occur with or without modification, if they should be eliminated for a period of time and how they might be replaced.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

This is actually a great opportunity for engagement. Ask your employees which activities they value the most. If activities have to be eliminated or modified, get their input and ideas on what can be done instead. You can see which activities are truly valued by employees and how they can be modified or replaced with activities that have meaning to your team yet will still accomplish your communication and recognition goals. Of course, thorough communication to your employees during this process will help them recognize your efforts to maintain a safe and healthy workplace.

Policies And Best Practices

What policies may be impacted or need to be changed due to the COVID-19 pandemic?

You will need to implement measures to ensure the health and safety of your employees but may also need to change other policies and practices to accommodate the new normal. A thorough analysis of existing policies should be undertaken to include adjustments made for recent legislation. Some of the policies may include:

- Attendance;
- Vacation/Paid Time Off;
- Remote work;
- Work hours, including start/stop time, breaks, lunch times, flexible hours, and staggered work hours;
- Timekeeping including clock in/out procedures;
- Leave policies including sick leave;
- Travel policies including business and personal travel; and
- Information technology and usage.

In addition, you may need to work closely with your IT/IS team as many of your changes in policies and the new local, state and federal laws may impact your HRIS system.

When returning employees to work, can we or should we issue new policies and handbooks?

Employers who are not otherwise limited by a collective bargaining agreement are certainly permitted to issue new policies or handbooks when returning employees to work. And many may decide this is a good opportunity to update policies, procedures and handbooks.

There are some issues to consider, however. If you modified policies by reducing benefits such as PTO, vacation, or holiday pay and you are uncertain whether or when you will return the benefits to pre-COVID-19 days, it may be more practical to wait to update and finalize your policies at a later date. If you intend to maintain the modified policies for a significant length of time, issuing a new handbook may be in order. If you made no changes but have not done a thorough review of your



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

handbook in recent years, this may be an excellent time to update and re-issue your handbook to all returning employees and those who stayed working.

Our employees have been on furlough. When we call them back to work, do we need to treat everyone as a new hire?

Some state laws address this situation, but generally most employees returning from furlough or a temporary layoff do not need to “re-hired” in the traditional sense. If these employees stayed on your payroll, most employers can simply return the employee to their prior position at the same pay rate and benefit eligibility as the employee left. You should document the return-to-work date using your normal personnel action form document. If there are any significant changes to wages and benefits for the returning employee, those changes should be communicated in writing.

If we terminated employees instead of laying them off or furloughing them, how do we go about re-hiring them? What should the application process include?

If you terminated employees and wish to re-employ them, the best practice would be to put the “applicant” through your company’s normal application screening process, even if you forego formal interviews. This should include an application, I-9 form (depending on the length of time the employee has been terminated) and the normal hiring paperwork. This process may also include criminal background and credit checks, drug test, and post-offer/pre-employment physical exams.

Once you have re-hired the individual, you should require the incoming employees to execute all new hire paperwork, which may include a handbook acknowledgment, arbitration agreement, restrictive covenant agreements, to name a few.

Do we need to update our personnel files when our employees return?

Not necessarily. While the return-to-work period may be a good opportunity to review personnel files for completeness, your staff may not have the bandwidth to tackle a complete review. At a minimum, you may want to determine whether there are critical missing documents in the file, such as arbitration agreement, I-9 form, signed policies, etc. The returning employee should be asked to complete those upon return.

Another important check you should perform is to ensure that medical information, including workers’ compensation documents return-to-work notes and any other documents which contain an employee’s medical information are separated from the personnel file. Under the Americans with Disabilities Act and many state laws, employee medical information must be stored in separate confidential medical files.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

We have not used arbitration agreements in the past. When we call employees back from furlough, should we ask them to sign an arbitration agreement?

Employers always need to carefully evaluate timing when implementing an arbitration program. Without thoughtful communication and explanation, employees can have negative reactions to an arbitration program. If, for your business and its particular circumstances, the ramp-up period within your company seems like the right time to implement arbitration, it would be a good time to roll out your program.

On this side of the curve, we see that our company's paid leave policies have been too generous. Our future financial circumstances are shaky. Can we change our paid leave policies?

Generally, employers may make a prospective change in the types of benefits they provide to employees absent a collective bargaining agreement. You should confirm whether state law imposes any specific requirements and should avoid the forfeiture of any pre-existing benefits prior to the layoff or furlough.

Are my required posters (including FFCRA) correctly placed in my workplace?

You are obligated to post numerous employment law related posters in locations throughout your facilities. Every employer covered by the Families First Coronavirus Response Act (FFCRA) must post in a conspicuous place on its premises a notice of the statute's requirements. You may satisfy this requirement by emailing or mailing the notice to its employees or posting it on the internal or external website.

UPDATED QUESTION & ANSWER (April 27, 2020)

What do we need to consider if we are thinking about implementing a voluntary attendance policy?

Voluntary attendance policies allow employees to voluntarily cease work and stay at home during a temporary period, without the fear of traditional consequences (i.e. discipline, termination, adverse performance reviews, etc.). However, if implemented improperly, these policies run the risk of modifying the at-will employment relationship with your employees and limiting your termination rights with respect to those who avail themselves of the policy. To limit this risk, keep these two main tips in mind. First, avoid express guarantees that employees who use the policy will not be subject to termination, or other adverse consequences that may become necessary if economic conditions worsen. Second, include express language that the policy does not alter the at-will relationship and all modifications to the at-will relationship may only be done through a signed writing executed by the employee and a company representative. For a deeper dive about the pros and cons of voluntary attendance policies in the COVID-19 era, read our recent alert on the matter.



Hiring Strategies

UPDATED QUESTION & ANSWER (April 24, 2020)

Can we screen job applicants for symptoms of COVID-19?

Yes. You may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as you do so for all entering employees in the same type of job.

UPDATED QUESTION & ANSWER (April 24, 2020)

If a job applicant has COVID-19 or symptoms associated with it, may we delay the start date of an applicant?

Yes. According to current EEOC and CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace. However, you should continue to apply their normal policies of non-discrimination to the hiring process.

UPDATED QUESTION & ANSWER (April 24, 2020)

May we withdraw a job offer when we need the applicant to start immediately but the individual has COVID-19 or symptoms of it?

Based on current EEOC and CDC guidance, this individual cannot safely enter the workplace, and therefore you may withdraw the job offer. However, you should continue to apply your normal policies of non-discrimination to the hiring process.

UPDATED QUESTION & ANSWER (April 24, 2020)

May we postpone the start date or withdraw a job offer because the individual is 65 years old or pregnant, both of which place them at higher risk from COVID-19?

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

Reasonable Accommodations

UPDATED QUESTION & ANSWER (April 24, 2020)

During the pandemic, if an employee requests an accommodation for a medical condition either at home or in the workplace, may we still request information to determine if the condition is a disability?

Yes, if it is not obvious or already known, you may ask questions or request medical documentation to determine whether the employee has a "disability" as defined by the ADA.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

UPDATED QUESTION & ANSWER (April 24, 2020)

During the pandemic, may we 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, you may ask questions or request medical documentation to determine whether the employee's disability necessitates an accommodation, either the one he requested or any other. Possible questions for the employee may include: (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of their position (that is, the fundamental job duties).

UPDATED QUESTION & ANSWER (June 15, 2020)

One of our employees has requested a reasonable accommodation because they live with a family member who is in a vulnerable population and are afraid of transmitting the virus to them. Do we have to accommodate them?

No. The EEOC confirmed that workers are not entitled to an ADA reasonable accommodation simply to avoid exposing a vulnerable family member to a potential case of COVID-19. "Although the ADA prohibits discrimination based on association with an individual with a disability," the agency said, "that protection is limited to disparate treatment or harassment." It confirmed that the federal disability rights statute does not require you to accommodate an employee without a disability based on any disability-related needs of a family member or anyone else.

However, you are certainly permitted to provide such flexibilities if you choose to do so. For example, you can allow an employee without a disability to work remotely to protect a family member of theirs who has a disability from potential COVID-19 exposure. You should be careful when doing so, however. Not only does the EEOC warn employers not to engage in disparate treatment on a protected basis when offering such flexibilities, you need to consider whether doing so could require you to offer remote work as an ADA reasonable accommodation to that employees or others similarly situated at some point in the future.

Remote Work Considerations

We see a lot of value in continuing our remote work plan (hiring flexibility, reduced rent, greater efficiency, morale, etc.). What do we need to keep in mind?

The COVID-19 pandemic has shown many employers the values and efficiencies associated with remote work. There are four main issues to evaluate or re-evaluate if your business will continue remote work practices: proper infrastructure, implementation, remote work plans and a comprehensive remote work policy.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

First, assess or re-assess your technological capabilities. Did you implement sufficient security and privacy protocols to protect your business or do you need to retool?

Second, determine whether your remote workers have the equipment needed to get their job done. Can you ensure they will continue to have access to the proper equipment? Can you provide remote “help desk” assistance on a long-term basis?

Third, implement, re-implement, or even re-tool the work plan. Evaluate the effectiveness of your work assignment and communications system, attendance and timekeeping records, to name a few.

Finally, review your existing remote policy to determine whether it needs updating – or implement a remote work policy if you started the practice without one. A remote work policy needs to be adjusted to fit your business needs and your organization’s expectations for your workforce, including that you might prefer separate policies for exempt and non-exempt employees.

In a panic, we allowed remote work without a policy or procedure. Now that things have calmed down, should we be more formal about remote work?

You may have allowed remote work with no policy or prepared a policy specifically designed for the COVID-19 coronavirus outbreak. In either case, you should develop an appropriate standardized remote work plan that addresses your business needs for when the crisis is over.

We are ready to call our employees back to our worksite, but an employee has expressed a preference for working from home. What can we do?

Some employees may have a real preference for working from home, but you can refuse remote work so long as the employee is not seeking a reasonable accommodation under the Americans with Disabilities Act (ADA). If an accommodation is being requested, you should conduct an interactive process with the employee to determine whether an obligation exists to provide such or another accommodation.

UPDATED QUESTION & ANSWER (April 21, 2020)

Due to government mandates or orders, we have employees working from home or remotely in jurisdictions that they previously were not performing any work in. Is there anything we should be considering?

State and local taxation is a complex and fact-intensive inquiry based on the applicable laws in the states and localities where employers and employees are located. While some states and localities have issued guidance on these issues, many have not, although additional guidance may be forthcoming. For this reason, if you have employees who are now working remotely in new jurisdictions, you may want to discuss specifics further with legal counsel, or with any member of our Employee Benefits team working in our Post-Pandemic Strategy Group.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

UPDATED QUESTION & ANSWER (June 15, 2020)

Most of our workforce is working remotely. Have our obligations changed when it comes to preventing workplace harassment?

The EEOC has warned employers that illegal harassment is still a viable concern even if your workforce is mostly working on a remote basis. “Harassment may occur using electronic communication tools – regardless of whether employees are in the workplace, teleworking, or on leave,” the agency has said. The EEOC reminded employers that your employees are prohibited by law from harassing other employees through emails, calls, video platforms, or chat communications.

The agency recommends that you should ensure your managers understand how to recognize harassment and know how to quickly identify and resolve potential problems. For example, the agency said that if one of your managers learns that a teleworking employee is sending harassing emails to another worker, they should take the same actions it would take if the employee was in the workplace. You may also choose to send a reminder to your entire workforce noting your harassment prohibitions, reminding them that harassment will not be tolerated, and inviting anyone who experiences workplace harassment to report it to management.

Business Continuity And Crisis Management

What should we consider from a human resources standpoint to ensure there is continuity in critical businesses processes?

What would happen if your CEO, CFO, IT team, front-line supervisors or payroll coordinator tests positive for COVID-19 and cannot work? The COVID-19 pandemic has shown the importance of having a business continuity plan in place. If your organization does not have a plan in place, now is certainly the time to do so to ensure you able to provide needed products and services to customers.

Be upfront with your employees about this activity and ask for their input so you have the best possible information and ideas on the table as you develop your plan. Identify essential processes in your operations. Then ensure those processes are thoroughly documented so they can be carried out by other individuals. Back-up employees should be identified and cross-trained on these processes including systems access required to perform the job. In the event key individuals are unavailable to work, a short-term and long-term succession plan should be adopted to provide stability in daily operations of the organization.

Now is the time to analyze and plan, understanding that those plans need to be flexible as circumstances evolve in the coming months.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

What should we consider from a documentation standpoint during and after the pandemic?

In your H.R. career, you may have dealt with several crises. This pandemic has certainly presented us with challenges we probably never thought we would encounter. Documentation may not be at the forefront of our minds when we think about crisis management – but it should be.

Many organizations are experiencing turnover. When people leave, so does a significant amount of institutional knowledge. This knowledge may be very useful the next time, but you may no longer have access to it if someone is no longer an employee.

In addition, most crises have many components that are common. Why reinvent the wheel every time? By having an established starting point, you can focus on other critical matters that demand your attention. While it is still fresh on your mind, take a few hours to document. Consider maintaining any documents related to the following:

- **Your project plan.** Include key elements, dates and responsible parties identified.
- **Your logistical plan.** Where, when and how did you meet? What challenges did you face? How did your daily operations change?
- **Technology and HR systems.** Were there any gaps in your information technology that need to be corrected? If you have multiple locations, did the technology work across the entire enterprise? What was the impact to your HRIS and other HR systems?
- **Policies and procedures.** Do you have a policy inventory? What policies were changed based on the crisis? What key decisions were made related to employees?
- **Communications.** Maintain a copy of the communications you sent to your employees and other key stakeholders. Were your communications effective? What gaps existed in your communications strategy? Are you planning to survey your employees to gauge their reaction to the way you managed this crisis?
- **Reflection.** How did you manage this crisis? What was employee morale throughout this crisis? What gaps existed in your preparation? Did you react quickly enough?

By taking time to document what happened you will create a road map for your future crisis planning, minimize company risks and improve the efficiency with which you manage the next major event.

What can we do from a care and compassion standpoint if an employee dies during this pandemic given new standards for social distancing?

Many employers have programs in place that are intended to show care and concern to employees and their family members when an employee passes away. These programs typically involve sending flowers to a funeral home, sending food to the home of the affected family, and ensuring management attend funeral events. You can show care and concern, as well as sympathy, in new



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

ways that do not involve physical contact.

This includes considering how to handle benefits coordination, internal announcements to co-workers, determining how to recognize the death such as making a charitable contribution, internal activities such as observing a moment of silence or flying a flag at half-staff, external communications (if needed), alternate recognition if in-person services cannot be attended by company representatives and co-workers and the return of personal belongings left at work. A review of your current programs and planning will ensure your organization is prepared to compassionately manage these circumstances.

Paid Sick Leave

Our state/locality has a paid sick leave requirement. When we bring employees back from furlough, do employees retain any existing balance?

If an employee had accrued paid sick or family leave pursuant to a state or local law, chances are that balance must be made available to the employee when they return to work. Most state and local laws have restoration provisions for employees who were terminated within a certain amount of time. Further, many employees who will be returning to work were not terminated in the first place.

Pay Equity

Why might now be a particularly opportune time to conduct a pay equity audit?

As employers reorganize their workforces and begin to bring employees back to work in roles that may have changed to include different duties and responsibilities, special consideration should be given to ensuring employees performing comparable work are paid equitably. A pay equity audit, performed in conjunction with inside or outside counsel, can be a very effective way to identify potentially unlawful pay disparities.

If such pay differences are identified, adjustments in pay to bring employees up to where they need to be can be rolled into other compensation changes that may be happening within the organization. For information on federal and state pay equity laws and resources on how to conduct an effective pay equity audit, visit our Pay Equity resource page.

To avoid or minimize layoffs, our company instituted pay reductions, applying different percentages to different pay ranges. We are concerned that we might lose some of our best employees to other employers who are now resuming operations and who are offering higher pay. What are the risks of eliminating the pay reductions for some, but not all, employees?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

In addition to general employee relations concerns that may arise where employees discuss pay among themselves, you need to ensure your compensation decisions are based on legitimate, non-discriminatory business reasons. You may also want to conduct an adverse impact analysis to see whether the decisions have a statistically significant adverse impact on a protected category. We recommend establishing criteria for the increases with the assistance of counsel and ensuring the criteria are implemented consistently.

OFCCP/Affirmative Action

During the pandemic, our company entered into a contract with another employer that would have created federal contractor/subcontractor status, but that was subject to the National Interest Exemption (NIE) available from March 17 to June 17, 2020. We want to continue performing this work after June 17 when the NIE expires, but we do not want to be subject to affirmative action compliance requirements. What options do we have?

First, confirm whether the NIE has been further extended past the original June 17 date. Second, if the work you are performing is still under the contract that issued during the NIE period, then that work should continue to be subject to the exemption. If not, confirm that the work you are performing is actually necessary to the performance of an ultimate federal contract. If not, you would not be subject to the affirmative action requirements on the basis of the contract at issue. If yes, then you have 120 days from the date of entering into the qualifying contract to meet the affirmative action compliance requirements. Determining the trigger date for the regulatory 120-day deadline may require some additional investigation.

The authors would like to thank Jan Czochara and Stephanie Prewitt of Foundations HR for their invaluable assistance in preparing this section.

[Return to Table of Contents](#)

SBA LOANS

UPDATED ANSWER (July 14, 2020)

In what manner are we required to spend Paycheck Protection Program (PPP) loan money?

The loan money can be used for payroll costs, payments of interest on any mortgage obligation not including prepayments, rent, lease, or utility costs, and interest on any other debt obligations incurred before February 15, 2020. 60% of the loan amount must be used for payroll costs.

UPDATED ANSWER (July 14, 2020)

What are “payroll costs”?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

Payroll costs are defined in the same manner as during the application process and include salary, wages, commission or similar compensation, cash tips or equivalents, payment for vacation, parental, family, medical, or sick leave, group health care benefits, retirement benefits and state or local taxes assessed on the compensation of employees.

Note that wages, salaries, commissions, or similar compensation is capped at \$100,000 as prorated over the eight-week period (\$15,385) or the 24-week period (\$46,154). Only wages, salaries, commissions, or similar cash compensation are subject to the \$100,000 cap. For example, an amount paid by the employer toward an employee's retirement account is not included in the \$100,000 cap.

UPDATED ANSWER (July 14, 2020)

During what time period can the loan funds be used and be considered for forgiveness?

Borrowers who received their PPP loan funds prior to June 5, 2020 may elect for either an eight-week or 24-week "covered period." PPP loan funds may be used in the eight-week or 24-week period following receipt of the PPP loan funds. If your payroll schedule is on a bi-weekly (or more frequent) basis, you may use an "Alternative Payroll Covered Period," which permits you to align the covered period (for payroll costs only) to your regular payroll schedule. The eight-week/24-week clock would begin on the first date of the first pay period following the day the loan was disbursed. For example, loan was disbursed on April 13, 2020, in the middle of a pay period. The first day of the next pay period is April 20, 2020, and the covered period will begin running from April 20 for payroll costs.

UPDATED ANSWER (July 14, 2020)

When does the covered period start?

The covered period begins on the date that the lender makes the first disbursement of the PPP loan to the borrower.

UPDATED ANSWER (July 14, 2020)

What if we can't spend all of the money within the covered period?

If money is not spent during the covered period, it can be returned or paid back over two years at an interest rate of 1% interest. Payments toward any remaining loan balance and interest are deferred until the SBA remits any forgiveness amount to the lender.

What if we spend PPP loan funds on debts or other items not expressly identified in the program?

If the funds are not used for the enumerated purposes, you will be directed to repay the misused amounts, with those amounts not being forgiven. If the funds are knowingly misused, you may be liable for criminal liability, including possible charges for fraud. It is important that you partner with



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

counsel and/or an accountant to ensure that you are spending the PPP funds in an appropriate manner to maximize your forgiveness eligibility.

UPDATED ANSWER (July 14, 2020)

Are we required to spend the remaining money on payroll costs/utilities even outside of the covered period?

Yes. If you do not spend the entirety of the loan amount during the covered period, and elect to retain the remaining amount, the remaining amount may still only be used for the expressly allowed purposes. Alternatively, you may pay back any unused funds.

UPDATED ANSWER (July 14, 2020)

Do costs have to be incurred and paid during the covered period to be forgivable?

Eligible payroll costs and non-payroll costs, such as rent, must be paid during the covered period, or incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period. This means that borrowers can include more rental, utility, and interest payments, including (those payments that have accumulated and remained unpaid due to the pandemic), so long as it is not a prepayment and it does not exceed the 40% threshold. The SBA has not yet issued any guidance as to whether Common Area Maintenance (CAM), property fees, or other ancillary rental charges may be included in the “rent” calculation.

UPDATED ANSWER (May 19, 2020)

What is included in “rent”?

“Rent” includes rent obligations incurred prior to February 15, 2020. For eligible non-payroll costs such as rent, these must be paid during the eight-week Covered Period beginning on the date the loan is disbursed, or incurred during the Covered Period and paid on or before the next regular billing date, even if the billing date is after the Covered Period. This means that borrowers can include more rental, utility, and interest payments, including (those payments that have accumulated and remained unpaid due to the pandemic), so long as it is not a prepayment and it does not exceed the 25% threshold. The SBA has not yet issued any guidance as to whether Common Area Maintenance (CAM), property fees, or other ancillary rental charges may be included in the “rent” calculation.

What is included in “transportation”?

Transportation is treated as a permissible utility payment as part of services that began before February 15, 2020. The SBA also has not issued any guidance as to what “transportation” means, or what is included. Under the Internal Revenue Code (26 U.S.C. § 162), traveling expenses have been interpreted to include fuel expenses going between one business location to another, and the SBA may adopt that same interpretation.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

If our company remains required to remain closed due to a government order, what should we do with the money obtained through an SBA loan?

Neither the SBA nor the Department of Labor have issued guidance on this issue, but based upon our best understanding of the spirit of the Paycheck Protection Program you should use the funds to pay your employees at least 75% of their normal rate of pay (even if they are not working). The alternative is to return the funds if you believe that payment of such wages are not necessary to support the ongoing operations of the company.

If our company remains required to remain closed due to a government order, may we pay our employees to not work?

Yes. The purpose and spirit of the CARES Act and the PPP is to maintain your payroll. Depending on your business, it may not be practical or feasible for your employees to “work” during the eight-week period. Consult with your managers as well as counsel to determine the best way to compensate your employees during the eight-week period to enhance your workforce and ensure maximum forgiveness.

UPDATED ANSWER (July 14, 2020)

What if the employees I want to pay under such a circumstance are collecting unemployment?

According to the [SBA's Loan Forgiveness Application](#) released on June 17, 2020, the employer will not be penalized for a reduction in FTEs in any of the following circumstances:

- Employer makes a good-faith written offer to return to work, but employee refuses;
- Employee voluntarily quits;
- Employee is terminated for cause; or
- Employee voluntarily takes a reduction in hours.

This new guidance alleviates the need for an employer to backfill positions that were vacated due to no fault of the employer. If you have laid off an employee (between February 15 and April 26, 2020), you can hire them back and not be penalized. If you cure any previous reduction in staff by December 31, 2020 (to the levels that existed as of February 15, 2020), you will qualify for full loan forgiveness.

UPDATED ANSWER (July 14, 2020)

What is the exact calculation for determining loan forgiveness?

There is a 10-step process for determining loan forgiveness. Download our guide [here](#).

UPDATED ANSWER (May 19, 2020)

How we can secure loan forgiveness if some of the employees we want to rehire to comply with the program refuse to come back to work (due to fear of the virus, medical vulnerability, etc.)?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

The CARES Act states that borrowers who maintain their average monthly full-time employee equivalent (FTE) during the eight-week forgiveness period will be eligible for full forgiveness, so long as the employer has not reduced wages by more than 25% for those who earned less than \$100,000 in 2019.

According to the SBA's Loan Forgiveness Application released on May 15, 2020, the employer will not be penalized for a reduction in FTEs in any of the following circumstances:

- Employer makes a good-faith written offer to return to work, but employee refuses;
- Employee voluntarily quits;
- Employee is terminated for cause; or
- Employee voluntarily takes a reduction in hours.

This new guidance alleviates the need for an employer to backfill positions that were vacated due to no fault of the employer. If you have laid off an employee (between February 15 and April 26, 2020), you can hire them back and not be penalized. As long as you cure any previous reduction in staff by June 30, 2020 (to the levels that existed as of February 15, 2020), you will qualify for full loan forgiveness.

UPDATED ANSWER (July 14, 2020)

What do we need to keep in mind in terms of rehiring if we want to ensure our loan is forgiven? Do we have to rehire the same people?

No, you may hire similarly qualified employees for unfilled positions.

UPDATED ANSWER (May 19, 2020)

What is a full-time equivalent employee and how do we calculate it?

FTE is different than headcount. To determine FTE count, for each employee, enter the average number of hours paid per week, divide by 40, and round the total to the nearest tenth. The maximum for each employee is capped at 1.0. A simplified method that assigns a 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours may be used at the election of the Borrower. For some borrowers, dividing the average number of hours paid per week by 40 may result in a higher FTE count which the borrower may want to maximize forgiveness. FTEs are calculated on a weekly basis.

Can we rehire fewer people, but keep my payroll costs the same? In other words, can we give raises to everyone?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

Yes. However, a lower FTE count will impact your forgiveness and the amount that is not forgiven will incur a 1% per annum interest rate. For example, if you received a loan for \$500,000 and had 20 average monthly FTEs from January 1 to February 29, 2020, but only had 10 FTEs during the eight-week forgiveness period, your eligibility for forgiveness is reduced by half, or \$250,000.

$$10/20 = .5 \times \$500,000 = \$250,000 \text{ (eligible for forgiveness)}$$

On the other hand, if your FTE count is 15 during the forgiveness period, your forgiveness is only reduced by 25%, or \$125,000.

$$15/20 = .75 \times \$500,000 = \$375,000 \text{ (eligible for forgiveness)}$$

UPDATED ANSWER (July 14, 2020)

Do we have to bring everyone back by June 30 that we laid off since February 15? Do we have to restore all wages too? Are both required?

There are safe harbors for both reduction in wages and reduction in FTEs. The safe harbor for wage reductions is to restore an employee's average hourly rate or salary to the February 15, 2020 level by December 31, 2020 or the date your loan forgiveness application is submitted, whichever is earlier. But only wage reductions made prior to April 26, 2020 will be subject to this exemption. The formula in the Forgiveness Application for applying the safe harbor does not account for any later wage reductions. This means that if you reduced employee wages by more than 25% after this date, you will not be able to avoid the reduction in forgiveness caused by these reductions. This means that for forgiveness purposes, a salary reduction during the covered period will not count against PPP loan forgiveness.

The first safe harbor for FTE reductions looks at two points in time – FTEs for the pay period including February 15, 2020 and the average FTEs from February 15, 2020 through April 26, 2020. If an employer had more FTEs on February 15, 2020 than the average FTEs between February 15, 2020 and April 26, 2020, so long as you restore the FTE count to what it was as of February 15, 2020, the safe harbor is met and you will avoid a reduction in forgiveness based on a reduction in FTEs within the covered period.

The second safe harbor for FTEs cures any reduction in FTEs if you can, in good faith, document that you were unable to operate between February 15, 2020, and the end of your covered period at the same level of business activity as you were before February 15, 2020, due to compliance with requirements or guidance issued by HHS, the CDC, or OSHA, related to standards for sanitation, social distancing, or any other worker or customer safety requirement. The SBA has clarified that compliance with a state or local order that is directly or indirectly related to guidance issued by HHS, the CDC, or OSHA is sufficient.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

UPDATED ANSWER (July 14, 2020)

What about employees making more than \$100,000?

Any employee who made the equivalent of over \$100,000 annualized during any single pay period in 2019 is excluded from the wage reductions calculation.

UPDATED ANSWER (May 19, 2020)

What if we have an employee who hasn't worked a full quarter? What rate do we use?

For all employees, you should use Q1 2020 (January 1, 2020 - March 31, 2020) to determine each employee's average wages.

If we bring someone back to work, is there specific onboarding paperwork recommended to maximize the chances of loan forgiveness?

You will want to document the restoration or rehiring of employees by providing employees with a written acknowledgment that they were returned to the same the position/level of pay held before staffing reductions occurred in response to COVID-19 conditions, and that your previous policies remain in force as those in place immediately before the reduction in force when the employee was employed previously. We have developed reinstatement agreements that can be tailored to employer needs. Contact your Fisher Phillips attorney for more details.

UPDATED QUESTION & ANSWER (May 19, 2020)

We applied for and received a PPP loan, but are having second thoughts about using it. What should we consider if we may want to return the loan?

The Treasury Department issued an update to "Frequently Asked Questions," which provides in FAQ # 31 that businesses are required to "assess their economic need for a PPP loan" before submitting an application, including determining whether a borrower had "access to other sources of liquidity). This was different than the "economic uncertainty" certification as enumerated in the CARES Act. The guidance initially advised that borrowers have until May 7, 2020 to pay the loan funds back to avoid further scrutiny or other legal consequence, including criminal charges and penalties.

On May 14, the U.S. Treasury announced that borrowers whose loan amount (combined with the loan amount of any affiliates) is less than \$2 million is automatically deemed to have made the certification in good faith. For borrowers whose loan amounts are in excess of \$2 million, the announcement makes clear that such borrowers that do not return PPP loan funds by May 18 may still have an adequate basis for making the required good-faith certification. As long as their business activity and ability to access other sources of liquidity at the time they applied for the PPP loan were insufficient to support their ongoing operations in a manner not significantly detrimental to the business, they can now feel confident in their ability to demonstrate good faith.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

UPDATED QUESTION AND ANSWER (July 14, 2020)

When can we apply for loan forgiveness?

You may submit a loan forgiveness application any time on or before the maturity date of your loan. The SBA has clarified that borrowers may request forgiveness before the end of your covered period, if you have used all the loan proceeds for which you are requesting forgiveness. You must apply for loan forgiveness within 10 months after the last day of your covered period, or the PPP loan is no longer deferred, and you must begin paying principal and interest.

UPDATED ANSWER (July 14, 2020)

How do we apply for loan forgiveness?

On June 17, 2020 the SBA released the Forgiveness Application and the EZ Forgiveness Application. Applications for forgiveness must be submitted within 10 months after the end of the covered period. The SBA's Interim Final Rules provide that after employers submit applications for forgiveness, lenders are required to respond within 60 days.

Generally, these are the required documents you need to provide to substantiate loan forgiveness, but lenders may have additional requirements.

For payroll costs, which must be populated onto the PPP Schedule A Worksheet to the Paycheck Protection Program Loan Forgiveness Application:

- Payroll reports documenting the cash compensation paid to employees;
- Payroll tax filings (Form 941);
- State income, payroll, and unemployment insurance filings;
- Verification of retirement and health insurance contributions;
- Documents verifying the number and pay rate of full-time equivalent employees on payroll for the applicable loan forgiveness dates.

For non-payroll costs:

- Documents (account statements, cancelled checks, etc.) verifying payment of qualified interest (amortization schedule), rent (lease agreements), and/or utility payment invoices.

Interim Final Regulations permit lenders to request that the SBA purchase the expected forgiveness amount of a PPP loan or pool of PPP loans at the end of week seven of the covered period. The expected forgiveness amount is the amount of loan principal the lender reasonably expects the borrower to expend allowable uses during the eight-week period after loan disbursement.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

UPDATED QUESTION AND ANSWER (July 14, 2020)

Can we use the EZ Forgiveness Application?

A borrower may apply for forgiveness using the EZ Application if any of the following apply:

- The Borrower is a self-employed individual, independent contractor, or sole proprietor who had no employees at the time of the PPP loan application;
- The Borrower did not reduce annual salary or hourly wages of any employee by more than 25% during the covered period compared to the period between January 1, 2020 and March 31, 2020 AND the Borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the covered period;
- The Borrower did not reduce annual salary or hourly wages of any employee by more than 25% during the covered period compared to the period between January 1, 2020 and March 31, 2020; and
- The Borrower was unable to operate during the covered period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 by HHS, CDC, or OSHA, related to the maintenance of standards of sanitation, social distancing, or any other worker or customer safety requirements related to COVID-19.

UPDATED ANSWER (July 14, 2020)

What if a portion of our loan is not forgiven? Can we challenge this?

Yes, if documentation submitted to the SBA by a lender indicates that the borrower is ineligible to receive the loan forgiveness amount claimed by the borrower, SBA will require the lender to contact the borrower in writing to request additional information.

Further, a lender must notify the borrower in writing that the lender has issued a decision to SBA denying a portion of the loan forgiveness application. Within 30 days of notice from the lender, a borrower may request that SBA review the lender's decision.

[Return to Table of Contents](#)

FFCRA PAID LEAVE AND EMERGENCY FMLA

Does the Families First Coronavirus Response Act (FFCRA) still apply to my rehired employees?

If you recall an employee any time before December 31, 2020, and the person indicates that they are unable to return because of one of the qualifying reasons for Emergency Paid Sick Leave (EPSL) benefits or Emergency Family and Medical Leave Act (EFMLA) leave under the Families First Coronavirus Response Act (FFCRA), they may be entitled to the EPSL benefit or EFMLA benefit.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

Further, if an employee returns to work, they will then be potentially eligible for these benefits until December 31, 2020 if subsequently covered by a qualifying reason that makes them unable to work or telework.

If we rehire an employee, do they need to work for 30 days before becoming eligible for EFMLA leave?

Not necessarily. The FFCRA was amended to provide that if an employee was laid off or otherwise terminated on or after March 1, 2020, and rehired or otherwise reemployed by the employer on or before December 31, 2020, they will be entitled to EFMLA if they had been on the employer's payroll for 30 or more of the 60 calendar days prior to the layoff or termination.

If we rehire employees and now we have 500 or more employees, can employees still request EPSL or EFMLA?

No. The 500-or-more employee count is a "snapshot" or dynamic approach and is calculated at the time EPSL or EFMLA leave is requested. Therefore, if an employee requests EPSL or EFMLA at a time you have 500 or more employees, they would not be entitled to leave.

If we hire a new employee as part of our return to operations, and they used their EPSL at their last employer, are they entitled to another 80 hours of EPSL with our company?

No. The U.S. Department of Labor (DOL) regulations specify that any person is limited to a total of 80 hours of EPSL. An employee who has taken all such leave and then changes employers is not entitled to additional EPSL from his or her new employer. However, an employee who has taken some, but fewer than 80 hours of EPSL and then changes employers is entitled to the remaining portion of such leave from their new employer, and only if the new employer is covered by the FFCRA.

UPDATED ANSWER (April 22, 2020)

We are "ramping back up" and having employees again report to the worksite. However, some employees are saying they want to continue to work from home because they are scared to be in a work environment. Do we have to let them work from home?

Generally, you are not required to allow employees to work from home. Even the DOL regulations to the FFCRA state that telework does not have to be provided unless an employer agrees to allow or permits it. If you otherwise have work for the employee to perform at the worksite, just being "scared" to come back to work would generally not be a qualifying reason under EPSL.

However, if the employee is in a "vulnerable" category, they might be eligible for EPSL depending on the specifics of the situation and whether they have been advised by a health care provider or are subject to a specific quarantine or isolation order because of their vulnerability. In addition, anxiety



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

or similar issues could raise potential Americans with Disabilities Act (ADA) issues and necessitate discussion of reasonable accommodation through the interactive process, including consideration of accommodations such as working from home (or additional leave time for an employee who may have already exhausted their EPSL).

For these reasons, it is best to consult with employment counsel to walk through these issues before making a final decision. If there is not a FFCRA or other medical or disability issue, you may be forced with a choice of instructing the employee to return to work (and the potential that they might quit) or terminating the employment relationship. Again, this decision would be best made in consultation with counsel.

We are “ramping back up” and having employees again report to the worksite. However, while operations were closed, an employee requested pay for FFCRA leave. Can we choose not to bring that employee back?

Although the employee was not qualified for FFCRA leaves while your operations were closed, choosing not to bring an employee back based on their request for FFCRA leave could be viewed as discriminatory and retaliatory. The decision on who to have return to work should not be based on your knowledge of an employee’s request or potential need for FFCRA leave.

UPDATED QUESTION & ANSWER (May 29, 2020)

If our employee requests EPSL or EFMLA during summer vacation based on unavailability of childcare, should we grant the request?

Employers faced with a request for paid leave based on unavailability of child care should have a discussion with their employees about what their typical summer child care plans were pre-COVID-19. If the employee worked for you during the prior summer vacation, what were the child care arrangements at that time? If the employee’s typical child care provider, including a summer camp or summer enrichment program, is closed due to COVID-19, then the employee likely is eligible for FFCRA leave. Forcing an employee to place their child in a day care or other child care setting, if the child’s “usual” child care provider is closed due to COVID-19-related reasons, risks an interference claim under the FFCRA. If the employee’s usual child care provider is available, but the employee is just generally uncomfortable sending their children, they may not be eligible. For additional information on this topic, review our recent Legal Alert – School’s Out For Summer: Unavailability of Child Care and the FFCRA.

UPDATED QUESTION & ANSWER (July 7, 2020)

Can a child summer camp or other child summer programs be considered a “place of care” for purposes of the FFCRA?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

Yes. A “place of care” is a physical location in which care is provided for the employee’s child while the employee works, which includes summer camps and summer enrichment programs. See 29 C.F.R. § 826.10(a). To be sure, “summer school” or other academic work during the summer required and provided by the school attended by the child during the academic year is treated as the child’s school for purposes of the FFCRA.

UPDATED QUESTION & ANSWER (July 7, 2020)

Must the summer camp or program be completely closed in order for the employee to be eligible for FFCRA leave?

No. A summer camp or program may also be “closed” for the purposes of FFCRA leave if it is partially closed for reasons related to COVID-19, *i.e.*, operating at a reduced capacity, such that some children that would have attended that camp or program this summer may no longer do so. In such instances, the same analysis as to whether the child would have attended that specific summer camp or program but for its partial closure due to COVID-19 is applicable.

UPDATED QUESTION & ANSWER (July 7, 2020)

Must the child have been enrolled in the summer program in order for the employee to be eligible for FFCRA leave?

Not necessarily. The expectation that employees take FFCRA leave based on planned summer enrollments is not different from the closing of other places of care, such as a day care center. An employee generally could not take FFCRA leave to care for his or her child based on the closing of a day care center that the child has never attended, unless there were some indication that the child would have attended had the day care center not closed in response to COVID-19.

UPDATED QUESTION & ANSWER (July 7, 2020)

How do you determine whether a child would have attended a summer program but for COVID-19-related reasons?

The question of whether a specific summer program would have been the place of care of an employee’s child had it not closed for COVID-19 related reasons is determined by a preponderance of evidence (*i.e.*, more likely than not). WHD investigators will consider whether there is evidence of a plan for the child to attend the camp or program or, short of a “plan,” whether it is still more likely than not that the child would have attended the camp or program had it not closed due to COVID-19. But a parent’s mere interest in a camp or program is generally not enough.

UPDATED QUESTION & ANSWER (July 7, 2020)

Is the child’s prior attendance to such summer program indicative of a planned place of care?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

It depends. Prior attendance and current eligibility may establish a summer camp or program as the child's planned place of care. A child's attendance of a camp or program during the summer of 2018 or 2019 may indicate that the camp or program would have been the child's place of care during summer 2020, as long as the child continues to satisfy qualifications for attendance. For example, a 13 year-old child who attended a summer camp for children age 10 to 12 in 2018 and 2019 would no longer qualify to attend the same camp in 2020. That camp therefore could not be the place of care of that 13 year-old child in summer 2020. Also, a child's attendance of a camp or program during the summer of 2017 or earlier, but not during 2018 or 2019, could not by itself establish that the camp or program would have been the place of care of an employee's child during the summer of 2020.

UPDATED QUESTION & ANSWER (July 7, 2020)

Under what circumstances can a summer program be deemed a place of care if the child is not currently enrolled and has not previously attend such program?

Current enrollment and/or recent prior attendance sufficiently indicate that a camp or program would have been a child's place of care had it not closed in response to COVID-19. But neither are necessary. A child who, for example, only recently met the age requirement for a summer camp could not have attended the camp in prior years. The same would be true of a child who recently moved from an area not serviced by the summer camp that the child planned to attend this summer or of a child whose parents had not yet made summer arrangements at the outset of the COVID-19 pandemic and delayed doing so due to uncertainty surrounding summer camps' and programs' operations. In such circumstances, there may nonetheless be indicators that a particular camp or program would have been the child's place of care this summer, for example, by being accepted to a waitlist pending the reopening of the camp or program or the reopening of its registration process.

UPDATED QUESTION & ANSWER (July 7, 2020)

What information must employees provide to employers when seeking leave for closure of summer programs?

In the case of leave to care for the employee's child whose school or place of care is closed, the employee must provide the name of the child, the name of the school or place of care, and a statement that no other suitable person is available to care for the child. 29 C.F.R. § 826.100(e). An employee who requests leave to care for his or her child based on the closure of a summer camp, summer enrichment program, or other summer program is subject to the same requirements described above and should provide the name of the specific summer camp or program that would have been the place of care for the child had it not closed. 29 C.F.R. § 826.100(e)(2). This requirement to name a specific summer camp or program may be satisfied if the child, for example, applied to or was enrolled in the summer camp or program before it closed, or if the child attended the camp or program in prior summers and was eligible to attend again. There may be other circumstances that show an employee's child's enrollment or planned enrollment in a camp or program.



[Return to Table of Contents](#)

WAGE AND HOUR ISSUES

We lowered the pay rates for our hourly non-exempt employees because of the financial strain caused by COVID-19. Can we increase their pay back to the original levels?

Yes. For your hourly non-exempt employees, you are free to change their rate of pay back to the original level. However, if any of these individuals have contracts or employment agreements, you will want to make sure that you amend or update the agreements to reflect the correct level of pay. Also be sure any wage payment notices are compliant with state and local law. Other unanticipated consequences include impact on your retirement or other plans that base benefits on compensation. You should be sure to consult your benefits attorney for further advice on this.

We lowered pay levels a few months ago for our non-exempt employees. Can we give “retroactive” increases so that employees are made whole for the pay they lost?

Yes, but proceed with caution if the employees have been working overtime (due to increased work, absent staff, etc.). By paying employees a “make whole” payment in a lump sum, you will affect their regular rate for purposes of overtime calculations. This can also create some complicated considerations as to what time period is covered by this one-time “make whole” payment, which will impact overtime calculations for multiple workweeks.

If we give non-exempt employees bonuses for working during the COVID-19 pandemic or for returning after COVID-19 closures, do we have to include this remuneration in the regular rate and include it for purposes of overtime calculations?

Usually, yes. Unless the payment is akin to a gift and is considered discretionary by the Department of Labor (which is a higher standard than you might think), then it must be included in the regular rate for overtime purposes. You should consider whether the payments are held out as incentives, which usually means the bonus is not discretionary and will affect each employee’s regular rate and overtime.

We changed our salaried, exempt employee’s salaries. When can I change it back?

We generally recommend keeping an exempt employee at their “new” salary level for a quarter or even longer.

We changed the classification of our salaried, exempt employees to non-exempt. Can and should we change them back?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

We do not recommend making repeated changes from exempt to non-exempt and back in rapid succession. If you have kept the change from exempt to non-exempt in place for at least a quarter (our rule of thumb), before you change an employee back to exempt, we recommend that you evaluate the economic circumstances of the company so that you are confident that you can keep the change back to exempt in place. When you communicate any such decision, the basis of the change should be improved economic circumstances of the company. Finally, you will want to consider whether they were appropriately classified as exempt in the first place.

Can we give the salaried exempt employee a bonus to catch them up for lost pay?

You can give employees a bonus to reward them. The Fair Labor Standards Act (FLSA) permits additional payments above and beyond the salary of an employee. However, you will want to avoid any indication that this bonus is really the employee's pay that was held back, which can have a multitude of implications. You should carefully consider any announcement of intentions, qualifying terms, and the bonus payments. Contact your attorney or a member of the Fisher Phillips Wage and Hour Practice Group to discuss further. Other unanticipated consequences include impact on your retirement or other plans that base benefits on compensation. You should be sure to consult your benefits attorney for further advice on this.

We are bringing a salaried exempt employee back from furlough, but only for 20-30 hours per week. Should we adjust their salary to reflect the reduced schedule?

You can adjust salaries due to economic circumstances. However, we do not generally recommend reducing salaries to match a reduced workload, as you risk losing the salary basis (a requirement for the most common exemptions). That does not mean, however, that an employee whose salary is reduced cannot have a reduced workload – this is permissible.

A few things to remember when reducing salaries: (1) make sure the salary still meets the federal (\$684) and any applicable state minimum salary levels; (2) communicate the reason for the change (e.g., "We are able to bring you back, but we cannot afford to bring you back at the same pay rate you had previously..."); and (3) do not repeatedly change the salary levels – exempt employees should not regularly have their salary levels adjusted. As explained above, we generally recommend that any changes in salary not occur more often than quarterly.

We want our exempt managers to work more hours because we eliminated several hourly positions. Is this okay?

Yes, you can increase the anticipated work hours for your exempt managers. Their salary is intended to cover all hours worked, no matter how many or how few. However, it is possible that the additional hours may carry with them new non-exempt duties for the manager, and the elimination of the hourly workers may have eliminated the manager's management tasks. It is important to make sure that the individual's duties warrant classifying them as exempt in the present role.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

UPDATED QUESTION & ANSWER (July 7, 2020)

Are there special considerations for reemployment of minor employees during/post COVID-19?

Yes. School closures due to COVID-19 may affect a minor employee's work hours. Additionally, certain return-to-work policies may not be suitable for, or permitted to be implemented toward minor employees. Thus, employers who employ minors should reexamine applicable federal and state laws prior to implementing their return-to-work policies, particularly as related to the subjects below:

- **Working Hours:** Pursuant to the FLSA, during any week in which school is "in session" minors ages 14 and 15 are permitted to work in nonagricultural employment only outside of school hours and may not work more than three hours in any school day, including Fridays, not more than eight hours in any non-school day, and may not work more than 18 hours total in the week.

For purposes of nonagricultural employment, school is considered to be "in session" during any week in which the public school district in which the child resides requires its students to attend school, *either physically or through virtual or distance learning*. Thus, if a public school district physically closes schools in response to COVID-19 but requires all students to continue instruction through virtual or distance learning for at least one day or during any part of one day, school is technically "in session" for purposes of the FLSA.

Generally, "summer school sessions, held in addition to the regularly scheduled school year, are considered to be *outside of school hours*." However, some school districts may be considering mandatory instruction for all students over the summer to make up for instruction time lost due to COVID-19. If a public school district does so, such mandatory summer sessions should be viewed as extensions of its regular schedule. Such periods of mandatory summer instruction would be considered "school hours," and school would be considered to be "in session" during any day and during any week in which the school district requires all students to receive instruction.

- **Medical Screenings:** Where permitted, many employers are requiring returning employees to submit to a temperature screening in an effort to avoid the spread of COVID-19. The EEOC has expressly permitted such screening for adult employees but has not addressed the issue as it relates to minor employees. Importantly though, this type of medical screening constituted a "medical examination" under the ADA. And, most states require parental consent before conducting medical examinations on minor employees. Therefore, if a company safety plan involves employee medical screening, employers should seek parental consent before implementing such policy toward minors and consult other relevant state laws.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

- **Working Papers:** Many states require that a designated school official issue working papers to a minor employee only after being satisfied that the working conditions and hours will not interfere with a student's education or damage a student's health. Certain states require that the issuing school must review the work papers in person for approval. School closures, however, may impact a minor employee's ability to procure his or her working papers. Some states are making an exception to this requirement. Employers must ensure to review relevant state guidance regarding such requirements and plan for anticipated delays in obtaining the requisite paper work.
- **Unpaid Internships:** Federal and state laws have set forth strict requirements that employers must satisfy in order to lawfully maintain an unpaid internship program. To the extent that employers are considering having unpaid interns (both minors and adults) work remotely, they must ensure that such work arrangement satisfies federal and state law requirements for unpaid internships. Additionally, the remote work may disqualify an intern from receiving school credit, which would in turn effect the employer's ability to lawfully maintain its unpaid internship program.

[Return to Table of Contents](#)

LABOR ISSUES FOR NON-UNION EMPLOYERS

What are the risk factors for non-union employers as they ramp up operations?

Union activity is often fueled by perceptions of job insecurity, alienation and unsafe work practices. For those returning to work after weeks – or months – of residential lockdown, these factors threaten to combine with a recent communication vacuum to form a powerful cocktail for organizing activity. As new hires from other industries and jurisdictions join the ranks of returning workers, another risk factor is potentially introduced through those employees who have yet to experience the unique benefits of a “direct dealing” workplace culture.

Reeling from decades of membership decline, unions see these developments as a land of organizing opportunity. Although union membership is hovering at an all-time low, recent polling data suggests that a growing number of American workers have adopted a positive view toward organized labor. Having devoted the past several weeks to driving increased scrutiny over the impact of COVID-19 on their dues paying members, unions are now expected to turn their attention to unorganized workers in an effort to stem the decline and replenish their ranks.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

Many unions have already begun the process of exploiting lingering anxieties by crafting messages that resonate with returning workers. Shining a light on the risk of workplace contagion and a potential return to layoff status that puts benefits at risk, and in some cases on fairness of the recall process itself, unions are tapping into concerns shared by workers experiencing these emotions for the first time within a tenuous economy.

Against the backdrop of these risk factors, the NLRB recently extended the duration of its controversial “quickie” election rules through at least the month of May. Unions see this time period as a window through which to accelerate their organizing efforts in advance of a procedural changes that will eventually double the amount of time to educate employees on the heels of a representation petition. Unions that have leveraged the dormant shutdown period to close the communication gap by maintaining a virtual platform for worker outreach are now positioned to “hit the ground running” as employees return to a brick and mortar workplace. The traditional organizing seeds of insecurity, alienation and safety concerns have already been sewn, and awareness has been raised.

What form is the organizing activity likely to take, and where will it come from?

There is a popular misconception that unions tend to launch their efforts from outside the organization by way of paid professional organizers, but experience tells us that most businesses are actually organized from within (i.e., from their own workers). In essential service sectors such as healthcare, warehousing, and distribution, employees have seized the initiative by resorting to coordinated protests, walkouts, work stoppages, and other forms of protected concerted activity (or PCA) to draw attention to their concerns. Some of these efforts were orchestrated by unions and other third parties, while others have been spontaneous.

These tactics directly impacted no more than a small percentage of American workers, but they indirectly impacted countless others by way of news and social media. They have proven effective in some situations for purposes of securing employer dialogue in addition to public sympathy. For guidance on these recent PCA challenges and employer options for meeting them, see the recent Fisher Phillips article on the subject.

It’s fair to assume that these tactics are likely to evolve and increase in intensity as workers resume side-by-side interaction. Now more than ever, open door policies and internal communication mechanisms will be tested by a wave of PCA challenges emerging from within the workplace. The path chosen for responding to those challenges may ultimately determine whether employers emerge with their union-free status intact – or as unionized casualties within a rapidly evolving labor relations landscape.

In addition to PCA and related group activities, you can expect to be on the receiving end of a host of workplace demands for premium pay, PPE, and paid leaves of absence. In some cases, these tactics will combine with appeals to the general public (by way of social and other media formats) to economically pressure union-free employers when they are at their most vulnerable. The temptation



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

may be to dismiss or diffuse these tactics, but as set forth below, you are better off confronting them directly through a robust strategy tailored to the unique aspects of their corporate cultures.

What can we do now to prepare?

Fortunately, a number of tools are available to counter these emerging challenges. Many can be successfully implemented remotely – before the first recalled employee returns to work. These proactive measures take a variety of forms, but they generally start with a customized preventive employee relations program incorporating specific timetables and accountability elements for purposes of enhancing the employee relations infrastructure. Human resources, front-line management and labor counsel should be closely involved in their development.

Because the most effective strategies are necessarily crafted around an employer’s labor relations and business objectives, there is no one-size fits all approach. Nonetheless, effective programs often contain a number of common elements, including:

- Detailed issue identification and resolution system with priority on safety issues;
- Intensive workplace safety/hygiene audits and wipe-down procedures;
- Inventory of all credible and available information delivery mechanisms;
- Innovative/modernized communication program with interactive components and social media vehicles driving upward and downward information flow;
- Expanded participatory initiatives including pre-shift huddles and skip step meetings;
- Enhanced outreach program for employees remaining on leave or layoff status;
- Establishment of a tailored PCA response plan;
- Development of a detailed list of “hidden” benefits and pro-employee track record;
- Union organizing vulnerability audit of new and traditional “hot button” issues;
- Workplace security audit for all intellectual and physical property;
- Extensive strike and other PCA contingency plans;
- Internal identification of statutory supervisors/candidates for remedial training;
- Supervisory training on labor relations, PCA response, and employee engagement;
- Implementation of enhanced management visibility across all shifts and locations;
- Desktop policy audits recapturing rights afforded by recent NLRB developments;
- Updated employee orientation program underscoring employee relations philosophy;
- Program for lawfully monitoring external social media activity specific to employer;
- Post-petition plan for NLRB procedural compliance and communication strategies in quickie election framework;



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

- Establishment/deployment of “rapid response” communications team;
- Legal bargaining unit analysis for potential “micro-unit” risk factors;
- Lawful implementation of engagement/opinion surveys with follow-up protocols;
- Evaluation/improvement of employee hiring and selection procedures;
- Audit of comparable industry/area wage and benefits programs; and
- Expand image building opportunities within workplace and surrounding community.

Many of these programs can be effectively devised and implemented with assistance and oversight from outside counsel, thereby enjoying attorney-client privilege status (at least in the formative stages). For assistance with that process, please feel free to consult your Fisher Phillips attorney or any one of the 75+ members of our Labor Relations Practice Group.

[Return to Table of Contents](#)

LABOR ISSUES FOR UNIONIZED EMPLOYERS

In recalling employees back to work, may we consider their skills and abilities so as to return the most qualified employees?

Your Collective Bargaining Agreement (CBA) likely has the method of recalling employees to work. Some recall provisions simply require you to follow inverse seniority order. Others may allow you some discretion to recall workers whose skills and abilities are superior to others without regard to seniority. Particular attention should be paid to the seniority, layoff, and recall provisions before hiring the workforce back.

Depending upon how long the layoff has been, care should be taken to discern when there is a break in seniority. If there is a break in seniority, the employee is not entitled to be returned to work through a recall. However, the union will likely demand that any break in seniority be bridged so there is no gap in employment.

When may we terminate the temporary enhanced benefits and may we do so unilaterally?

During the pandemic, some employers provided enhanced benefits like weekly appreciation bonuses, hazard pay, insurance continuation, and assistance with childcare costs. Most of these improved benefits were intended to be temporary and may be terminated upon the return to normal business operations. However, you should expect the union to advance a bargaining demand for those improved benefits to remain in place for the remaining life of the CBA. Such a demand, however, does not mean you must agree to maintain those enhancements.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

When the parties resume normal labor relations, what considerations should we make a priority?

Depending upon the financial impact the pandemic has had to your business, you may need to ask the union to re-open the CBA to seek mid-term concessions in order to meet evolving customer demands and service hours. While the union may not be predisposed to agree to re-open the CBA, such arrangements may be mutually beneficial to ensure a greater number of workers returning to the workforce.

Regardless of whether the parties mutually agree to re-open the contract, during successor collective bargaining, you will want to ensure you have considered improving your Management Rights language, evaluating the strength of the no-strike language, considering revisions to layoff and recall so as to afford management discretion in retaining the most qualified employees, and proposing a Force Majeure clause allowing you to cancel the CBA upon an act outside of its control.

What can we do now to prepare for the ramp-up?

Conduct a labor relations audit of your CBA, policies, and negotiations strategy. Begin supervisor training as soon as you can to ensure consistent enforcement of performance standards, grievance processing, and lawfully responding to protected concerted activities. Finally, begin developing new systems to meet with the union to effectuate Labor/Management meetings, grievance meetings, and collective bargaining so as to honor any remaining social distancing and shelter-in-place orders.

[Return to Table of Contents](#)

UNEMPLOYMENT COMPENSATION

When we rehire an employee, do we have to report the hire to a specific state employment agency?

Yes. Federal law requires employers to report newly hired employees to the National Directory of New Hires, which includes rehired employees who have been separated from employment for at least 60 days. State laws also have new hire and rehire reporting requirements.

What is the time period in which we must report rehiring an employee?

Typically, 20 days from the date of hire, but some states have time periods as short as seven days.

If we try to rehire an individual or bring an employee back to work from a furlough or temporary layoff who is receiving unemployment and the employee refuses to return to work, what should we do?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

You may find that robust unemployment benefits for some workers create a disincentive for employees to return to work. Most states have waived the requirement that an employee who is on unemployment search for employment. Employers with essential business operations have also been faced with an increasing reluctance to work by employees who have concerns over the possibility of contracting the virus at work.

Where an employer has available work for an employee, states may deny unemployment benefits if the employee refuses to work without good cause. The Department of Labor recently issued guidance related to the CARES Act unemployment provisions noting that “*quitting work without good cause to obtain additional benefits may be considered fraud.*”

The guidance states that if an individual obtains benefits through fraudulent measures, the employee or individual will be: (1) ineligible to receive any future unemployment compensation benefit payments; (2) responsible to pay back the benefits obtained because of the fraud; and (3) subject to criminal sanction and prosecution. You should report any cases of suspected fraud to your state unemployment agency. All states maintain a fraud hotline that employers can call or other means of reporting including via online, email or mail. States typically have active fraud investigations units that will follow up on suspected cases of fraud.

Of course, there may be situations where an employee’s decision not to return to work will be considered good cause. If an employee refuses to return to work due to child care or other COVID-19 related issues, for example, they may be eligible for benefits under the Pandemic Unemployment Assistance program offered through the Federal CARES Act. The Federal CARES Act expands eligibility to many who, in the past, have not qualified for unemployment benefits, including, but not limited, to those with primary caregiving responsibilities for children who are unable to attend school or child care due to COVID-19, those who have been diagnosed with COVID-19, those with a household member who has been diagnosed with COVID-19, and those providing care to a family or household member with COVID-19.

In general, you should adopt a multi-prong strategy to keep the workforce in place. First, you should take steps to provide a safe workplace. Both OSHA and the CDC have provided guidance on developing a plan to address workplace exposure concerns. You can find OSHA’s Guidance on Preparing Workplaces for COVID-19 [here](#) and the CDC’s Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19) [here](#). Second, you may also want to consider temporary incentive programs to entice employees to continue to work, such as a temporary increase in hourly wages or a one-time bonus payments. Finally, you can also advise workers that the refusal of safe work may impact an employee’s entitlement to benefits.

If we recall an employee from layoff or furlough on a reduced hours basis, can that employee still receive unemployment benefits?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

Possibly. In general, if the employee is working less than full time hours and the employee's weekly wages are less than their weekly benefit amount as determined by the state, the employee may be entitled to partial unemployment benefits. Partial unemployment benefits differ per state. However, in general, a portion of an employee's weekly gross earnings are excluded from the partial weekly benefit calculation.

We are considering laying off workers given the downturn in our business. Should we participate in a shared work program instead?

Work share programs provide a good alternative to layoffs. These programs allow companies to reduce employee hours and employees to collect prorated unemployment benefits while remaining employed. By participating in a work share program, you are able to retain trained employees and avoid the expense of recruiting, hiring, and training new employees when business picks up. Many (but not all) states offer work share programs, which require an application by the employer and approval by the state agency.

If we laid off an employee who then goes to work for another employer, are we still liable for our former employee's unemployment if they are laid off by the second employer and files an unemployment claim?

Possibly. In general, states will look at the prior earnings of the employee in the first four of the last five quarters. If the employee worked for two different employers during the four quarters at issue, then the state will notify both former employers about the claim and will look to both employers for unemployment benefits coverage.

Will unemployment benefits claims filed due to COVID-19 related reasons be charged to our account, thereby potentially increasing our experience rating?

Although typically this is the case, many state unemployment agencies have indicated that unemployment benefits paid to employees laid off due to COVID-19 related reasons will not be charged to the employer's account.

[Return to Table of Contents](#)

BENEFITS/TAXES

UPDATED QUESTION & ANSWER (July 16, 2020)

We know that the FFCRA, as amended by the CARES Act, generally requires group health plans and insurers to cover certain items and services related to FDA-approved COVID-19 diagnostic testing, without cost-sharing, advanced authorization or other medical management. What testing should we be ensuring our plan offers covered employees?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

- FDA-approved diagnostic tests are required to be covered when a provider determines them to be medically appropriate. The FDA's website has a list of FDA-approved tests and test developers.
- If an employee takes a COVID-19 diagnostic test that is *not* FDA-approved, the plan may verify whether the test developer has requested, or intends to request, authorization from the FDA. If the test is not verified, general plan terms shall govern, and cost-sharing may apply, or the claim may be denied.
- If an "attending health care provider," which includes the individual's primary physician and other licensed/authorized providers that make individualized clinical assessments, determines a test is medically appropriate, the testing is required to be covered.
- Provider-directed at-home testing is covered.
- There are no limits on the number of COVID-19 diagnostic tests plans must cover, if a provider determines the tests to be medically appropriate.
- Plans must cover without cost-sharing, "facility fees" and "related items or services" associated with furnishing or determining the need to furnish a COVID-19 diagnostic test.
- Out-of-network mandated COVID-19 testing must be reimbursed pursuant to the CARES Act (the cash price listed by the provider on the provider's website or a negotiated lower rate) *not* at the ACA rate.
- Generally, balance billing is precluded for mandated diagnostic testing.

UPDATED QUESTION & ANSWER (July 16, 2020)

We are reopening our business. If employees are getting tested for general surveillance or as part of an employee "return to work" program, is that testing covered by the FFCRA and required to be provided without cost-sharing?

A group of federal agencies clarified that *general* workplace health and safety screening tests not intended primarily for *individual* COVID-19 diagnosis or treatment are beyond the scope of the FFCRA, and therefore, *not* required to be covered without cost-sharing. Although employers are not required under the FFCRA/CARES mandate to pay for general testing, as a practical matter, employers often choose to pay for COVID-19 surveillance testing in furtherance of good employee or customer relations. Also note, if employers mandate testing as a precondition of working, non-FFCRA laws/rules may require the employer to cover the cost of testing.

UPDATED QUESTION & ANSWER (July 16, 2020)

Once the pandemic is over, are we required to continue to provide COVID-19 diagnostic or treatment coverage? If we do not have to, do we have to notify employees before we make this change?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

Plans that reverse COVID-19 diagnosis or treatment coverage enhancements at the end of the emergency period will be deemed to have satisfied the Summary of Benefits and Coverage 60-days advance notice obligation for material modifications provided that plan sponsors ensure that participants, beneficiaries and enrollees: (1) were previously notified of the general duration of the additional benefits coverage or reduced cost-sharing; or (2) are notified of the reversal reasonably in advance of the reversal.

UPDATED QUESTION & ANSWER (July 16, 2020)

Employees who are not enrolled in major medical health coverage are asking us to provide telehealth care. I recall that after health care reform providing telehealth to these individuals could create issues. Can I provide telehealth now that my employees are anxious about going to a doctor's office or hospital?

Yes, temporary guidance provides that, under specified conditions, large employers may offer solely telehealth and remote-care benefits for employees and dependents *who are not eligible under any employer sponsored plan* during the COVID-19 emergency period.

UPDATED QUESTION & ANSWER (July 16, 2020)

We have a wellness program, but participants are having difficulty participating in it due to COVID-19. Can we make changes to the program mid-year?

Plans may waive applicable health-contingent wellness program standards for similarly situated participants or beneficiaries having difficulty meeting the standards due to COVID-19 circumstances.

UPDATED QUESTION & ANSWER (July 16, 2020)

Are there any other compliance items we should know about?

Guidance from federal agencies confirms that no-cost items and services required under FFCRA and CARES Act can be disregarded for specified MHPAEA compliance purposes. Further, grandfathered health plan status will not be lost solely due to reversing FAQs Part 42 (Q9 and Q14) safe harbor benefits after the national COVID-19 emergency period is over.

UPDATED QUESTION & ANSWER (May 21, 2020)

Several of our employees want to change their Section 125 cafeteria elections due to unexpected COVID-19 medical and childcare challenges. Furloughed employees want to change or drop health coverages and employees caring for children are concerned about being able to exhaust growing flexible spending account balances. Do employees have to wait until open enrollment to change their elections, as currently required by our plan?

If you amend your cafeteria plan as permitted by recent IRS guidance in Notice 2020-29, your employees may not have to wait until open enrollment to make election changes. This guidance allows you to amend your Section 125 cafeteria plan, related health plans, and flexible spending



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

arrangements in a manner that enables employees to make mid-year election changes and benefit from grace period extensions in 2020. While all election coverage changes must be prospective, you are free to limit the number of election changes that can be made; specify the time period for which changes can be made; and in the case of flexible spending accounts, limit elections to amounts not less than already reimbursed. Please reference the Fisher Phillips Alert “Employers To The Rescue . . . Maybe! IRS Permits Additional Flexibility For Cafeteria Plan Elections and Carryovers” for additional details.

UPDATED QUESTION & ANSWER (April 24, 2020)

When a full-time employee’s hours are reduced indefinitely, how long should active group health coverage continue before COBRA is offered?

UPDATED ANSWER (July 16, 2020)

When a full-time employee’s hours are reduced indefinitely, how long should active group health coverage continue before COBRA is offered?

The analysis is involved but extremely important, particularly for applicable large employers subject to ACA mandates and penalties. The basic rules for extending coverage to furloughed personnel – those working reduced hours or no hours but still employed – are as follows:

- Review and follow the eligibility terms of the group health plan. Most large employers offer coverage for any employee regularly scheduled to work 30+ hours a week – which coincides with the ACA employer mandate definition of full time. However, some plans offer health plan eligibility for part-time employees working 15+ hours a week. Again, it all depends on the terms of your plan.
- The *general* rule is that active employee coverage terminates if an employee does not work a sufficient number of hours (reduces work to part-time). However, there are exceptions to this general rule and the most common are as follows:
 1. The employee is on a protected leave – federal (e.g., FMLA) or state – where active employee coverage has to be maintained for a period of time.
 2. The plan is written to allow persons on unprotected leaves (paid or unpaid) to remain covered under the plan. Particularly for self-insured plans, the combinations are endless. For example, a plan may be written to allow a person on unpaid medical leave or personal leave or company-mandated leave to remain on the health plan for six months or a year – so long as the person pays their premiums or makes arrangements with the employer to repay premiums when they return.
 3. An applicable large employer utilizes a “look-back measurement period” to determine full-time status. Without going into detail, if a plan utilizes a look-back measurement method, an employee’s previous full-time status will be “preserved” for health coverage purposes for some



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

period of time – three months, six months, etc. – regardless of how many hours a week the employee is currently working.

4. An applicable large employer utilizes a “monthly measurement method” to determine full-time status. An employer utilizing a monthly measurement period can remove an employee from coverage based on a reduction in hours if the employee does not complete 130 hours of service in a month.
 - Note, there are rules for imputing hours of service – for example, an employee using earned vacation, holiday, PTO, is generally treated as performing an hour of service.
 - When a reduction in hours results in a loss of coverage, remember that this counts is a COBRA qualifying event.

The bottom line is that, at some point, previous full-time employees working reduced hours will eventually lose active employee coverage. Plan terms and service crediting are at the heart of the analysis. When COBRA is offered, remember that agency guidance in IRS Notice 2020-01 and Final Rule 85 FR 26351 permits ERISA health plan participants to extend COBRA’s qualifying event notice, election and payment, deadlines until 60-days after the National Emergency Period ends. For more details, please reference the Fisher Phillips’ Alert: New Benefit Plan Deadline Extensions Provide Opportunities for Participants - And Burdens For Plan Sponsors.

UPDATED QUESTION (April 24, 2020)

How do we handle benefits waiting periods for rehired employees?

Plan documents generally can require employees to satisfy waiting periods unless there is an exception. One common exception is when workers are rehired. When an individual is rehired, they may fill out a new I-9 and W-4 and generally make benefit and cafeteria plan selections in the same manner as a new employee. However, rehires may regain employer-sponsored coverage(s) more quickly than a new hire depending on: 1) plan document terms; 2) the length of time between separation from service and rehire; and 3) whether the employer is an applicable large employer subject to ACA employer mandates.

For non-health benefits, rehires are generally subject to the same waiting periods as a new employee, unless the plan specifically indicates otherwise. Note, however, if a rehire previously exercised a conversion right – for example, converted a life or AD&D policy during their separation period – the insurance carrier and plan documents will need to be consulted for specific guidance on reinstating coverage through the employer.

Health benefit waiting period exceptions for rehires are a bit more complex. Plan provisions often provide for waivers of waiting periods for employees rehired within 30 days. This could be a required provision in an insured policy or an employer administrative practice. The waiting period for ACA-governed major medical plans may not exceed 90 days, but again, plans are permitted to provide coverage sooner, and often do for rehires. We have noticed that insurers have been generous by



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

providing extended coverage during the pandemic. This trend may continue with rehires, but we will have to wait and see.

Under the ACA, rehired full-time employees may trigger Code §4980H liabilities if not offered coverage within a specified period after returning to work. An applicable large employer using look-back measurement periods must determine if a returning full-time employee is considered 1) a continuing employee – who must be offered coverage no later than the first day of the calendar month following resumption of services; or 2) a terminated and rehired employee – who may be offered coverage the first month following three full calendar months of employment.

If you have adopted the Break-in-Service method, you must treat an employee who has had LESS than a 13 consecutive week break-in-service as a continuing employee and may treat an employee who has had a 13+ consecutive week break-in-service as a new employee. Educational organizations may apply a 26-week standard instead of 13. If you choose, you may treat an employee as terminated for absences shorter than 13 weeks by using the Rule of Parity. Under the Rule of Parity, the employee may be treated as a new hire if the separation from employment was at least four weeks long and exceeds the number of weeks of employment immediately preceding the period in which no services were performed. More complex plan specific rules apply to variable hour employees.

Finally, rehires who timely elected and continuously maintained COBRA coverage during their separation from service generally do not have to satisfy eligibility waiting periods if they are eligible for benefits again.

Are there additional plan or benefits considerations we should consider when employees return to work?

- The plan must automatically distribute new Summary Plan Descriptions (SPDs) to anyone who ceases to be a participant covered under a plan. Technically, then, even if the participant was rehired within 30 days, the plan must automatically distribute a new SPD if they lost coverage under a plan between termination and rehire.
- The health plan summary plan description(s) or the COBRA election materials should clearly state if failure to elect or pay for COBRA would create a gap in health coverage for qualified rehires.
- If the Break-In-Service rules apply to your plan, ensure the break is based on consecutive weeks. If the break is not based on consecutive weeks, additional analysis must be performed for persons with intermittent separations.
- If an employee retired, started participating in a retiree-only health plan, and is subsequently rehired, the rehired retiree is likely required to reenroll in the active employee plan.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

If your employees remained eligible for health insurance coverage during the pandemic, you may have been paying the employee and employer portion of premiums. You may have to make business decisions about whether and how to collect past premiums from employees. For these questions, you may need to consult a benefits attorney as well as a wage and hour attorney to review.

If the eligibility requirements during the pandemic differ from the eligibility rules in your plan document, or if you decided to offer telehealth benefits, you should review the plan document with legal counsel to determine whether an amendment or a summary of material modifications is required.

With respect to retirement plans, you may have partially terminated 401(k) plans based on how many people were laid off. You should review employee census data and plan documents to determine whether a partial termination occurred and next steps. Additionally, some plan loans may have been impacted during employees' terminations or extended unpaid leaves.

Will we continue to be eligible for tax credits as employees return to work?

EFMLA, EPSL, and Employee Retention Credits will continue to be available until December 31, 2020. However, as you increase your workforce, your eligibility for credits may change. For example, as you increase your workforce so that you have over 500 employees, you will no longer be eligible for EFMLA or EPSL tax credits.

UPDATED QUESTION & ANSWER (July 16, 2020)

Are EFMLA and EPSL wages reported on Form W-2, and if so, are there any special reporting instructions?

Yes. EFMLA and EPSL payments are taxable wages reported in Boxes 1, 3 and 5 of 2020 Form W-2. In addition, the IRS recently mandated in IRS Notice 2020-54 (issued July 8, 2020) that employers must, at the same time and in the same manner the W-2 is issued to an employee, disclose in Box 14 (an optional box on Form W-2) **or** in a separate statement the EFMLA and EPSL amounts received by the employee in the following manner:

1. "sick leave wages subject to the \$511 per day limit" [enter total paid under Section 5102(a)(1), (2), and (3) of the EPSL *[sick leave paid for the employee to care for themselves]*];
2. "sick leave wages subject to the \$200 per day limit" [enter total paid under Sections 5102(a)(4), (5) and (6) of the EPSL *[sick leave paid for the employer to care for another individual]*];
3. "emergency family leave wages" [enter total EFMLA paid]

Notice 2020-54 provides model employee instructions that can be provided with the W-2 instructions or in a separate statement. The employee instructions are optional. The Notice also explains that providing the information as indicated in the Notice is important so employees that have self-employment income can properly claim FFCRA credits on new IRS Form 7202 (currently



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

unreleased). You should ensure your payroll provider is prepared to comply with these 2020 Form W-2 obligations.

UPDATED QUESTION & ANSWER (July 16, 2020)

Our employees have expressed interest in donating PTO to help individuals adversely impacted by COVID-19? Are there any special leave-based donation programs relating to COVID-19?

Yes, if you want to provide employees with an opportunity to donate leave to assist pandemic victims, there are several options.

- **Traditional Options:** Your organization may adopt a Medical Emergency Leave-Sharing Plan meeting the requirements of IRS Revenue Ruling 90-29, in which employees may donate leave to an employer-sponsored leave bank for “medical emergencies” of fellow employees and/or their families. Your organization may adopt a Major Disaster Leave-Sharing Plan meeting the requirements of IRS Notice 2006-59, in which employees may donate leave to an employer-sponsored leave bank for fellow employees “adversely affected” by a “Presidentially-declared major disaster.”
- **New Option:** Your organization may adopt a COVID-19 Pandemic Leave-Based Donation Program pursuant to recently issued IRS Notice 2020-46, that allows employers to contribute the cash equivalent of employees’ donated leave to charitable organizations providing relief to pandemic victims without taxing employees on the value of the leave. In a properly administered COVID -19 Leave Donation Program under Notice 2020-46:
 1. Employees voluntarily elect to forego vacation, sick or personal leave.
 2. Depending on how the program is structured, the employee and/or the employer selects the charity to receive all or a portion of the cash equivalent of the foregone leave.
 3. The employer makes a cash payment before January 1, 2021.
 4. The employer’s cash payment must be made to a Code §170(c) charitable organization for the relief of COVID-19 pandemic victims in “affected geographic areas” – which currently includes all 50 states, the District of Columbia, and the five main territories, American Samoa, Guam, Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands.
 5. The employer takes either a Code §170 charitable deduction or a Code §162 business deduction, provided the employer meets the respective requirements of either section.

Tax consequences are beyond the scope of this FAQ and highly fact specific, but generally, if structured properly, the donor employees under these programs should not recognize income nor receive a tax deduction; employee recipients are taxed on the value of the leave they receive; and the employer receives a deduction. Leave donation programs should be in writing and, because of their complexity, created with specific guidance from legal counsel regarding program structure, taxation and employment law considerations.



[Return to Table of Contents](#)

IMMIGRATION

UPDATED ANSWER (July 7, 2020)

How should we address I-9s that were done through remote review processes?

Under normal Form I-9 rules, employers are required to physically examine original, acceptable documents in the presence of the employee. In response to COVID-19 business safety practices, however, the Department of Homeland Security (DHS) announced that it was temporarily relaxing this requirement. Instead, employers operating remotely as a result of COVID-19 would no longer be required to review an employee's identity and work authorization documents in the employee's physical presence. Instead, inspection of documents can be conducted remotely (e.g., by video, fax, or email).

This temporary guidance was set to expire June 18. Because of ongoing precautions related to COVID-19, DHS has extended this policy for an additional 30 days. If you are performing inspections remotely, you must obtain, inspect, and retain copies of the Section 2 documents within three business day of hire. In addition to completing Section 2, you also should enter "COVID-19" in the Additional Information field."

Then, when normal operations resume, all employees whose documents were presented via remote verification must, within three business days, undergo the required "in-person" examination of documents. The person conducting the physical examination should write the words "documents physically examined" in the "Additional Information" box in Section 2, and should include their name and the date of inspection.

In addition, if you availed your organization of this option, you must provide written documentation of your remote onboarding and telework policy during this time. It is important to keep in mind that the DHS's relaxed requirements apply only to employers who are operating remotely – if there are employees physically present at a work location, then you must follow the normal in-person physical inspection rules.

This relaxation of the in-person document review rule by DHS is clearly a stop-gap measure, and you should treat it as such. If you continue to have employees present at your operations, and barring the new-hire being subject to COVID-19 quarantine or lockdown protocols, you should conduct the in-person document review, either by having the new employee come to the facility to complete the I-9 process or having them go to an authorized representative designated by the company. If you use the temporary procedure, you must have a written "remote onboarding and telework policy" in place; and be prepared to complete the in-person document review within three days of the resumption of "normal operations" for all employees who presented their documents remotely.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

What do we do with rehiring workers?

It is anticipated that many laid off workers will be rehired. If you rehire employees within three years of the date that a previous Form I-9 was completed, you may either complete a new Form I-9 or complete Section 3 of the current version of Form I-9. To complete Section 3 for rehires, you must confirm that the original Form I-9 relates to your employee, and review the original Form I-9 to determine if your employee is still authorized to work, including whether employment authorization documentation presented in Section 2 (List A or List C) has since expired (or have been auto-extended).

If your employee is still authorized to work and their employment authorization documentation is still valid, enter the date of the rehire in the space provided in Section 3 of the current version of Form I-9.

If the employee is no longer authorized to work or the employment authorization documentation has since expired and requires reverification, you must have the employee present an unexpired List A or List C document. Do not reverify an employee's List B (identity) document. Enter the document information and the date of rehire in the spaces provided in Section 3 of the current version of Form I-9.

You may take this opportunity to do deeper reviews of your employee's documents by completing new I-9s. If you choose the option to complete new I-9s for rehired employees, you should be consistent in applying the standard of new I-9s for all rehired employees. Depending on the nature of other job changes, such as furloughs, reduction in hours, and compensation, section 3 would not need to be completed. Section 3 is reserved for reverification, rehire, and changes in name.

UPDATED ANSWER (May 21, 2020)

What do we expect from ICE regarding I-9 inspections?

Shortly before the emergency of the COVID-19 coronavirus threat, Immigration and Customs Enforcement (ICE) was extremely active in their issuance of Notices of Inspection (NOIs) for I-9 documentation. Employers around the country were required to assemble the I-9s and related records despite various social distancing requirements.

On March 20, ICE announced it was halting many enforcement actions amid the crisis. In addition, it announced that any employers who were served NOIs by DHS during the month of March 2020 and have not already responded will be granted an automatic extension for 60 days from the effective date. ICE has now granted an additional extension of 30 days to these employers. At the end of the extension period, DHS will determine if an additional extension will be granted.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

Going forward, DHS will continue to monitor the ongoing National Emergency and provide updated guidance as needed. You are required to monitor the DHS and ICE websites for additional updates regarding when the extensions will be terminated, and normal operations will resume. Employers who have been served NOIs should use this opportunity to carefully review your I-9s and documentation in anticipation of a return of ICE in the near future. In addition, it is very possible that the spike of NOIs is going to continue in the summer, which has been a pattern for ICE and even more plausible in an election year when immigration enforcement is a major issue.

What do we need to consider for temporary visa holders?

Temporary visa holders and their employers have had additional struggles and obligations under the COVID-19 crisis. Temporary visas have complex rules for maintenance of status. This includes wage and worksite requirements which could be deeply impacted by furloughs, changes to employment, and terminations.

Visa categories such as H-1B, E-1, E-3, E-3, TN, L-1, O-1, and H-2Bs have a 60-day grace period for a loss of status. The grace period means that foreign nationals will not be considered “out of status” for almost two months following their unemployment. This will give foreign nationals the opportunity to look for other employment or apply for a visa change of status, which might be useful if you take the correct actions to refile, transfer, or amend existing visa petitions.

Employers and people on temporary visas must be extra diligent in documenting clear maintenance of status. Failure to do so could have dire consequences years later. It is highly likely that upon international travel to get a new visa stamp, while applying for an extension of status, or applying for permanent residence, the maintenance of status issues will be closely examined by USCIS or the Consulate before granting immigration benefits. Failure to maintain the records documenting status can result in a denial of a visa, continued status, or permanent residence.

UPDATED ANSWER (July 7, 2020)

What do we need to know about international travel, visa appointments and Canadian border entries?

Many U.S. Citizens, permanent residents, and temporary visa holders are trapped abroad during the COVID-19 outbreak. How each government manages travel restrictions varies depend on the circumstances in that country. The State Department, CDC, and CPB provide travelers the most up-to-date information on conditions worldwide and travel restrictions that might exist. Returning travelers must be prepared for various levels of examination and quarantine upon their return and when transiting through other countries.

Foreign employees who will have the hardest time will be those who require new visas to return. The ability to issue new visa stamps resides with U.S. Consulates. These consulates are currently closed, backlogged for appointments, and could add additional scrutiny for people applying for visas. In



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

many cases, getting an appointment for a new visa can take months and appointments can be canceled without warning. Additionally, applicants for certain types of visas, including H-1B, J-1, and L-1, are impacted by the Presidential Proclamation of June 22, 2020. This proclamation prohibits individuals from applying for H-1B, J-1, and L-1 visas (as well as the corresponding visas for spouses and children of H-1B, J-1, and L-1 visa holders).

The United States and Canada share the longest border of any two countries in the world. The governments of the two countries have closed the border for nonessential travel through July 21, 2020. Canadians who may qualify under an exception to the closure may suffer through inconsistent guidance on who is permitted to apply at the port of entry for TN (NAFTA professional) and L-1 Intracompany Transferee visas. Many are being refused adjudication based upon them not working in an essential business or other technicalities.

In addition, Canadians traveling to the border to obtain a visa who are subsequently denied entry might find themselves having to self-quarantine under Canadian rules for coming into the United States. More than ever, travelers must be prepared to explain how they are working in essential businesses and carry the necessary supporting evidence.

UPDATED ANSWER (July 7, 2020)

What Does President Trump's Proclamation Suspending Immigration mean for employers?

President Trump has recently issued two proclamations suspending the entry of certain individuals due to the economic situation in the U.S. The first Proclamation issued on April 22, 2020 will have minimal impact on most employers. This proclamation only applies to immigrant visa applicants who were outside the country on April 23 at 11:59 pm Eastern and do not already have a valid immigrant visa or another type of travel document that would permit them to travel to the U.S. Please see our legal alert for more information. While the suspension initially was scheduled last for 60 days, this has been extended to December 31, 2020.

On June 22, 2020, President Trump issued an additional Proclamation suspending the entry of individuals in H, J, and L status through December 31, 2020. The suspension on entry is limited to foreign nationals who: were outside of the country on the effective date of proclamation; did not have a valid nonimmigrant visa on the effective date of this proclamation; and did not have an official travel document other than a visa that is valid on the effective date of the proclamation. It does not impact individuals entering in another status, such as B, E, TN, O, and P; individuals with valid visas as of June 22, 2020; lawful permanent residents and spouses or children of US citizens; or individuals whose entry is in the national interest as determined by the Departments of State or Homeland Security.

For more information on the individuals impacted by the Proclamation, please see our legal alert. Both Proclamations direct the DHS and the DOL to study of the impact of foreign workers on U.S. workers, and the results of the study could prompt future restrictions on these nonimmigrant



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

programs. Thus, you should ensure that change of employer applications or extensions of status applications are filed as quickly as possible.

UPDATED ANSWER (July 7, 2020)

Is U.S. Citizenship & Immigration Services still processing work visas?

Yes, USCIS is still processing petitions, including employment-based petitions for H-1Bs, L-1s, TNs, and other employment-authorized visa categories. USCIS temporarily suspended in-person services at its field offices and application support centers (ASCs) and is gradually reopening for some in-person services. Available services vary by location and case type. USCIS field offices will send notices to applicants and petitioners with scheduled appointments and naturalization ceremonies impacted by the extended temporary closure. As USCIS resumes operations for in-person services, USCIS will automatically reschedule ASC appointments due to the temporary office closure. Individuals will receive a new appointment letter in the mail.

UPDATED QUESTION & ANSWER (April 30, 2020)

Do we need to complete new I-9s when furloughed employees are brought back to work?

No If it is a temporary furlough and there is a continued expectation of employment, it is not considered a new hire for I-9/E-Verify purposes. If it is truly a termination and rehire, then it can be treated as new hire for I-9/E-Verify purposes.

UPDATED QUESTION & ANSWER (April 30, 2020)

If we decide to reduce an H-1B worker's hours to part-time employment and/or reduce pay, are we required to file an amended H-1B petition with USCIS?

Yes, an amended H-1B must be filed for material changes in the terms and conditions of employment, including if you are reducing an H-1B worker's hours to part-time employment and if you are reducing pay below the required wage listed on the Labor Condition Application.

UPDATED QUESTION & ANSWER (April 30, 2020)

Is it possible for our organization to hire an H-1B worker that was laid off by another employer?

Yes, you can file an H-1B petition to transfer the worker within the 60-day grace period after termination. The foreign national may remain in the U.S. for up to a 60-day period following the termination or for the remainder of the existing visa petition and status validity period, whichever is shorter.

During this 60-day grace period, the employee may search for a new employer and may also be rehired by the original employer. If rehired, the original employer must file a new petition if it has notified USCIS of the prior termination.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

UPDATED ANSWER (July 7, 2020)

If a foreign national employee was in the process of applying for a visa stamp at the U.S. Consulate abroad, is there anything that can be done to bring that employee to the U.S. now?

Unfortunately, the foreign national will need to wait to resume visa processing once the U.S. Consulates abroad reopen. Issuance of certain visas, including H-1Bs, J-1s, and L-1s, are currently halted due to the Presidential Proclamation issued on June 22, 2020. Individuals applying for H-1B, J-1, and L-1 visas abroad (as well as their spouses and children) cannot obtain visas and enter the U.S. until the Proclamation expires on December 31, 2020. Limited waivers of this suspension are available for individuals whose entry is deemed to be in the national interest.

UPDATED ANSWER (July 7, 2020)

If a foreign national employee was abroad at the time that the U.S. closed its borders due to COVID-19, but has a valid work visa stamp, can the employee now enter the U.S.?

Yes, as long as the foreign national employee is not subject to any of the recent Presidential Proclamations. These Proclamations bar travel for individuals who have been in China, Iran, United Kingdom, Ireland, the 26 countries of the Schengen area, and Brazil during the past 14 days; individuals traveling from Canada or Mexico for non-essential tourism or recreation; and individuals seeking to travel on an H, J, or L visa who did not have a valid visa and were not present in the U.S. on June 22, 2020.

UPDATED QUESTION & ANSWER (April 30, 2020)

If a foreign national employee stuck abroad can purchase an airline ticket to re-enter the U.S., does that mean that U.S. Customs & Border Protection is allowing foreign nationals from that country into the U.S.?

No. U.S. Customs and Border Protection has the complete discretion to deny entry.

UPDATED QUESTION & ANSWER (April 30, 2020)

What if a foreign national employee cannot leave the U.S. due to either the U.S. or country of citizenship's travel restrictions, but needs to renew a Blanket L visa?

Under these circumstances, you should file the L-1 visa extension with USCIS in the U.S. prior to the expiration of the foreign national's authorized period of stay.

UPDATED QUESTION & ANSWER (April 30, 2020)

How can we extend the stay of a foreign national who entered as a business visitor using ESTA or the Visa Waiver Program if that foreign national is unable to depart?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

U.S. Customs and Border Protection confirmed that visa waiver program travelers should be able to seek satisfactory departure beyond their expiration dates by contacting any CBP Port of Entry, Deferred Inspection Site or the USCIS Contact Center.

UPDATED QUESTION & ANSWER (April 30, 2020)

Do we still have to complete E-Verify queries during the pandemic?

Although you are still required to create E-Verify cases within three days of the date of hire and to notify employees about Tentative Nonconfirmations (TNCs), USCIS temporarily extended the timeframe to resolve TNCs due to the closure of Social Security Administration and other offices. You may not take any adverse action against an employee because the E-Verify case is in an interim case status.

UPDATED QUESTION & ANSWER (April 30, 2020)

Do foreign national employees qualify for unemployment benefits?

In general, foreign nationals may qualify for unemployment benefits if they are authorized to work, are unemployed through no fault of their own, meet the work and wage requirements of the state, and meet any additional state requirements. H-1B or L-1 visa holders may not qualify for unemployment in states where they are not considered able and available to work because their work visas are tied to a specific employer. Each state handles unemployment insurance differently; thus, you should discuss your specific state's requirements with your employment and immigration attorneys.

[Return to Table of Contents](#)

INTERNATIONAL LAW

COVID-19 has caused significant slowdown in our international businesses. Can we dismiss some or all of our local employees in a certain country?

Most countries outside of the U.S. do not have employment at will, which means an employer may not terminate an employee whenever it wants without or without cause. Many jurisdictions require employers to provide working notice or pay in lieu of notice based on an employee's years of service, position, age, and other relevant factors. Some jurisdictions prohibit all termination without cause and may order reinstatement in certain cases. A significant decrease of a company's revenue may be a just cause, but companies are often required to complete various procedural steps and/or meet onerous burdens of proof to be able to claim this ground.

Many countries urge employers to explore alternative measures before terminating an employee. Such measures may include retraining, transferring to other divisions within the company, implementing flexible work arrangements, temporary layoffs, paid and unpaid leaves, and wage



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

adjustments.

To help stabilize employment, many governments have implemented special programs to subsidize employers' payroll expenses. Depending on the country, the subsidies can cover up to 75% to 80% or more of an employer's payrolls expenses.

Given the high cost of termination and the generous government assistance programs in many countries, it can be more cost effective to explore other alternatives before terminating an employee.

Can we reduce international employees' salaries or hours?

Usually not without the employees' consent. These changes may be considered material changes to an employee's employment conditions. Without consent from the affected employees, a change in employment conditions may constitute constructive dismissal in many countries.

Now that our business has picked up again, can we hire new international employees or hire back the ones we terminated during the pandemic?

Depending on the jurisdiction, you may need to prioritize bringing back formerly terminated employees. Some countries require employers to notify and prioritize hiring back the former employees who have been terminated within a certain period of time before it can hire any new employees.

Our local workforces in foreign countries want to continue to work from home even after those countries have lifted their lockdown orders. Should we allow it?

If an employee is able to perform their essential job functions from home, you should allow it to the extent possible even after the lockdown orders have been lifted. This helps reduce the likelihood of workplace infections and boosts employee morale.

Some foreign national and local governments have issued guidelines to encourage employers to consult with their employees and accommodate their post-coronavirus work requests flexibly. Just as with workers in the U.S., you should adopt a phased approach that include safety protocols to limit contact, promote social distance, screen for symptoms, and test for COVID-19. Measures may include physical barriers at worksites, staggered shifts, and dividing workers into units and separate them from other units to reduce cross-infections.

You should also consider providing employees with benefits such as more paid time off and childcare subsidies. Innovative programs such as crowdsourced babysitting among employees can also help employees return to work faster.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

UPDATED ANSWER (June 18, 2020)

What kind of measures can we adopt to ensure a safe and healthy workplace?

You should follow country-specific guidance on the required health and safety measures in the wake of COVID-19 and avoid implementing the same set of rules in all of your foreign locations. The extent of infections has been different in every country and what is deemed legally and socially acceptable can vary greatly. Health and safety measures must be tailored accordingly.

When taking certain preventive measures such as temperature taking or requiring employees to wear masks, you must ensure compliance with local privacy and data protection laws. While employers in many Asian countries are allowed to take their employees' temperatures several times a day and require their employees to wear masks, for example, such measures may be deemed an invasion of privacy and potentially trigger data protection law violations in countries like the U.K. and Australia. You need to understand such laws in the jurisdictions where your employees work. When consent is needed for testing and record keeping, take appropriate procedures to ensure such consent is valid.

When can we send our expats back to the foreign countries?

Even if a country has reopened, there may still be restrictions on inter-city or inter-region travels within a country. You should stay up to date on such restrictions or risk having their expats quarantined in an unfamiliar location.

You should provide your expats with information on where and how to get tested in their locations of assignment and where to seek medical assistance quickly should they or their families become infected. Many expat executives will find their living and working environment significantly changed in a foreign country, so it is critical to provide ongoing physical and mental support to ensure successful international assignments. We also recommend you review the terms of your expat contracts and prepare a contingency plan should a second wave of COVID-19 hit.

Can our company reduce our expats' compensation?

An expat's assignment contract will dictate the answer to this question. Some expat contracts, especially those for executives, may deem a reduction in base pay or incentive compensation a sufficient cause to allow the employee to terminate the contract and receive a generous severance package.

Any current reduction of compensation in exchange for some other right to future compensation may trigger adverse tax consequences and should be reviewed carefully for U.S. and foreign local tax compliance to ensure that the arrangement does not violate applicable tax rules. Such creative compensation solutions must be structured carefully to avoid undesirable tax consequences.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

You must also be cautious in reducing benefits or perks in a foreign country. For instance, in some European countries changing the class or brand of a vehicle provided to an employee may be deemed a change sufficiently material to constitute a breach of contract.

We have a question specific to a certain foreign country. Where should we look?

For country-specific information, please visit our Cross Border Employer Blog.

[Return to Table of Contents](#)

WRONGFUL DEATH/PERSONAL INJURY/WORKERS' COMPENSATION

Could our company be sued directly for an injury related to COVID-19 exposure outside the state workers' compensation system?

Workers' compensation insurance generally covers injuries or illnesses that are caused "unintentionally" by an accident or exposure in the work environment. However, because the damages recovered in a workers' compensation claim are generally capped by statute, plaintiffs' lawyers may ignore the statutory workers' compensation system. They may instead file a lawsuit in court claiming intent or willfulness, as they recognize that the potential recovery may be much higher. In some states, the worker may file both a workers' compensation claim and a lawsuit.

UPDATED ANSWER (May 8, 2020)

For a workers' compensation claim, who has the burden of proving whether the employee was exposed to COVID-19 in the workplace or not?

Generally, under normal workers' compensation procedures, the burden is on the employee to establish that their injury or illness was directly caused by their duties. However, states are already beginning to shift that burden for cases involving COVID-19. Illinois was the first state to create a rebuttable presumption that a first responder or front-line worker who contracts COVID-19 is covered by workers' compensation, but a state court judge blocked the rule. The Illinois Workers' Compensation Commission said that it would try again to implement an enforceable burden-shifting rule. Meanwhile, California's governor issued an order that presumes most workers who contract COVID-19 after being in the workplace – not just front-line or essential workers – are entitled to workers' compensation benefits. Expect further states to try and enact similar emergency laws in the coming weeks and months.

What types of claims should we expect if one of my employees became sick or died during the pandemic?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

In addition to workers' compensation claims, an employee may attempt to bring claims via a tort claim of negligence or wrongful death in civil court.

What steps can we take to avoid such lawsuits?

The best way to defend a wrongful death or personal injury lawsuit is to prevent it from ever occurring. Some prudent workplace safety practices for employers concerning the coronavirus include:

- Follow the CDC's Interim Guidance for Businesses, including best practices for social distancing, Guidelines for Cleaning and Disinfecting the workplace, and quarantining employees who have an exposure to a confirmed COVID-19 case, found at the CDC's Public Health Recommendations for Community Exposure. Send employees with confirmed cases home until released by a medical professional or until they meet the guidelines for discontinuing self-isolation.
- Ensure that employees are provided and properly wearing all required PPE.
- If you are an essential business employing critical workers, the CDC has adopted different guidelines to follow, including allowing asymptomatic employees who have had a direct COVID-19 exposure to continue to work as long as certain guidelines are met.
- Educate your employees and engage with them. Constantly remind employees of the symptoms of COVID-19 and urge them to seek medical attention if symptoms appear. Check in with isolated sick employees at least once a day to ask about their health. An employee with whom you engage will be less likely to seek litigation against their employer. An employee's family will also appreciate this courtesy. If a COVID-19 death does occur, reach out to and embrace the family, extend genuine heartfelt condolences, and ensure the funeral is paid for.
- Inform employees of confirmed cases of COVID-19 in the workplace. The CDC recommends that employers notify potentially exposed co-workers of confirmed cases. Err on the side of transparency. Although no case law currently exists, we believe that OSHA may ultimately determine that a failure to notify employees of a confirmed COVID-19 case is a violation of OSHA's general duty clause, the agency's generic requirement to maintain a safe work environment.

What about claims by non-employees, including customers, vendors, and visitors?

Generally, claims by non-employees will not be covered by workers' compensation laws or insurance. Those claims are likely to be brought via a tort claim of negligence in civil court. The same guidance as above applies. Be prepared to demonstrate that you followed CDC and OSHA guidance to reduce any transmission of the virus. At this time, that will be the best proof that the company acted reasonably in light of the risk. Document the efforts you took, whether through training, posting signs, changed procedures, or equipment purchased and implemented.



What should we do if a lawsuit is filed against our company?

Take immediate steps to defend the claim, including the following:

- Notify counsel and all insurers who may provide coverage for such a claim, including your general liability, workers' compensation, and premises liability insurers.
- Determine with the advice of counsel if early dismissal of the lawsuit is possible. A workers' compensation exclusive remedy statute may in fact apply, resulting in a quick resolution to the lawsuit, leaving only a worker's compensation claim.
- If the lawsuit proceeds, prepare witnesses and gather documents to demonstrate the company's COVID-19 response plan and measures, representing your commitment to employee safety during the pandemic. You may also have the lawsuit dismissed if you can show that, given your safety practices, it was nearly impossible for the disease to be contracted at work or due to the company's actions or omissions.

[Return to Table of Contents](#)

CONFLICTING DIRECTION FROM VARYING GOVERNMENT OFFICIALS

What should we do if we are faced with conflicting laws or orders from federal, state and local government officials?

This is a more common experience as state and local governments issue or enact their own laws related to stay-at-home orders, the wearing of face coverings, paid sick leave requirements, and other provisions of law.

While there are some exceptions, with respect to labor and employment matters, state and local governments are generally allowed to enact their own provisions of law that may go farther than federal requirements. Within the FFCRA, for example, EPSL is in addition to paid sick leave requirements enacted at the state or local level. While EFMLA does not add to the total 12 weeks an employee may be entitled to under the traditional FMLA, this may not be the case with respect to state "mini-FMLA" laws.

However, the effect of this may depend on the specific language of the state or local law. For example, while some local jurisdictions are enacting their own paid sick leave requirements specific to COVID-19, some of these laws apply only to employees not covered by the FFCRA. Some provide credits, exemptions, or "offsets" for employers that already provide generous leave benefits.

For these reasons, it is best to consult with employment law counsel to navigate the relationship between these federal, state, and local requirements as they relate to specific circumstances. You can contact your Fisher Phillips attorney or any member of the Fisher Phillips Government Relations Practice Group.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

UPDATED QUESTION & ANSWER (April 21, 2020)

What if the federal government says businesses should open, but our state or local government directs us to remain closed?

This is an evolving and largely untested area of law. However, in general, a more restrictive state or local shutdown or “shelter-in-place” order will control. There could be litigation over this issue as more conflict develops between the federal government and state or local governments over this issue. For these reasons, it is best to consult with counsel if you are presented with a conflict between federal law and state or local law related to this issue.

UPDATED QUESTION & ANSWER (April 21, 2020)

What if the federal government says that we are an “essential business” (and therefore exempt from a shutdown or “shelter-in-place” order) but a state or local government says we are not?

This is an evolving and largely untested area of law. However, in general, the federal definition of “essential businesses” under the Cybersecurity and Infrastructure Security Agency (CISA) Guidance on Essential Critical Infrastructure Workforce establishes minimum standards. Many state and local jurisdictions have adopted more restrictive provisions and definitions. There could be litigation over this issue as more conflict develops between the federal government and state or local governments over this issue. For these reasons, it is best to consult with counsel if you are presented with a conflict between federal law and state or local law regarding who is considered an “essential business.”

[Return to Table of Contents](#)

TRADE SECRETS, NON-COMPETITION, AND DUTY OF LOYALTY ISSUES

What should we be considering with respect to protection of our confidential information and key relationships as we return to normal operations?

In some instances, you may have difficulty enforcing a restrictive covenant against an employee who was terminated without cause. Depending upon the circumstances, a judge may conclude it is unreasonable to enforce a restrictive covenant when an employee has been discharged without cause based on the implicit reasoning of “if the employee was not good enough to work for you, then why should you prevent them from working for someone else?” As always, the surrounding facts and circumstances can affect a court’s decision.

Moreover, judges may be reluctant to enforce restrictive covenants in a tight job market. When times are good, it is easier to enforce a restrictive covenant because the assumption is that an employee has plenty of options to find a new job and they should be able to work without violating their agreement. When times are tight, however, those assumptions may not apply.



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

Additionally, former employees who work in the businesses that have been identified as essential under state or federal guidance can argue they should not be prohibited from working freely because an injunction to the contrary is against the public interest as set forth in state shelter-in-place orders. On the other hand, an employee whose conduct could be seen as unfairly damaging an essential business may be more likely to get enjoined. Courts will have to balance the competing interests.

What are some new realities we should consider as we assess our vulnerability with respect to confidential information and key relationships?

It is likely that former employees might take more risks now than they would under normal circumstances. If a former employee cannot find a job that complies with their non-compete restriction, then they will be more likely to take one that does not. Likewise, that former employee might be more likely to pursue customers covered by a non-solicitation covenant based on the rationale that desperate times require desperate measures.

Meanwhile, courts are operating at reduced capacity, and this could impact your strategy decisions. Whereas it is normally relatively simple to get the attention of a court to schedule immediate hearings for injunctive relief, this is a harder task when courts do not have the same resources and have to conduct hearings remotely.

Finally, working from home exacerbates existing issues with respect to employer information moving outside of your protected systems. Prior to the COVID-19 pandemic, employers were already facing problems with respect to employees working remotely and thereby having confidential information on their personal devices. The pandemic has only heightened those concerns because it has greatly increased the amount of work that is performed away from your facility and often outside of your systems, devices, and accounts.

Additionally, laying off or furloughing employees remotely may not permit you to conduct normal, in-person exit interviews where the employee is required to turn over all company confidential information in their possession. Thus, you need to think through your exit procedures to maximize the chances that your former employees are returning or deleting all confidential information.

Additionally, companies that are hiring new employees from competitors need to consider that the odds are greater that their new employees will have confidential information from their former employer on personal devices or accounts, whether inadvertently or otherwise. Therefore, you need to be proactive about educating new employees to purge themselves of materials from former employers.

Likewise, employees may have important business information at home that exists nowhere on company systems. For this reason, you need to make sure that your exit procedures include a requirement that employees return to the company business-related materials stored at home,



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

including by emailing back to the company documents and data stored on home computers, residing in personal email, and/or saved to cloud-based storage accounts. You also need to be prepared to assist employees when they need to return large amounts of company information, such as by providing them with external storage devices or FTP sites to return the materials.

UPDATED ANSWER (April 21, 2020)

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FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

in personal email, and/or saved to cloud-based storage accounts. You also need to be prepared to assist employees when they need to return large amounts of company information, such as by providing them with external storage devices or FTP sites to return the materials. Finally, you need to make sure that when employees return to work and their normal facilities, they bring with them company-sensitive information that they developed or worked on when they were working from home so that it can be stored on company systems, devices, and accounts.

What problems are created by employees having been in limbo between being employed and unemployed?

During the pandemic, many employees have been furloughed – enduring some aspects of being unemployed (no job duties or paychecks) while enjoying other aspects of being employed (still receiving health insurance and other benefits, as well as being listed as an active employee). This can create a number of different issues.

For instance, most restrictive covenants start with language along the lines of “during employment and for a period of [X] months thereafter...” Is a furloughed employee in a position where the restrictive covenant starts to run? Additionally, in many states, the duty of loyalty is tied to employment status. Does a furloughed employee have to abide by the duty of loyalty? Put another way, is a furloughed employee prohibited from soliciting customers or employees on behalf of a competitor or performing similar competitive acts? If a furloughed employee rejoins your company, is it necessary to have them execute a new restrictive covenant, and if so, is additional consideration required? Each of these questions needs to be addressed on a case-by-case basis and with the consultation of your employment counsel.

What do we need to know about non-compete restrictions that are tied to job duties and territories that have changed as a result of the pandemic?

The COVID-19 pandemic has created all manner of upheaval in the workplace and one such way is that employees are doing things differently than they were before. This can mean that they are performing different duties, especially as many employers have retooled their offerings to a new economic reality. This can also mean that employees have new territories as they have picked up areas from co-workers who have been discharged or fallen ill. For any employer that lists specific job duties and/or territories in a non-compete restriction, this would trigger a need to revise the covenants.

[Return to Table of Contents](#)



USERRA/MILITARY LEAVE

To what position is the service member entitled upon reemployment?

As a general rule, service members are entitled to reemployment in the position they would have attained with reasonable certainty but for their absence due to uniformed service. This position is known as the “escalator principle.” Depending on the circumstances, this may not be the same position. If service members would have been promoted with reasonable certainty had they not been absent, they would be entitled to that promotion upon reinstatement.

Conversely, depending on economic circumstances, reorganizations, layoffs, etc., the escalator principle could result in reemployment to a demoted, transferred, or even eliminated position. For example, if an seniority or job classification would have resulted in a layoff during the period of service, and that layoff continued after the date of reemployment, then “reemployment” would conceivably result in layoff status.

What are the general entitlements of uniformed service members upon reemployment?

There are four basic entitlements:

1. Prompt reemployment. “Prompt” means as soon as practicable under the circumstances of each case. Absent unusual circumstances, you are generally expected to reemploy returning service members almost immediately (as set forth below) if they have been absent for 30 days or less. If they have been absent for more than 30 days, then reemployment must occur within two weeks of the employee’s application for reemployment.
2. Accrued seniority, as if continuously employed. This applies to all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.
3. Training or retraining and other accommodations if applicable (such as in the case of a long period of absence or a service-connected disability).
4. Special protection against discharge, except for cause. This protection extends for 180 days following periods of service of 31-180 days, or for a year following periods of service of 181 days or more. Such protection does not insulate service members from application of the “escalator principle.” In other words, returning service members are not entitled to preferential treatment if the escalator principle would otherwise place them in a position that has been eliminated as part of a legitimate reduction in force, provided that they would have faced the same consequences had they remained continuously employed.

How soon must a service member report back to work or apply for reinstatement upon return from uniformed service?



FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

For service periods of up to 30 consecutive days, the service member must report back to work for the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and safe transportation home, allowing for an 8-hour rest period.

For service periods of 31 to 180 days, the service member must submit a written or verbal application for reemployment no later than 14 days after completion of service. After a service period of 181 days or more, the service member must apply for reemployment no later than 90 days after completion of service.

These deadlines can be extended for upwards of two years to accommodate any period in which the service member was hospitalized for or convalescing from an injury or illness that occurred or was aggravated during military service.

Can employers delay reinstatement of service members released from active duty following service in COVID-19-affected areas for quarantine purposes?

Probably not. USERRA requires employers to “promptly” reemploy returning service members. The applicable regulations state that “prompt” typically means within two weeks of the employee’s application to return to work, unless unusual circumstances exist. In some cases, however, a delay may be warranted by application of COVID-19 *applicable to all employees* traveling to areas with a high risk for exposure to COVID-19. In these situations, employers may consider encouraging the service member to telework before returning to the workplace, if feasible.

How do we handle benefit waiting periods for returning service members?

If employer-provided health coverage was terminated during a period of uniformed service, then no waiting period or exclusion can be imposed upon reemployment unless such a period would otherwise have been imposed had the service member remained continuously employed. A health plan, however, may impose an exclusion or waiting period for coverage of service-connected disabilities as determined by the Secretary of Veterans’ Affairs (VA).

[Return to Table of Contents](#)

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FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

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FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

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FP BEYOND THE CURVE: BACK-TO-BUSINESS FAQs FOR EMPLOYERS

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[Return to Table of Contents](#)

Conclusion

We will continue to monitor this rapidly developing situation and provide updates as appropriate, including updating this FAQ on as-needed basis. Make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of the FP Post-Pandemic Strategy Group.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.