Seyfarth

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Coronavirus Information and FAQs

Introduction

This document and the FAQs are intended to provide you with general information about the 2019 Novel Coronavirus disease, also known as COVID-19, including how it is transmitted and how you can prevent infection. It does not constitute legal advice on this topic.

This document is not intended to be exhaustive and we encourage you to supplement your knowledge by visiting the Centers for Disease Control website at www.cdc.gov.

*The following information is provided based upon currently known information. Contents with *** next to their subheading are substantially revised in this edition. The progress of this disease is constantly evolving. The foregoing information is subject to change based upon such evolving information. If you have any questions regarding this matter, please contact your Seyfarth attorney.*

TABLE OF CONTENTS

1. Background Information

(a) What is Coronavirus?

Coronavirus is a respiratory virus that originated in Wuhan, China. The virus is contagious and potentially fatal. It is suspected that it is transmitted through coughing and sneezing of infected individuals, but recent studies have shown it may also be transmitted via contact with surfaces and airborne particles. At the present time, there is no vaccine, cure, or specific treatment.

(b) How does Coronavirus spread?

Health authorities have not confirmed how Coronavirus is transmitted, but suspect it is spread through person-to-person contact or contact with infected bodily fluids. There is also evidence that the virus has been spread by airborne or animal sources. Authorities do not believe you can get it from water or food.

(c) How many people survive Coronavirus?

Coronavirus had a fatality rate of less than 3% in China, with a fatality rate outside of China lower than that. The current fatality rate in the United States is below 2% and decreasing as more cases are diagnosed. As such, the majority of those affected so far have survived the disease.

(d) What are the signs and symptoms of Coronavirus?

Individuals infected with Coronavirus have displayed the following symptoms:

- Mild to severe respiratory illness (including pneumonia and/or bronchitis);
- Fever;
- Cough; and
- Difficulty breathing.

(e) How infectious is Coronavirus?

Virus transmission may happen on a spectrum and authorities are not sure if the virus is highly contagious, or less so, though based upon recent evidence, they believe it is highly contagious. For person-to-person transmission, health authorities suspect the virus is spread through coughing and sneezing, similar to how influenza and other respiratory pathogens are spread. Health authorities do not believe you can get it from water or food. Recent studies show it may be possible to get the virus from airborne sources.

There is evidence that the virus can be spread through touching a surface that someone sneezed or coughed on and then touching your face.

A study conducted by Johns Hopkins indicates that the average time from infection to first symptoms, also known as the incubation period, is 5.1 days. However, the official CDC incubation period is as little as 2 days or as many as 14. During this

period, an individual can be infected and spreading the disease although they may not be experiencing the signs and symptoms of the virus.

(f) Has the Coronavirus been declared a worldwide pandemic?

On March 11, 2020, the World Health Organization ("WHO") released a "breaking" tweet quoting Doctor Tedros Adhanom Ghebreyesus, Director-General: "We have therefore made the assessment that COVID-19 can be characterized as a pandemic."

According to the CDC definition, a "pandemic" refers to a (1) a virus that can cause illness or death with (2) sustained person-to-person transmission of that virus and (3) evidence of spread throughout the world. As the WHO has the reach to demarcate the global spread of the disease, individual countries look to the WHO to confirm a pandemic. The WHO cautioned that "describing the situation as a pandemic does not change WHO's assessment of the threat posed by this coronavirus. It doesn't change what WHO is doing, and it doesn't change what countries should do." Accordingly, the WHO has not made additional recommendations based on the "pandemic" declaration.

(g) How long can the Coronavirus live outside of the human body?

It can vary. For similar viruses, most exist for a few hours depending on the hardness of the surface it exists on, as well as ambient air conditions. The harder the surface, the longer the virus can survive.

During recent testing, *under ideal laboratory conditions* which cannot be reproduced in the real-world, the virus was able to survive 2-3 days on plastic and metal, less than 24 hours on cardboard, and less than 4 hours on copper. However, CDC indicated a more realistic real-world time frame is minutes-to-an hour on soft surfaces and hours to a day on hard surfaces.

(h) How can I protect myself?

Because there is currently no vaccine to prevent infection, the best way to protect yourself is to avoid being exposed to this virus. The CDC recommends the following additional steps:

- Wash your hands often with soap and water for at least 20 seconds. Use an alcohol-based hand sanitizer that contains at least 60% alcohol if soap and water are not available.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Avoid close contact with people who are sick.
- Stay home when you are sick.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
- Clean and disinfect frequently touched objects and surfaces.

(i) What happens if I suspect I or someone I know has Coronavirus?

If you exhibit symptoms of Coronavirus or have had close contact with someone exhibiting Coronavirus symptoms, **DO NOT** report to work. Remain in your home and call, message, or email your healthcare professional. Additionally, if you or someone you have had close contact with exhibit symptoms of Coronavirus following recent travel from areas heavily affected by Coronavirus, you must mention your recent travel when you contact your healthcare professional. There is a growing list of affected areas within the United States, as well as a long list of affected countries that is rapidly changing. Please refer to the CDC website at https://www.cdc.gov/coronavirus/2019-ncov/locations-confirmed-cases.html for the current listing. Your healthcare professional will work with your state's public health department and CDC to determine if you need to be tested for Coronavirus.

(j) Should I provide information to my employees about the Coronavirus?

Yes. Information is available at no cost on the:

- CDC website -- https://www.cdc.gov/coronavirus/index.html
- WHO website -- https://www.who.int/emergencies/diseases/novel-coronavirus-2019

2. Employee Restrictions

(a) Should I consider quarantining employees, or having employees remain off work, who have recently returned from areas heavily affected by Coronavirus?

Yes. Many states are now requiring individuals who have traveled out of state (internationally and domestically) to self-quarantine for 14 days after return. As a result, you should consider telling any employee returning from international and domestic areas heavily affected by Coronavirus that they should remain away from work for 14 days after their return. Since this list of heavily affected locations continues to change, please refer to the CDC website at https://www.cdc.gov/coronavirus/2019-ncov/locations-confirmed-cases.html for the current listing. You can also consider telling employees to self-monitor for any symptoms of Coronavirus. If any symptoms occur, the employee should self-quarantine and be evaluated by a healthcare provider. Further, even if not symptomatic, employees may also want to consult a healthcare provider to confirm that the employee is not infectious before returning to work. For union-represented employees, applicable collective bargaining agreements should be consulted regarding employment terms relevant to such actions.

(b) Should I consider quarantining employees who have travelled to countries near areas heavily affected by Coronavirus, or who may travelled with individuals from areas heavily affected by Coronavirus on a plane or other carrier?

At the time of publication, perhaps. Employers should consult the CDC and World Health Organization for the most up to date information on quarantining employees

from countries in close proximity to areas heavily affected by Coronavirus. For individuals who have travelled with individuals with exposure to areas heavily affected by Coronavirus, employers should have such employees screened by a healthcare provider before bringing them back to work.

(c) Can I restrict employees from traveling to areas heavily affected by Coronavirus as determined by the CDC?

Yes. Employers may consider restricting employee travel to the areas affected by the disease for business purposes.

Employers cannot tell employees that they cannot travel to areas heavily affected by Coronavirus for personal purposes. Employers should remain aware of their obligations under leave laws to allow employees leave to travel to affected areas to care for others who are ill, as well as their obligations to avoid national origin discrimination. Moreover, several states have off-duty discrimination laws that provide blanket protections to prohibit discrimination against employees who participate in legal activities outside the workplace, such as personal travel, such as New York, where personal travel would be considered "off-duty conduct." The employer may however require a note for the employee to return to work, as discussed below.

Employers may also consider requesting that employees inform the employer if they are traveling for personal reasons so the employer is aware of employees who are going to areas and are potentially exposed to the disease.

Employees who travel to areas heavily affected by Coronavirus need to be informed that they may be quarantined upon their return. Employees should also be informed that there may not be adequate medical services available if they travel to areas heavily affected by Coronavirus and become ill.

(d) Can I prevent an employee from entering the workplace if they refuse to answer our COVID-19 questionnaire?

Yes. Employers can make answering a COVID-19 questionnaire related to travel and contact with confirmed or exposed individuals a condition of employment. The employer can also ask an employee if they have any of the COVID-19 symptoms designed by WHO and CDC. Do not ask for any other medical information - the employer just needs to know if the employee currently has any COVID-19 symptom(s). There may be state or local laws that impact asking an employee about COVID-19 symptoms. For example, in California, an employer should ask generally if the employee is experiencing any of the COVID-19 symptoms but not ask the employee to identify which specific symptoms he or she is experiencing.

If an employee refuses to answer, the employer should explain the reason for the requirement. If the employee still refuses to complete the required disclosure form, he/she should be sent home. In such circumstances, the company should check any state/local reporting pay laws that may be in place in that jurisdiction to determine if reporting pay is required.

(e) Can a healthy employee in a direct patient-care position (e.g., nurse) who is not in a high risk group refuse to treat COVID-19 patients out of fear of exposure?

Any employee may refuse to perform a task if all of the following conditions are met:

- Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so; and
- The employee refused to work in "good faith." This means that the employee must genuinely believe that an imminent danger exists; and
- A reasonable person would agree that there is a real danger of death or serious injury; and
- 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.

While this employee may believe he/she is in imminent danger, objectively, that probably is not the case so long as the employer is following CDC and the most recent OSHA guidance on protecting healthcare workers from the Coronavirus. Once the employer explains/demonstrates to the employee that its actions comport with those expectations, an ongoing refusal to perform work would be unreasonable and the protected nature of that activity would fall away. In turn, the employer could take an adverse action. Whether the employer should do that in this situation is another question. Each situation should be analyzed on a case-by-case basis.

The employee may refuse to perform work tasks on account of exposure to COVID-19 and articulate unique risk factors due to a disability. This action would require the employer to engage in the interactive process with the employee and determine whether they should consider reasonable accommodations, including not interacting with COVID-19 positive patients, unless that is an essential function of the job.

(f) Can our clients ask our employees to sign COVID-19 questionnaires or acknowledgements without violating the law?

Yes. The information sought by clients is the same type of information employers are asking their employees to disclose with a view toward preventing spread of the virus. The EEOC has stated in its updated COVID-19 pandemic guidance document that these types of inquiries do not violate the ADA. For union-represented employees, unless the ability to require such acknowledgments is covered/addressed through management rights in the applicable collective bargaining agreement (e.g., through the ability to unilaterally implement employment policies), it may be subject to bargaining, although arguably this may be accomplished on an expedited basis.

3. Essential Businesses

States, cities and various localities throughout the United States have issued orders requiring closure of non-essential businesses / shelter-in-place for non-essential workers. Each of these orders is unique and businesses in each location must carefully review any order to determine if their business/workforce is deemed “essential.”

Being deemed "essential" in one location does not mean the same business is "essential" elsewhere.

The list of statewide orders continues to grow rapidly, but as of March 31st includes the following (applying some standard of essential, or comparable term, to businesses): Alaska, Arizona, California, Connecticut, Delaware, New York, New Jersey, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Pennsylvania, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wisconsin, as well as the District of Columbia and Puerto Rico. Importantly, many more municipalities and counties have issued orders specific to their jurisdictions, both in the states listed above and in states without statewide orders. Care should be taken in states with both a statewide and local orders.

The Cybersecurity & Infrastructure Agency (CISA), on behalf of the Federal government, has also issued an advisory memorandum listing "essential" infrastructure and workers during the COVID-19 pandemic. The guidance is intended to assist States and other localities and is not binding. However, states such as California, Hawaii, Minnesota and North Carolina, as well as cities and counties across the country have incorporated the CISA Guidance into their respective stay-at-home orders. The initial CISA guidance was issued on March 19, 2020 and was amended on March 28, 2020: https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce.

Employers should also be aware that many states and localities have included additional COVID-19 related health requirements that must be complied with for essential businesses to continue operations.

Below is a general synopsis of the most common business questions related to essential business / workforce orders.

(a) What are minimum basic operations?

Businesses deemed "non-essential" should review individual orders to determine what minimum basic operations are allowed. Certain orders explicitly allow non-essential businesses to conduct minimum basic operations. These generally include:

- maintaining payroll and benefits;
- maintaining inventory and/or physical conditions;
- security; and
- enabling other employees to work from home.

Other orders, however, are narrower and non-essential businesses should review the order to determine what minimum basic operations are allowed.

(b) What if a business / manufacturer / service provider does work that is deemed both "essential" and "non-essential" under an order?

Simply put, any non-essential business should likely cease (beyond any minimum basic operations allowed). Some states specifically address this issue, such as New York, which clarifies in its guidance that businesses doing both essential and non-essential work must cease all non-essential work. Other states and localities do not specifically address this issue, with the orders simply stating that all non-essential business must cease. We are unaware of any orders that expressly allow businesses doing both essential and non-essential work to continue the non-essential operations. We are also unaware of any states or localities prohibiting an increase in the amount of essential work being done, so businesses doing both may look to increase the essential portion of the work or production.

(c) What if my business is not listed in the order as "essential" but I think it is essential?

Many states and localities have created mechanisms for businesses to request a designation as "essential." Each individual business will need to determine whether it is in its best interest to request such a designation. Seyfarth attorneys are available to help businesses weigh the pros and cons of this.

(d) What are the risks of violating an essential business order?

It is up to each state and locality as to whether to include any built-in penalties for violating the orders. Certain states have included civil penalties. These tend to range from $2,000 for the first violation up to $10,000 for any subsequent violation. Other states and localities, such as Michigan, have designated violations as a misdemeanor. Many states have included methods for employees to report non-essential businesses that continue to operate.

Employers should also be wary that continuing to operate non-essential businesses may garner unwanted media attention.

(e) Do employees and businesses need any kind of documentation showing they are essential?

Any essential business should consider maintaining a document on the business's premises that sets forth the basis for its belief that it is an essential business and that can be shown to law enforcement. Essential businesses or non-essential businesses maintaining minimum basic operations may want to also provide employees with a letter and/or business card that provides basic information about why the employee is essential and/or compliant with the order and that can be shown to law enforcement if the employee is stopped. Seyfarth attorneys can easily assist employers with preparing such documentation.

4. Coronavirus Aid, Relief, and Economic Security Act (CARES Act) - Title I, Keeping American Workers Paid and Employed Act

Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) makes **$349 billion** available to small businesses as part of an expansion of the U.S. Small Business Administration's (SBA) Section 7(a) loan program (the Paycheck Protection Program or PPP) and appropriates an additional **$10 billion** through an expansion of the SBA's Section 7(b) Economic Injury Disaster Loan (EIDL) program. The following are answers to some frequently asked questions about these two programs.

Note Regarding Lapse of Appropriations: On April 16, 2020, the SBA posted notices on its website that SBA is unable to accept new applications for either the Paycheck Protection Program or the Economic Injury Disaster Loan COVID-19 related assistance program (including EIDL advances) based on available appropriations funding.

With respect to the EIDL program, the SBA noted that applicants who have already submitted their applications will continue to be processed on a first-come, first-served basis.

There are ongoing discussions in the U.S. Congress regarding potential additional appropriations to fund these programs.

(a) Paycheck Protection Program Loans

(i) What types of businesses and entities are eligible to receive a PPP loan under the CARES Act?

Under the CARES Act, **in addition to any business that qualifies as a "small business concern"** under existing SBA rules, the following businesses and entities generally are eligible to receive a PPP loan: any business concern, nonprofit (501(c)(3)), veterans organization (501(c)(19)), or Tribal business concern, i**n each case that employs not more than the greater of**:

(A) **500 employees whose principal place of residence is in the US**[1];

(B) if applicable, the size standard in number of employees established by the SBA for the applicable industry of the business; or

(C) if the business has more than 1 physical location and is assigned a NAICS code beginning with 72 (i.e., the business is in the accommodation and food services industry) at the time of loan disbursement, 500 employees per physical location of the business.

The SBA defines a "business concern" as a business entity organized for profit, with a place of business located in the U.S., which operates primarily within the U.S. or

[1] The words "whose principal place of residence is in the U.S." were not in the CARES Act but were added in the Interim Rule (as defined below) and are also included in the description of this test in SBA Interim Rule #2 published on April 3, 2020 and in the April 6 Guidance (as defined below).

which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor. A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.

Business concerns that otherwise meet the existing SBA definition of "small business concern" may also apply for PPP loans, including business concerns that met, as of March 27, 2020, the SBA's interim "alternative size standard": i.e., businesses whose maximum tangible net worth is not more than $15 million and for which the average net income after Federal income taxes (excluding any carry-over losses) for the two full fiscal years before the date of the application is not more than $5 million.

Businesses can check their NAICS code at the SBA website to see if they are considered a small business by the SBA size standards: https://www.sba.gov/size-standards.

It is important to note that **all employees, whether employed on a full-time, part-time or other basis, are counted** in making the above determinations of the number of employees.

In addition, except as noted below in the following question, the **SBA's "affiliation rules" also generally apply** to the above determinations such that, for example, a business's employee count will include employees of its affiliates. For many venture-capital and private-equity backed businesses, this may preclude eligibility for PPP loans. **However, further guidance from the SBA may provide additional waivers, changes or clarifications with respect to the application of the SBA affiliation rules for purposes of PPP loans. We will be monitoring this closely and will provide any updates.**

Generally, affiliation exists when one entity controls or has the power to control another, or a third party controls or has the power to control both (in other words, it is similar to the commonly used affiliate test of controls, controlled by or under common control with). Control may be established by ownership or control, or the power to control 50% or more of a business concern's voting stock. Additionally, a party may be deemed to control a business concern as a result of the ability of that party, under the business concern's charter, bylaws or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders of the business concern. PPP loan applicants are subject to the affiliation rules contained in 13 CFR 121.301. The SBA's affiliation rules are accessible here: https://www.sba.gov/sites/default/files/affiliation_ver_03.pdf.

The loan applicant must have been (and must certify that it was) **in operation on February 15, 2020** and either had employees for which they paid salaries and payroll taxes or paid independent contractors (as reported on a Form 1099-MISC). In evaluating a borrower's eligibility, a lender may consider whether a seasonal borrower was in operation on February 15, 2020 or for an 8-week period between February 15, 2019 and June 30, 2019.

As noted in the Paycheck Protection Program Interim Final Rule published by the SBA on April 2, 2020 (Interim Rule), businesses that are not eligible for PPP loans are identified in 13 CFR 120.110 and described further in SBA's Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2, except that nonprofit organizations authorized under the CARES Act are eligible. (SOP 50 10 can be found at https://www.sba.gov/document/sop-50-10-5-lender-development-company-loan-programs). The Interim Rule also indicates that the following businesses will be ineligible:

1. Businesses that have engaged in any activity that is illegal under federal, state, or local law;

2. Individuals who employ household employees such as nannies or housekeepers;

3. Businesses with an owner with 20 percent or more of the equity who is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony within the last five years; and

4. Businesses that have (or whose owners or other affiliates) ever obtained a direct or guaranteed loan from the SBA or any other Federal agency that is currently delinquent or has defaulted within the last seven years and caused a loss to the government.

From the SBA Interim Rule published on April 14, 2020 (the April 14 Interim Rule):

Clarification regarding Legal Gaming Businesses: A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues if the existing standard in 13 CFR 120.11(g) is met (i.e., the business does not derive more than one-third of gross annual revenue from legal gambling activities) or the following two conditions are satisfied: (a) the business's legal gaming revenue (net of payouts but not other expenses) did not exceed $1 million in 2019; and (b) legal gaming revenue (net of payouts but not other expenses) comprised less than 50 percent of the business's total revenue in 2019. Businesses that received illegal gaming revenue are categorically ineligible.

(ii) Will lenders take into account a business's affiliates in determining loan eligibility?

Generally, yes. However, affiliation rules will not apply if a business fits into one of the following **categories for which the CARES Act expressly waives the SBA affiliation rules** or if the business falls into an existing SBA exception to the affiliation rules (see 13 CFR 121.103(b)(2) for existing affiliation exclusions):

- the business has **500 employees or fewer** and, as of the date the loan is disbursed, is assigned **NAICS code 72** (the Accommodation and Food Services sector);

- the business is operated as a **franchise** and is assigned a franchise identifier code by the SBA (the SBA's Franchise Directory is accessible here: https://www.sba.gov/document/support--sba-franchise-directory); or
- the business receives **financial assistance from a company licensed to operate as a small business investment company (SBIC)** under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681).

For other business concerns, the current understanding is that the SBA affiliation rules generally will apply. **However, further guidance from the SBA may provide additional waivers, changes or clarifications with respect to the application of the SBA affiliation rules for purposes of PPP loans. We will be monitoring this closely and will provide any updates**.

(iii) What time period should borrowers use to determine their number of employees and payroll costs to calculate their maximum loan amounts?

From PPP guidance released by the Treasury Department on April 6, 2020 (April 6 Guidance):

In general, borrowers can calculate their aggregate payroll costs using data either from the previous 12 months or from calendar year 2019. For seasonal businesses, the applicant may use average monthly payroll for the period between February 15, 2019, or March 1, 2019, and June 30, 2019. An applicant that was not in business from February 15, 2019 to June 30, 2019 may use the average monthly payroll costs for the period January 1, 2020 through February 29, 2020.

Borrowers may use their average employment over the same time periods to determine their number of employees, for the purposes of applying an employee-based size standard. Alternatively, borrowers may elect to use SBA's usual calculation: the average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if it has not been operational for 12 months).

The April 6 Guidance is accessible here: https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf.

(iv) The affiliation rule based on ownership (13 C.F.R. 121.301(f)(1)) states that SBA will deem a minority shareholder in a business to control the business if the shareholder has the right to prevent a quorum or otherwise block action by the board of directors or shareholders. If a minority shareholder irrevocably gives up those rights, is it still considered to be an affiliate of the business?

From the April 6 Guidance:

No. If a minority shareholder in a business irrevocably waives or relinquishes any existing rights specified in 13 C.F.R. 121.301(f)(1), the minority shareholder would no longer be an affiliate of the business (assuming no other relationship that triggers the affiliation rules).

(v) How do the $10 million cap and affiliation rules work for franchises?

From the April 6 Guidance, as updated by the Treasury Department on April 13, 2020 ("April 13 Guidance"):

If a franchise brand is listed on the SBA Franchise Directory, each of its franchisees that meets the applicable size standard can apply for a PPP loan. (The franchisor does not apply on behalf of its franchisees.) The $10 million cap on PPP loans is a limit per franchisee entity, and each franchisee is limited to one PPP loan.

Franchise brands that have been denied listing on the Directory because of affiliation between franchisor and franchisee may request listing to receive PPP loans. SBA will not apply affiliation rules to a franchise brand requesting listing on the Directory to participate in the PPP, but SBA will confirm that the brand is otherwise eligible for listing on the Directory.

(vi) How do the $10 million cap and affiliation rules work for hotels and restaurants (and any business assigned a North American Industry Classification System (NAICS) code beginning with 72)?

From the April 13 Guidance:

Under the CARES Act, any single business entity that is assigned a NAICS code beginning with 72 (including hotels and restaurants) and that employs not more than 500 employees per physical location is eligible to receive a PPP loan.

In addition, SBA's affiliation rules (13 CFR 121.103 and 13 CFR 121.301) do not apply to any business entity that is assigned a NAICS code beginning with 72 and that employs not more than a total of 500 employees. As a result, if each hotel or restaurant location owned by a parent business is a separate legal business entity, each hotel or restaurant location that employs not more than 500 employees is permitted to apply for a separate PPP loan provided it uses its unique EIN.

The $10 million maximum loan amount limitation applies to each eligible business entity, because individual business entities cannot apply for more than one loan. The following examples illustrate how these principles apply.

- Example 1. Company X directly owns multiple restaurants and has no affiliates.

  Company X may apply for a PPP loan if it employs 500 or fewer employees per location (including at its headquarters), even if the total number of employees employed across all locations is over 500.

- Example 2. Company X wholly owns Company Y and Company Z (as a result, Companies X, Y, and Z are all affiliates of one another). Company Y and Company Z each own a single restaurant with 500 or fewer employees.

  Company Y and Company Z can each apply for a separate PPP loan, because each has 500 or fewer employees. The affiliation rules do not apply, because Company Y and Company Z each has 500 or fewer employees and is in the food services business (with a NAICS code beginning with 72).

- Example 3. Company X wholly owns Company Y and Company Z (as a result, Companies X, Y, and Z are all affiliates of one another). Company Y owns a restaurant with 400 employees. Company Z is a construction company with 400 employees.

  Company Y is eligible for a PPP loan because it has 500 or fewer employees. The affiliation rules do not apply to Company Y, because it has 500 or fewer employees and is in the food services business (with a NAICS code beginning with 72).

  The waiver of the affiliation rules does not apply to Company Z, because Company Z is in the construction industry. Under SBA's affiliation rules, 13 CFR 121.301(f)(1) and (3), Company Y and Company Z are affiliates of one another because they are under the common control of Company X, which wholly owns both companies. This means that the size of Company Z is determined by adding its employees to those of Companies X and Y. Therefore, Company Z is deemed to have more than 500 employees, together with its affiliates. However, Company Z may be eligible to receive a PPP loan as a small business concern if it, together with Companies X and Y, meets SBA's other applicable size standards," as explained in FAQ #2.

(vii) What if an eligible borrower contracts with a third-party payer such as a payroll provider or a Professional Employer Organization (PEO) to process payroll and report payroll taxes?

From the April 6 Guidance:

SBA recognizes that eligible borrowers that use PEOs or similar payroll providers are required under some state registration laws to report wage and other data of the Employer Identification Number (EIN) of the PEO or other payroll provider. In these cases, payroll documentation provided by the payroll provider that indicates the amount of wages and payroll taxes reported to the IRS by the payroll provider for the borrower's employees will be considered acceptable PPP loan payroll documentation. Relevant information from a Schedule R (Form 941), Allocation Schedule for Aggregate Form 941 Filers, attached to the PEO's or other payroll provider's Form 941, Employer's Quarterly Federal Tax Return, should be used if it is available; otherwise, the eligible borrower should obtain a statement from the payroll provider documenting the amount of wages and payroll taxes. In addition, employees of the eligible borrower will not be considered employees of the eligible borrower's payroll provider or PEO.

(viii) Are sole proprietors, independent contractors and self-employed individuals eligible to obtain a loan through the PPP?

Yes, sole proprietors, independent contractors and self-employed individuals are eligible to obtain a loan through the PPP if they otherwise meet eligibility requirements. Such individuals will be required to submit documentation evidencing eligibility for the program, including payroll tax filings reported to the IRS.

In its April 14 Interim Rule, the SBA provided additional details regarding PPP loan eligibility, maximum loan amount calculations and loan forgiveness determinations for individuals that have income from self-employment and file a Form 1040, Schedule C. See Annex A hereto for details.

(ix) What is the deadline to apply for a loan through the PPP?

The deadline to apply for a PPP loan is **June 30, 2020**. Since the CARES Act limits the amount the SBA is authorized to guarantee to $349 billion and subscription rates are likely to be high, however, borrowers are encouraged to apply as soon as possible in order to access these funds. As noted in the Interim Rule, the PPP is "first-come, first-served."

Based on Treasury Department guidance published on March 31, 2020, starting April 3, 2020, small businesses and sole proprietorships can apply for PPP loans and starting April 10, 2020, independent contractors and self-employed individuals can apply.

The Treasury Department guidance is accessible here: https://home.treasury.gov/system/files/136/PPP%20Borrower%20Information%20Fact%20Sheet.pdf.

The application for a PPP loan is accessible here: https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf.

(x) Where can eligible borrowers apply for a PPP loan?

Eligible borrowers can apply for a PPP loan through any bank or lending institution enrolled in the SBA's 7(a) lending program. All federally insured depository institutions, federally insured credit unions, and Farm Credit System institutions also are eligible to participate as lenders in the PPP program. (The SBA does not lend money directly under the PPP program - instead, it sets guidelines for loans to be made by its partnering lenders.)

Businesses are encouraged to check with their existing lenders, or can find a participating lender using the SBA's Lender Match tool, accessible here: https://www.sba.gov/funding-programs/loans/lender-match. A list of the 100 most active SBA Section 7(a) lenders, as provided by the SBA's Office of Capital Access, is accessible here: https://www.sba.gov/article/2020/mar/02/100-most-active-sba-7a-lenders.

The CARES Act permits the SBA Administrator and the Treasury Secretary to authorize additional lenders deemed to have the necessary qualifications to process, close, disburse, and service PPP loans.

(xi) What is the maximum amount that a borrower can borrow under the PPP?

The maximum loan amount that a particular borrower is eligible to borrow will depend on the borrower's situation (see below), but **in all cases the loan amount cannot exceed $10 million**.

- For borrowers that were in business between February 15, 2019 and June 30, 2019 (other than seasonal businesses), the maximum loan amount will be equal to **2.5 times the business's average monthly "payroll costs"** during the previous 12 months or from calendar year 2019.
- For seasonal business borrowers that were in business between February 15, 2019 and June 30, 2019, the maximum loan amount will be equal to 2.5 times the business's average monthly "payroll costs" between February 15, 2019 (or, at the election of the business, March 1, 2019) and June 30, 2019.
- For borrowers that were **not** in business between February 15, 2019 and June 30, 2019, the maximum loan amount will be equal to 2.5 times the business's average monthly "payroll costs" between January 1, 2020 and February 29, 2020.
- For borrowers that have taken or take out an SBA EIDL (see below for additional details on this program) between January 31, 2020 and the date that PPP loans are made available and want to refinance that loan into a PPP loan, the maximum loan amount will be equal to 2.5 times the applicable payroll costs as determined above plus the outstanding amount of the EIDL.

Applicants should note that, pursuant to the Interim Rule, the SBA clarified that independent contractors do not count as employees for purposes of the PPP loan amount calculations (because they have the ability to apply for the loan on their own).

The SBA clarified the calculation of the maximum loan amount in the Interim Rule as follows:

- Step 1: Aggregate payroll costs from the last 12 months for employees whose principal place of residence is the United States.
- Step 2: Subtract any compensation paid to an employee in excess of an annual salary of $100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of $100,000 per year.
- Step 3: Calculate average monthly payroll costs (divide the amount from Step 2 by 12).
- Step 4: Multiply the average monthly payroll costs from Step 3 by 2.5.

- Step 5: Add the outstanding amount of an SBA EIDL made between January 31, 2020 and April 3, 2020, less the amount of any "advance" under an SBA EIDL (because it does not have to be repaid).

The examples below illustrate this methodology:

Example 1 – No employees make more than $100,000

Annual payroll: $120,000
Average monthly payroll: $10,000
Multiply by 2.5 = $25,000
Maximum loan amount is $25,000

Example 2 – Some employees make more than $100,000

Annual payroll: $1,500,000
Subtract compensation amounts in excess of an annual salary of $100,000: $1,200,000
Average monthly qualifying payroll: $100,000
Multiply by 2.5 = $250,000
Maximum loan amount is $250,000

Example 3 – No employees make more than $100,000, outstanding EIDL loan of $10,000

Annual payroll: $120,000
Average monthly payroll: $10,000
Multiply by 2.5 = $25,000
Add EIDL loan of $10,000 = $35,000
Maximum loan amount is $35,000

Example 4 – Some employees make more than $100,000, outstanding EIDL loan of $10,000

Annual payroll: $1,500,000
Subtract compensation amounts in excess of an annual salary of $100,000: $1,200,000
Average monthly qualifying payroll: $100,000
Multiply by 2.5 = $250,000
Add EIDL loan of $10,000 = $260,000
Maximum loan amount is $260,000

(xii) What expenses count as "payroll costs"?

- salary, wage, commission, or similar compensation;
- payment of cash tip or equivalent;
- payment of vacation, parental, family, medical, or sick leave (subject to the exceptions noted in the following question);
- allowance for dismissal or separation;
- payment required for the provisions of group health care benefits, including insurance premiums;
- payment of any retirement benefit;

- payment of State or local tax assessed on the compensation of employees; and
- payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than $100,000 in 1 year, as prorated for the period beginning February 15, 2020 and ending on June 30, 2020.

(xiii) What costs are not eligible "payroll costs"?

The CARES Act expressly provides that the following are not eligible "payroll costs":

- Individual employee/sole proprietor/independent contractor compensation in excess of an annual salary (or wages, commission, income, net earnings or similar compensation, as applicable) of $100,000, as prorated for the period beginning February 15, 2020 and ending on June 30, 2020;
- taxes imposed or withheld under chapters 21, 22, and 24 of the Internal Revenue Code during the period beginning February 15, 2020 and ending on June 30, 2020;
- compensation of employees whose principal place of residence is outside of the U.S.; and
- qualified sick and family leave for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (FFCRA), as applicable.

(xiv) The CARES Act excludes from the definition of payroll costs any employee compensation in excess of an annual salary of $100,000. Does that exclusion apply to all employee benefits of monetary value?

No. In the April 6 Guidance, the Treasury Department clarified that the exclusion of compensation in excess of $100,000 annually applies only to cash compensation, not to non-cash benefits, including:

- employer contributions to defined-benefit or defined-contribution retirement plans;
- payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and
- payment of state and local taxes assessed on compensation of employees.

(xv) Can a partnership include compensation of active partners in payroll costs? Can a partner in a partnership file for its own PPP loan?

From the April 14 Interim Rule:

Yes. The self-employment income of general active partners may be reported as a payroll cost, up to $100,000 annualized, on a PPP loan application filed by or on behalf of a partnership. A partner in a partnership, however, may not submit a separate PPP loan application for himself/herself as a self-employed individual.

Partnerships are eligible for PPP loans under the CARES Act, and the SBA has determined, in consultation with the Treasury Department, that limiting a partnership and its partners (and an LLC filing taxes as a partnership) to one PPP loan is necessary to help ensure that as many eligible borrowers as possible obtain PPP loans before the statutory deadline of June 30, 2020. This limitation will allow lenders to more quickly process applications and lower the burdens of applying for partnerships/partners. The SBA has further determined that permitting partners to apply as self-employed individuals would create unnecessary confusion regarding which entity, the partner or the partnership, applies for partner and LLC member income, and would generate loan proceeds use coordination and allocation issues. Rent, mortgage interest, utilities, and other debt service are generally incurred at the partnership level, not partner level, so it is most natural to provide the funds for these expenses to the partnership, not individual partners.

(xvi) How should a borrower account for federal taxes when determining its payroll costs for purposes of the maximum loan amount, allowable uses of a PPP loan, and the amount of a loan that may be forgiven?

From the April 6 Guidance:

Under the Act, payroll costs are calculated on a gross basis without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld, such as the employee's and employer's share of Federal Insurance Contributions Act (FICA) and income taxes required to be withheld from employees. As a result, payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer's share of payroll tax. For example, an employee who earned $4,000 per month in gross wages, from which $500 in federal taxes was withheld, would count as $4,000 in payroll costs. The employee would receive $3,500, and $500 would be paid to the federal government. However, the employer-side federal payroll taxes imposed on the $4,000 in wages are excluded from payroll costs under the statute.[*]

[*] The definition of "payroll costs" in the CARES Act, 15 U.S.C. 636(a)(36)(A)(viii), excludes "taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period," defined as February 15, 2020, to June 30, 2020. As described above, the SBA interprets this statutory exclusion to mean that payroll costs are calculated on a gross basis, without subtracting federal taxes that are imposed on the employee or withheld from employee wages. Unlike employer-side payroll taxes, such employee-side taxes are ordinarily expressed as a reduction in employee take-home pay; their exclusion from the definition of payroll costs means payroll costs should not be reduced based on taxes imposed on the employee or withheld from employee wages. This interpretation is consistent with the text of the statute and advances the legislative purpose of ensuring workers remain paid and employed. Further, because the reference period for determining a borrower's maximum loan amount will largely or entirely precede the period from February 15, 2020, to June 30, 2020, and the period during which borrowers will be subject to the restrictions on allowable uses of the loans may extend beyond that period, for purposes of the determination of allowable uses of

(xvii) Besides payroll costs, what are other permitted uses of PPP loan proceeds?

The CARES Act provides that the following are permitted uses of PPP loan proceeds:

- uses already allowed under the SBA's Business Loan Program, such as working capital expenses;
- costs related to the continuation of group healthcare benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- employee salaries, commissions, or similar compensations;
- payments of interest on any mortgage obligations (but not any prepayment of or payment of principal on a mortgage obligation);
- rent and utilities; and
- payments of interest on other debt obligations incurred before February 15, 2020.

The Interim Rule further specifies that at least 75 percent of the PPP loan proceeds must be used for payroll costs.

Note that PPP loans do not cover qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Public Law 116–127).

(xviii) Will terms of the PPP loans vary from borrower to borrower or lender to lender?

No. Per guidance published on the Treasury Department website on March 31, 2020, ***all loan terms will be the same for everyone.***

(xix) What is the term of a PPP loan?

The loan term is **2 years**.

(xx) What interest rate will apply?

The interest rate on PPP loans will be **1.0% per annum**.

(xxi) Will there be any prepayment penalties on PPP loans?

No, prepayment penalties will not apply to PPP loans.

(xxii) What about other loan fees?

Neither the SBA nor any lender will impose **any loan fees**.

loans and the amount of loan forgiveness, this statutory exclusion will apply with respect to such taxes imposed or withheld at any time, not only during such period.

(xxiii) Will interest payments on PPP loans be deferred for any period? What about principal and fee payments?

Yes. **100% of principal, interest and fee payments will be deferred for a period of six months**, starting at the origination date of the loan.

(xxiv) Are PPP loans recourse loans?

The PPP loans are **nonrecourse** against any individual shareholder, member or partner of an eligible borrower, except to the extent that the shareholder, member or partner uses loan proceeds for purposes not authorized under the loan program.

(xxv) Are PPP loans eligible for loan forgiveness?

Businesses receiving a loan through the Paycheck Protection Program are eligible for loan forgiveness, **up to the principal amount of the loan**. Note, however, that the borrower is entitled to loan forgiveness only for costs in the below-listed categories incurred during the 8 week period beginning on the date the loan is disbursed[3] (the sum of the eligible costs, Base Forgiveness Amount):

- "payroll costs" (as defined above);
- payments of interest on mortgage obligations in existence before February 15, 2020 and incurred in the ordinary course (but not any prepayment of or payment of principal on a mortgage obligation);
- payments of rent under a lease agreement in effect prior to February 15, 2020; and
- utility payments, including electricity, gas, water, transportation, telephone or internet, for which service began prior to February 15, 2020.

A borrower with tipped employees, as described in the Fair Labor Standards Act of 1938, may receive forgiveness for additional wages paid to those employees.

Additionally, as noted above, the Interim Rule (published on April 2, 2020) specifies that at least 75 percent of the PPP loan proceeds shall be used for payroll costs. The PPP loan application also requires a certification from the borrower that the borrower understands that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.

[3] Note that the CARES Act references the "origination" date rather than the "disbursement" date in its definition of "covered period" applicable to the PPP loan forgiveness provisions. The April 6 Guidance, as updated by the Treasury Department on April 8, 2020, however provides that the 8-week period used for calculating a borrower's payroll costs begins on the date the lender makes the first disbursement of the PPP loan to the borrower, and notes that the lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval. On this basis, we have changed references to "origination" date to "disbursement" date when discussing 8-week periods applicable to loan forgiveness.

The amount of loan forgiveness is **subject to reduction if there is a reduction in the business's number of employees or wages during the eight-week period beginning on the date of disbursement of the applicable PPP loan.** It is important to note that reduction in number of employees or wages between February 15, 2020 and April 26, 2020 will not trigger a reduction in loan forgiveness if the business eliminates the reduction by June 30, 2020.

As a practical matter, businesses should gather documentation as to average monthly payroll costs and, with that, calculate their maximum loan amount (as described above). Businesses should also determine how much of the maximum they will spend on permitted uses (including making payroll and paying rent) within eight weeks of receiving the loan (i.e., the amount that can be forgiven). If a business will use it all, they should consider requesting the maximum amount. A business that borrows more than it ends up spending on permitted uses in eight weeks can, without prepayment penalties, repay the outstanding/unforgiven balance.

Additional guidance with regard to loan forgiveness from the Treasury Department/SBA is forthcoming.

(xxvi) How are the reduced forgiveness amounts calculated?

Employee Count Reduction Amount:

The CARES Act reduces forgiveness of a loan proportionally if an employer reduces its number of employees. Specifically, the Base Forgiveness Amount (as described in the preceding question) will be reduced to equal the following:

The amount obtained by multiplying (A) the Base Forgiveness Amount by (B) the quotient obtained by dividing:

(1) the average number of full-time equivalent employees per month employed by the borrower during the eight-week period beginning on the date of the loan disbursement, by

(2) either (at the election of the borrower, other than seasonal employers, which must choose option x)

(x) the average number of full-time equivalent employees per month employed by the borrower during the period beginning on February 15, 2019 and ending on June 30, 2019; or

(y) the average number of full-time equivalent employees per month employed by the borrower during the period beginning on January 1, 2020 and ending on February 29, 2020.

The average number of full-time equivalent employees for the above calculation is determined by calculating the average number of full-time equivalent employees for each pay period falling within a month. Though the CARES Act does not provide a specific definition of "full-time equivalent employee" for purposes of the above calculation, an employer's number of

full-time equivalent employees for applicable periods is to be verified by, among other documentation that may be required by the SBA, the employer's payroll tax filings with the IRS and state income, payroll, and unemployment insurance filings. We will be closely monitoring any additional SBA or Treasury Department guidance on this point and will update accordingly.

Wage and Salary Reduction Amount

The CARES Act further reduces the Base Forgiveness Amount by the amount of any reduction in the total salary or wages of any employee of the business during the eight-week period beginning on the disbursement date of the loan that is in excess of 25% of such employee's total salary or wages during the most recent full quarter during which the employee was employed before the eight-week period beginning on the disbursement date of the loan.

For purposes of this calculation, a business is not required to count any employees who received, during any single period during 2019, wages or salary at an annualized rate of pay of more than $100,000.

The SBA and the Secretary of the Treasury are permitted under the CARES Act to prescribe regulations granting *de minimis* exemptions from the requirements for limiting the loan forgiveness with respect to covered loans.

(xxvii) Will borrowers recognize any cancellation of indebtedness (COD) income for tax purposes on forgiven amounts of a PPP loan?

No. Loan forgiveness will not be included in a business's taxable income.

(xxviii) What terms apply to any amounts not forgiven under the PPP loan forgiveness provisions of the CARES Act?

Any portion of the loan that is not forgiven will continue to accrue interest at 0.5% per annum. As noted previously, the loan term is 2 years, and all payments of principal and interest will be deferred for 6 months after the origination date of the loan. The SBA will continue to guarantee any unforgiven amounts during the term of the loan.

(xxix) How does a borrower obtain loan forgiveness?

Borrowers must apply for loan forgiveness through the applicable lender. In the loan forgiveness application, the borrower will be required to provide (i) evidence of the number of full-time employees on payroll and pay rates, including IRS payroll tax filings and State income, payroll and unemployment insurance filings and (ii) documentation verifying payments on covered mortgage obligations, lease obligations, and utilities. Additionally, an authorized representative of the loan forgiveness applicant must certify that the documentation provided is true and correct and that the amount that is being forgiven was used to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments. Lenders must make a decision on the forgiveness application within 60 days of receipt.

Within 90 days after the lender has determined the loan forgiveness amount, the SBA will reimburse the lender directly for the principal amount of any forgiven debt, plus interest accrued through the date of repayment.

(xxx) Does the CARES Act provide lenders any safe harbor for purposes of determining loan forgiveness?

If a lender has received the documentation required from a borrower attesting that the borrower has accurately verified the payments for payroll costs, payments on covered mortgage obligations, payments on covered lease obligations, or covered utility payments during the covered period: (i) an enforcement action may not be taken against the lender under section 47(e) of the Small Business Act relating to loan forgiveness for the payments for payroll costs, payments on covered mortgage obligations, payments on covered lease obligations, or covered utility payments, and (ii) the lender will not be subject to any penalties by SBA relating to loan forgiveness for the payments.

(xxxi) Will the borrower have to provide a personal guarantee or collateral to obtain a PPP loan?

No. SBA personal guarantee and collateral requirements are waived for PPP loans.

(xxxii) Are businesses eligible for a PPP loan even if they have alternate sources of credit?

Yes, for purposes of PPP loans, the CARES Act suspends the SBA's requirement during the covered period that a small business concern be unable to obtain credit elsewhere, as defined in section 3(h) of the Small Business Act.

(xxxiii) Will the business owners be required to inject funds from personal liquid assets to reduce the SBA loan amount?

No. Section 1102(e) of the CARES Act permanently rescinded the SBA's February 10, 2020 Interim Rule that added a requirement that a 20% owner of a 7(a) borrower inject liquid assets into the borrower to reduce the size of the loan amount when that owner's liquid assets exceed certain specified amounts.

(xxxiv) Is it possible to obtain more than one PPP loan?

No, borrowers will only be permitted to obtain one PPP loan. Each loan will be registered under a Taxpayer Identification Number at the SBA to prevent multiple loans to the same entity. Additionally, the PPP loan application requires applicants to certify that during the period beginning on February 15, 2020 and ending on December 31, 2020, the borrower has not and will not receive another PPP loan.

(xxxv) Are any particular groups to be prioritized for PPP loans?

The SBA is expected to issue guidance to lenders and agents to ensure that the processing and disbursement of covered loans prioritizes small business concerns and entities in underserved and rural markets, including veterans and member of the military community, small business concerns owned and controlled by socially and

economically disadvantaged individuals, women and businesses in operation for less than 2 years.

(xxxvi) I am a lender. What percentage of the loan will be eligible for SBA guarantee?

100% of the loans will be guaranteed by the SBA.

(xxxvii) What other lender fees will be reimbursed by the SBA?

The SBA will also reimburse lenders for origination or underwriting fees in an amount of (i) 5% for loans of not more than $350,000, (ii) 3% for loans of more than $350,000 and less than $2 million and (iii) 1% for loans equal to or greater than $2 million.

(xxxviii) Will PPP loans be eligible to trade on the secondary market?

Yes, and the SBA will not collect any fees on any guarantee sold into the secondary market. Additionally, during the covered period, so that the impacted borrower may receive a deferral of principal, interest and fees for the 6 month-to-one-year deferral period provided for under the CARES Act, the SBA will exercise its authority to purchase any covered loan sold on the secondary market if the investor declines to approve a deferral requested by the lender.

(xxxix) Who is eligible to lend?

All existing SBA-certified lenders will be given delegated authority to speedily process PPP loans. All federally insured depository institutions, federally insured credit unions, and Farm Credit System institutions also are eligible to participate in this program.

A broad set of additional lenders can begin making loans as soon as they are approved and enrolled in the program. New lenders will need to submit their application to DelegatedAuthority@sba.gov to apply with the SBA.

(xl) May lenders accept signatures from a single individual who is authorized to sign on behalf of the borrower?

From the April 6 Guidance:

Yes. However, the borrower should bear in mind that, as the Borrower Application Form indicates, only an authorized representative of the business seeking a loan may sign on behalf of the business. An individual's signature as an "Authorized Representative of Applicant" is a representation to the lender and to the U.S. government that the signer is authorized to make the certifications, including with respect to the applicant and each owner of 20% or more of the applicant's equity, contained in the Borrower Application Form. Lenders may rely on that representation and accept a single individual's signature on that basis.

(xli) Are PPP loans for existing customers considered new accounts for FinCEN Rule CDD purposes? Are lenders required to collect, certify, or verify beneficial ownership information in accordance with the rule requirements for existing customers?

From the April 6 Guidance:

If the PPP loan is being made to an existing customer and the necessary information was previously verified, the lender does not need to re-verify the information.

Furthermore, if federally insured depository institutions and federally insured credit unions eligible to participate in the PPP program have not yet collected beneficial ownership information on existing customers, such institutions do not need to collect and verify beneficial ownership information for those customers applying for new PPP loans, unless otherwise indicated by the lender's risk-based approach to BSA compliance.

(xlii) Are eligible businesses owned by directors or shareholders of a PPP lender permitted to apply for a PPP loan through the lender with which they are associated?

An otherwise eligible business owned (in whole or part) by an outside director or holder of a less than 30 percent equity interest in a PPP lender is not prohibited from obtaining a PPP loan from the PPP lender on whose board the director serves or in which the equity owner holds an interest, provided that the eligible business owned by the director or equity holder follows the same process as any similarly situated customer or account holder of the lender. Favoritism by the lender in processing time or prioritization of the director's or equity holder's PPP application is prohibited. Lenders should comply with all other applicable state and federal regulations concerning loans to associates of the lender. Lenders should also consult their own internal policies concerning lending to individuals or entities associated with the lender.

The foregoing paragraph does not apply to a director or owner who is also an officer or key employee of the PPP lender. Officers and key employees of a PPP lender may obtain a PPP loan from a different lender, but not from the PPP lender with which they are associated.

(xliii) Can lenders use scanned copies of documents or E-signatures or E-consents permitted by the E-sign Act?

From the April 6 Guidance, as updated by the Treasury Department on April 15, 2020:

Yes. All PPP lenders may accept scanned copies of signed loan applications and documents containing the information and certifications required by SBA Form 2483 and the promissory note used for the PPP loan. Additionally, lenders may also accept any form of E-consent or E-signature that complies with the requirements of the Electronic Signatures in Global and National Commerce Act (P.L. 106-229).

If electronic signatures are not feasible, when obtaining a wet ink signature without in-person contact, lenders should take appropriate steps to ensure the proper party has executed the document.

This guidance does not supersede signature requirements imposed by other applicable law, including by the lender's primary federal regulator.

(xliv) Are businesses receiving a PPP loan eligible for the Employee Retention Credit for Employers Subject to Closure or Experiencing Economic Hardship or the deferral of employer payroll taxes provided for under the CARES Act?

Title II of the CARES Act provides eligible employers an employee retention credit which is a refundable payroll tax credit for 50% of qualified wages (qualified wages are limited to $10,000 per employee per all quarters). Qualified wages also include health plan expenses. **The credit is not available to employers receiving a PPP loan.**

The CARES Act also allows employers and self-employed individuals to defer the employer share of Social Security tax (6.2%). The deferred tax is payable in equal parts over the following two years. **Deferral is not available to employers obtaining forgiveness of indebtedness under PPP loans.**

(xlv) If a business or lender, as applicable, filed or approved a loan application based on the version of the PPP Interim Final Rule published on April 2, 2020, does it need to take any action based on the April 6 Guidance?

From the April 6 Guidance:

No. Borrowers and lenders may rely on the laws, rules, and guidance available at the time of the relevant application. However, borrowers whose previously submitted loan applications have not yet been processed may revise their applications based on clarifications reflected in the April 6 Guidance.

(b) Economic Injury Disaster Loans ("EIDLs" and Grants)

(i) What is the Economic Injury Disaster Loan Program?

The CARES Act expands the SBA's Section 7(b) loan program and will provide EIDLs to eligible borrowers in declared disaster areas that have suffered substantial economic damage as a result of COVID-19. The CARES Act directly appropriates $10 billion towards EIDLs related to COVID-19.

(ii) What businesses are eligible for an EIDL under the CARES Act?

Generally, the following businesses are eligible for EIDLs and grants under the CARES Act, assuming other eligibility criteria are met:

- businesses with not more than 500 employees;

- (i) cooperatives, (ii) Employee Stock Ownership Plans (ESOPs) as defined in section 3 of the Small Business Act (15 U.S.C. 632)) and (iii) tribal small businesses, in each case with not more than 500 employees;
- any individual who operates under a sole proprietorship or as an independent contractor, with or without employees;
- private nonprofit organizations; and
- small agricultural cooperatives.

Businesses that otherwise meet the existing SBA definition of "small business concern" may also apply for EIDLs.

To be eligible for an EIDL under the CARES Act provisions, businesses must have been in business on January 31, 2020 (the CARES Act otherwise waives the SBA requirement that the business have been in operation for the one-year period prior to the disaster).

(iii) Are affiliation rules waived for EIDLs?

No, there is no waiver of affiliation rules for EIDLs.

(iv) What are the key terms of EIDLs?

Borrowers can borrow an amount up to $2 million. EIDLs have terms of up to 30 years, with maximum interest rates of 3.75% per annum for for-profit companies and 2.75% per annum for non-profits. Principal and interest may be deferred for up to four years.

(v) Where can businesses apply for EIDLs?

To apply for an EIDL online, visit https://disasterloan.sba.gov/ela. EIDLs are obtained directly from the SBA.

(vi) Are personal guarantees required for EIDLs?

EIDLs do not require personal guarantees for advances of loans of less than $200,000.

(vii) Are applicants required to demonstrate that alternative sources of credit are not available?

No, applicants are not required to demonstrate that they cannot obtain credit elsewhere. Additionally, EIDLs during the covered period may be approved based solely on the applicant's credit score (no tax return is required) or the SBA may approve the loan using alternative methods.

(viii) Are EIDLs eligible for loan forgiveness?

No. EIDLs are **not eligible for loan forgiveness** and must be repaid in accordance with the terms of the loan.

(ix) How does a business obtain an "emergency grant" under the EIDL program? Are emergency grants eligible for forgiveness?

The CARES Act provides for up to $10,000 of an EIDL, at the discretion of the SBA, to be advanced within three days of receipt of an application as an "emergency grant". No portion of any emergency grant is required to be repaid, even if the EIDL application is ultimately denied.

To obtain an emergency grant, a business must first apply for an EIDL and then request the advance. Applicants must provide a self-certification form under penalty of perjury that they are eligible.

(x) What are permitted uses of amounts advanced under an EIDL?

EIDLs are intended to pay for expenses that could have been met had the disaster not occurred. Permitted uses of proceeds under the CARES Act expressly include providing paid sick leave to employees unable to work due to the direct effect of COVID-19, maintaining payroll to retain employees during business disruptions or substantial slowdowns, meeting increased costs to obtain materials unavailable from the applicant's original source due to interrupted supply chains, making rent or mortgage payments and repaying obligations that cannot be met due to revenue losses.

(xi) If a business has applied for, or received an EIDL related to COVID- 19 before the PPP became available, will the business be able to refinance into a PPP loan?

Yes. If a business received an EIDL between January 31, 2020 and April 3, 2020, the business will be eligible to refinance the EIDL into the PPP.

(xii) Can a business obtain both a PPP and an EIDL?

Yes, but if the business's EIDL was used for payroll costs, the PPP loan must be used to refinance the EIDL.

As a general matter, the PPP loan and the EIDL cannot be used for the same purposes. Furthermore, applicants for PPP loans must certify that any EIDL received by the applicant between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other permitted purposes of the PPP loan. Any advance amount received under the emergency grant program will be subtracted from the PPP loan amount eligible to be forgiven.

(c) Relief for Holders of Other SBA Loans

(i) Are businesses that have other SBA loans eligible for relief?

Yes. Beginning no later than 30 days after the date on which the first payment is due, the SBA will pay all principal, interest, and fees on existing SBA loans for 6 months pursuant to 7(a), Community Advantage, 504, and Microloan programs. For loans currently in deferment, the SBA will begin making payments after the deferment

period. Borrowers who obtain new loans under those programs within six months after the enactment of the CARES Act are also entitled to have the SBA make a full 6 months of loan payments.

5. CARES Act - Workforce Implications in Unemployment and Tax Credits

The CARES Act provides multiple provisions increasing/enhancing the unemployment compensation benefits available to persons affected by the pandemic. The legislation also make particular tax credits or refunds available to employers for employee retention, as well provides relief for Coronavirus-related paid leave (discussed in the following section). We also cover implications for employee benefits and executive compensation in those respective later sections of this guide.

(a) What unemployment programs are available?

The unemployment provisions of the Act are dense and intricate. But, in essence, there are four available baskets of aid available to workers:

(i) State Unemployment Compensation

- *Who is eligible?* Employees who are fired or experience a reduction in hours, subject to state-specific limitations.
- *What do they get?* This is determined by state law. If the employee receives at least $1 of state unemployment compensation, the employee also receives a $600 federal supplement through July 25 or 26, 2020, depending on whether unemployment compensation weeks are calculated on a Saturday or Sunday.
- *How long do they get this benefit?* The duration depends on state law. The maximum is 26 weeks, and some states with lower unemployment compensation periods are extending their benefits in response to the COVID-19 pandemic.
- *Does the availability of this program ever expire?* No.
- *Is this payment paid by the state or federal government?* States make these payments, including the $600 federal supplement. The federal government reimburses the state.

(ii) Pandemic Emergency Unemployment Compensation

- *Who is eligible?* Employees are eligible if they: (a) used all normal state unemployment compensation benefits, (b) can't get normal state unemployment compensation benefits, (c) are not getting Canadian unemployment compensation benefits, (d) are able, available, and actively seeking work, and € have not performed any work that week.
- *What do they get?* Determined by state law. If the employee receives Pandemic Emergency Unemployment Compensation for a week before July 25 or 26, 2020, depending on whether unemployment compensation weeks are calculated on a Saturday or Sunday, the employee also receives a $600 federal supplement. This benefit may be available only for weeks of "complete unemployment."

- *How long do they get this benefit?* This benefit is available for up to 13 weeks, but the $600 federal supplement is subject to the same end-of-July time limitation. Any benefit after that is the benefit available under state law for a week of total unemployment.
- *Does the availability of this program ever expire?* Yes, this program is set to expire December 31, 2020.
- *Is this payment paid by the state or federal government?* States make these payments, including the $600 federal supplement. The federal government reimburses the state. CARES directs states to create "Pandemic Unemployment Compensation Accounts" funded with benefits for each individual.

(iii) State Extended Benefits

- *Who is eligible?* Employees who have exhausted normal unemployment benefits, but only if the state has "triggered on" extended benefits under the Federal-State Extended Unemployment Compensation Act of 1970.
- *What do they get?* Determined by state law. The $600 federal supplement is not available for extended benefits.
- *How long do they get this benefit?* This benefit is available for between 13-20 weeks, depending on state law and the state's unemployment rate.
- *Does the availability of this program ever expire?* Yes, states must "trigger" it, and states can "trigger off" extended benefits as they see fit.
- *Is this payment paid by the state or federal government?* States make these payments.

(iv) Pandemic Unemployment Assistance

- *Who is eligible?* Pandemic Unemployment Assistance is available to "covered individuals." A "covered individual is someone who (a) must either (i) be ineligible for benefits, (ii) have exhausted all benefits, (iii) be self-employed, seeking work, or lack a sufficient work history, or (iv) otherwise not quality for regular or extended benefits; (b) must provide a self-certification that the individual is otherwise available to work but is unemployed, partially unemployed, or unavailable to work because of a number of COVID-related issues (available in DOL regulations); (c) must be unable to telework with pay; and (d) must not be receiving any paid sick leave or other paid leave.
- *What do they get?* The individual receives the greater of the weekly benefit amount available under state law and the weekly benefit amount available as Disaster Unemployment Assistance (calculated under a federal regulation). The $600 federal supplement is also available for Pandemic Unemployment Assistance for weeks before July 25 or 26, 2020.

- *How long do they get this benefit?* This benefit is available for weeks between January 27, 2020 and December 31, 2020. The $600 federal supplement is subject to the same limitation as the other provisions. An individual is capped at 39 weeks of Pandemic Unemployment Assistance, less any weeks of benefits used in other programs.
- *Does the availability of this program ever expire?* Yes, this program is set to expire December 31, 2020.
- *Is this payment paid by the state or federal government?* Technically, the federal government make these payments, but the Secretary of Labor is directed to provide these payments through states if the state has an adequate program to disburse them. It is difficult to imagine that the federal government would create a whole separate payment system just for this payment.

(b) Do the unemployment programs have to be used in a particular order?

Yes, the DOL guidance clearly contemplates that the programs should be used in the order presented above.

For individuals who are not traditionally eligible for unemployment benefits, such as independent contractors and sole proprietors, the individual either qualifies for Pandemic Unemployment Assistance or doesn't receive any benefit.

(c) Do people in workshare programs get the extra $600?

Likely yes. The DOL has determined that the federal $600 supplement is available for participants in a short-time compensation program. Despite potential congressional disagreement, this stance most complies with the Act's language.

(d) Will employers be charged for these benefit expansions?

States cannot charge employers for payments made using funds received from the federal government. State law will determine whether employers may be charged for unemployment benefits that are normally available absent CARES, and many unemployment claims may fall within exceptions under state law. For example, many state laws do not charge employers for benefits associated with claims because of a state declaration of disaster recognized under the Stafford Act. The federal government has recognized state declarations of disaster in more than two dozen states, so the impact of COVID-19 unemployment claims may have a diminished impact on unemployment tax accounts.

(e) Are these expanded benefits subject to special treatment?

Yes, according to the DOL, the expanded unemployment benefits should be treated like payments of normal unemployment compensation under state law and be given the same protections from waiver, release, assignment, execution, attachment, and garnishment.

(f) Are these expanded unemployment benefits taxable?

Yes, they are taxed and should be included on Form 1099Gs.

(g) What are the tax credits available for employers who retain their employees?

The Act creates an employee retention tax credit for "eligible employers" that close or suffer losses due to the coronavirus pandemic. Eligible employers are allowed a credit against employment taxes equal to 50% of "qualified wages" (up to $10,000 in wages and qualified healthcare expenses, as discussed later) for each employee during the period March 13 through December 31, 2020. In other words, employers are eligible for a credit of 50% of the qualified wages paid to workers who have become idle due to the pandemic, up to a total tax credit of $5,000 per employee. The tax credit is taken as a credit against employer's portion of social security taxes with any excess refunded to the employer. Though not pertinent to large businesses, the credit is not applicable if a company also takes advantage of a small business interruption loan.

(h) What makes an employer eligible for the tax credits?

An employer is eligible to participate in this program if it: (i) carried on a trade or business during calendar year 2020, and (ii) with respect to any calendar quarter for which, (a) its operations and/or business were fully or partially suspended due to a governmental COVID-19-related order, or (b) the calendar quarter is within the period beginning with the calendar quarter (after December 31, 2019) during which gross receipts for that quarter are less than 50% of the gross receipts for the same calendar quarter of the prior year and ending with the first calendar quarter (after December 31, 2019) after the first calendar quarter during which the business's gross receipts are greater than 80% of gross receipts for the same calendar quarter in the prior year.

(i) What are "qualified wages?"

They are defined differently for large and small employers. For employers with more than 100 full-time employees, on average, in 2019, qualified wages means wages paid to an employee who is not performing services for the employer (e.g., a furloughed employee who remains on the employer's payroll). For employers with 100 or fewer full-time employees on average in 2019, qualified wages include all wages paid by the employer regardless of whether the employee is performing services for such wages.

The IRS has issued FAQs that provide some clarity regarding these provisions, in pertinent part here: https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act. Even with this further guidance, the provisions' requirements, including those pertinent to the definition of "qualified wages" remain unclear in many respects. Our best thinking continues to be that qualified wages would be any wages paid even though an employee is not performing the work that would normally earn the wages. For example, if an employer reduces an employee's hours by 40%, but continues to pay the employee's full compensation – or some reduced amount less than 40% – that "delta" of pay would be qualified wages. Similarly, if an employee were completely furloughed and yet paid some amount of wages then those wages would qualify.

6. Families First Coronavirus Response ACT (FFCRA)

The below consists of Seyfarth analysis as well as guidance from the Department of Labor. They are complemented by the complete DOL FFCRA FAQs available at the DOL website (where additional, more specific topics are also addressed): https://www.dol.gov/agencies/whd/pandemic/ffcra-questions. The DOL FAQs are updated regularly. Please review the corresponding FAQs on the DOL website to confirm you have the most updated information.

(a) When does the law go into effect? (See also DOL FAQ #1)

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

(b) As an employer, how do I know if my business is under the 500-employee threshold and therefore must provide paid sick leave or expanded family and medical leave? (See also DOL FAQ #2)

Private sector employers are only required to comply with the Acts if they have fewer than 500 employees.

You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. This count includes employees on leave; temporary employees who are jointly employed and maintained on another employer's or temporary agency's payroll; and, day laborers supplied by a temporary agency. Independent contractors are not considered employees for purposes of the 500-employee threshold.

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

In general, two or more entities are separate employers unless they meet the integrated employer test under the Family and Medical Leave Act of 1993 (FMLA). **If two entities are an integrated employer under the FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of paid sick leave under the Emergency Paid Sick Leave Act and expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act.**

(c) Which employees are eligible for paid sick leave and expanded family and medical leave? (See also DOL FAQ #38)

While every employee is eligible for paid sick leave regardless of length of employment, an employee must have been employed for 30 calendar days in order to qualify for expanded family and medical leave.

Furloughed and laid off employees are not entitled to paid sick leave and expanded family and medical leave.

Additionally, an employer may exclude any employee who is a "health care provider" or an "emergency responder" from the paid leave requirements (see below and definitions of these terms in FAQ ##56-57). An employer may not, however, prevent these classes of employees from taking unpaid leave under the FMLA.

Paid sick leave is only available to employees who qualify under one of the reasons set forth below. An employee may not take paid sick leave under the FFCRA if they unilaterally decide to self-quarantine for an illness without medical advice, even if they have COVID-19 symptoms.

(d) How do you determine whether an employee has "been employed for at least 30 calendar days by the employer" for purposes of expanded family and medical leave? (See also DOL FAQ #14)

An employee is considered to have been employed for at least 30 calendar days if the employee was on its payroll for the 30 calendar days immediately prior to the day the employee's leave would begin. For example, if an employee wants to take leave on April 1, 2020, the employee would need to have been on the employer's payroll as of March 2, 2020.

If an employee has been working for a company as a temporary employee, and the company subsequently hires the employee on a full-time basis, they may count any days they previously worked as a temporary employee toward this 30-day eligibility period.

(e) How much must an employee be paid while taking paid sick leave or expanded family and medical leave under the FFCRA? (See also DOL FAQ #7)

It depends on the employee's normal schedule as well as the reason the employee is taking leave.

If the employee is taking **paid sick leave** (which is capped at 80 hours for a full-time employee) because they are unable to work or telework due to a need for leave because they (1) are subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) have been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (3) are experiencing symptoms of COVID-19 and are seeking medical diagnosis, they shall receive for each applicable hour the greater of:

- their regular rate of pay,

- the federal minimum wage in effect under the FLSA, or
- the applicable State or local minimum wage.

In these circumstances, they are entitled to a maximum of $511 per day, or $5,110 total over the entire paid sick leave period.

If the employee is taking **paid sick leave** because they are: (4) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (5) caring for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (6) experiencing any other substantially-similar condition that may arise, as specified by the Secretary of Health and Human Services, they are entitled to compensation at 2/3 of the greater of the amounts above.

Under these circumstances, they would be subject to a maximum of $200 per day, or $2,000 over the entire two-week period (10 workdays/80 hours).

Note: The phrase "caring for an individual" in reason (4) is broader than just an employee's immediate family member and can also include a roommate or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if that person self-quarantined or was quarantined (i.e. the individual depends on the employee to care for him/her). (See 29 CFR 826.20(a)(5).) That said, the care must be for a person whom the employee has some relationship with, and the person must expect or depend on the employee's care during their self-quarantine.

If the employee is taking **expanded family and medical leave**, they may take paid sick leave for the first 10 workdays (2 weeks) of that otherwise unpaid leave period, or they may substitute any accrued vacation leave, personal leave, or medical or sick leave they have under their employer's policy. For the following ten weeks, they shall be paid for their leave at an amount no less than 2/3 of their regular rate of pay for the hours they would be normally scheduled to work. The regular rate of pay used to calculate this amount must be at or above the federal minimum wage, or the applicable state or local minimum wage. However, they shall not receive more than $200 per day or $12,000 for the twelve weeks that include both paid sick leave and expanded family and medical leave when they are on leave to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

Note that, as regards caring for a child whose school or place of care is closed, only one parent is needed; only one parent should be taking childcare leave at a time. A school is still considered closed even if online instruction is taking place or assignments are still due.

At present, there is no "substantially similar condition" to COVID-19, though this may evolve pending guidance from HHS.

(f) How do you count hours worked by a part-time employee for purposes of paid sick leave or expanded family and medical leave? (See also DOL FAQ #5)

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

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

(g) When calculating pay due to employees, must overtime hours be included? (See also DOL FAQ #6)

Yes. All hours normally scheduled to be worked during the leave period should be compensated. However, for non-exempt employees, all hours are paid at the regular rate, including overtime hours. Overtime hours counted toward paid leave are not paid at 1.5x the regular rate because the hours are not worked.

(h) What is the regular rate of pay for purposes of the FFCRA? (See also DOL FAQ #8)

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

If the employee is paid with commissions, tips, or piece rates, these amounts will be incorporated into the above calculation to the same extent they are included in the calculation of the regular rate under the FLSA.

You can also compute this amount for each employee by adding all compensation that is part of the regular rate over the above period and divide that sum by all hours actually worked in the same period.

(i) May an employee take the full amount of paid sick leave for self-quarantine and then another amount of paid sick leave for another provided reason?

No. An employee may take up to two weeks—or ten days—(80 hours for a full-time employee, or for a part-time employee, the number of hours equal to the average

number of hours that the employee works over a typical two-week period) of paid sick leave for any combination of qualifying reasons. However, the total number of hours for which the employee can receive paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.

(j) How does childcare-related leave interact with paid sick leave and expanded family and medical leave? (See also DOL FAQ #10)

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

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

(k) Can an employer deny paid sick leave if an employee was given paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect (on April 1, 2020)? (See also DOL FAQ #11)

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

(l) Is all leave under the FMLA now paid leave? (See also DOL FAQ #12)

No. The only type of family and medical leave that is paid leave is expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act taken because the employee must care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, and this leave is only paid when such leave exceeds 10 workdays (2 weeks) (*i.e.* it is paid for weeks 3 through 12).

Per DOL guidance, an employee already out on a voluntary leave of absence, such as FMLA leave, may opt to end that leave and immediately go back out on FFCRA paid sick leave and/or paid family leave if there is a qualifying reason to do so.

(m) Are the paid sick leave and expanded family and medical leave requirements retroactive? (See also DOL FAQ #13)

No.

(n) What records does an employer need to keep when their employee takes paid sick leave or expanded family and medical leave, for purposes of tax credits? (See also DOL FAQ #15, 16, and 29 CFR 826.100)

An employee is required to provide the employer documentation containing certain information prior to taking paid sick leave or expanded paid family medical leave (e.g. name, date(s), qualifying reason for leave, and an oral or written statement that the employee is unable to work because of the qualified reason for leave), as well as additional information depending on the reasons for leave. See 29 CFR 826.100 for additional specifics (e.g. name of the government entity, health care provider, school, etc.).

Additionally, the employer may also request an employee to provide any additional material required by the IRS for the employer to support a request for the corresponding tax credits for reimbursement of the costs of that leave. If an employer intends to claim a tax credit under the FFCRA for its payment of the sick leave or expanded family and medical leave wages, it should retain appropriate documentation in its records. See IRS applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. (See IRS, *COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs*, https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs; IRS Form 7200, https://www.irs.gov/forms-pubs/about-form-7200.) Note that for sick leave reason #5 and the corresponding reason for enhanced family medical leave (loss of childcare, etc.), the required documentation requires the employee to represent that no other suitable person will be caring for the son or daughter during the period for which the employee is requesting paid leave. An employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

(o) Is paid sick leave or expanded family and medical leave available to employees who are furloughed, laid off, or whose worksites there are closed, whether before or after April 1? (See also DOL FAQ #23, 24, 26, 27)

No. If, prior to the FFCRA's effective date, an employer lays off, furloughs, or sends an employee home and stops paying the employee because it does not have work for them to do or any other legitimate business reasons, the employee will not be eligible for paid sick leave or expanded family and medical leave but may be eligible for unemployment insurance benefits. This is also true whether an employer closes their worksite for lack of business or because it is required to close pursuant to a Federal, State, or local directive.

Such employees may be eligible for unemployment insurance benefits.

(p) What happens if an employer closes their worksite while an employee is on paid leave? (See also DOL FAQ #25)

The employer must pay for any leave used before the employer closed. As of the date an employer closes their worksite, employees are no longer entitled to paid sick leave or expanded family and medical leave, but they may be eligible for unemployment insurance benefits.

(q) May an employee supplement the pay mandated under the FFCRA upward with paid leave that an employee may have under an existing employer-provided paid leave policy (*e.g.*, vacation, PTO)? May an employer require an employee to do so? (See also DOL FAQ #31-34)

An employer may, but is not required, to permit an employee to use existing employer-provided paid leave (e.g., PTO, vacation) to supplement the amount the employee receives from paid sick leave or expanded family and medical leave. In addition, an employer cannot require an employee to draw down or concurrently use employer-provided paid leave during periods of paid sick leave or paid family leave; the employee may choose to save employer-provided leave for future use in accordance with the employer's leave policies. Further, the employer may not claim, and will not receive tax credit, for any supplemental amounts paid above the required minimum leave payments.

However, an eligible employee may elect to use, or an employer may require that an employee use, leave the employee has available under the employer's policies for child care purposes, such as vacation or personal leave or paid time off, concurrently.

(r) How does usage of FFCRA leave impact FMLA leave over the next 12 months? (See also DOL FAQ #44-46)

An employee may take a total of 12 workweeks of leave during a 12-month period under the FMLA, including the Emergency Family and Medical Leave Expansion Act. If an employee takes some, but not all 12, workweeks of their expanded family and medical leave by December 31, 2020, they may take the remaining portion of FMLA leave for a serious medical condition, as long as the total time taken does not exceed 12 workweeks in the 12-month period.

For example, assume an employee takes four weeks of Expanded Family and Medical Leave in April 2020 to care for their child whose school is closed due to a COVID-19 related reason. These four weeks count against their entitlement to 12 weeks of FMLA leave in a 12-month period. If they are eligible for preexisting FMLA leave and need to take such leave in August 2020 because they need surgery, they would be entitled to take up to eight weeks of FMLA leave.

However, an employee is entitled to paid sick leave under the Emergency Paid Sick Leave Act regardless of how much leave they have taken under the FMLA. Paid sick leave is not a form of FMLA leave and therefore does not count toward the 12 workweeks in the 12-month period cap. But note that if the employee takes paid sick leave concurrently with the first two weeks of expanded family and medical leave,

which may otherwise be unpaid, then those two weeks do count towards the 12 workweeks in the 12-month period.

(s) Are there reinstatement rights after taking Paid Sick Time? Paid Family Leave?

Paid Sick Time -- Yes, insofar that the Act prohibits employers from discharging (or otherwise taking retaliatory/discriminatory action against) employees who take paid sick time in accordance with the Act.

Paid Family Leave -- Generally, employees are entitled to the same reinstatement rights that they would have following leave taken under the federal FMLA for other reasons. There are exceptions for employers who employ fewer than 25 employees, where the employee's position no longer exists due to economic conditions or operation changes (among other criteria).

Under both laws, an employee may be furloughed, laid off, or discharged for legitimate business reasons that are independent of the taking of leave, such as economic reasons, business closure, misconduct, etc.

(t) Can Paid Sick Time or Paid Family Leave be taken intermittently? Paid Family Leave? (See also DOL FAQ #20-22)

Paid Sick Time -- Unless the employee is teleworking, paid sick leave for qualifying reasons related to COVID-19 must be taken in full-day increments. Teleworking employees may take paid sick leave intermittently when the employer and employee agree to the intermittent work/leave arrangement.

Paid Family Leave -- Only by agreement of the employer and employee.

(u) What are the penalties for employers who do not provide Paid Sick Time? Paid Family Leave?

Paid Sick Time -- An employer who violates the paid sick time provisions of the act shall be considered to have failed to pay minimum wages in violation of the FLSA and be subject to the penalties described in the FLSA (e.g., double damages and attorneys' fees--without tax credit).

An employer who unlawfully terminates an employee in violation of the act shall be considered to be in violation of the discrimination provisions of the FLSA and subject to the penalties described in the FLSA (e.g., double damages and attorneys' fees--without tax credit).

Paid Family Leave -- The normal FMLA penalties will apply (e.g., double damages and attorneys' fees--without tax credit).

(v) Who is a "health care provider" or "emergency responder" who may be excluded by their employer from paid sick leave and/or

expanded family and medical leave? (See also DOL FAQ #56, 57, and CFR 29 826.30(c)(1) and (2))

A "health care provider" is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

However, please note that while the regulations and FAQs contain the broad definition of "health care provider" above, the preamble to the regulations states: "The term "health care provider" as used in sections 3105 and 5102(a) of the FFCRA, however, is not limited to diagnosing medical professionals. Rather, such health care providers include any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency. Such individuals include not only medical professionals, but also other workers who are needed to keep hospitals and similar health care facilities well supplied and operational." These seemingly conflicting statements may result in the previous definitions being read more narrowly.

An "emergency responder" is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using these definitions to exempt employees from the provisions of the FFCRA.

(w) When does the small business exemption apply to exclude a small business with fewer than 50 employees from the childcare leave provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act? (See also DOL FAQ #58)

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing paid sick leave and expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1) The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

2) The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

3) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

There is no small business exception for providing paid sick leave of up to 80 hours for an employee's own COVID-19-related illness or self-quarantine or to care for another individual with a COVID-19-related illness or self-quarantine.

(x) Must an employer with fewer than 500 employees post a notice to employees about these new leave/time off rights?

Yes, by April 1, 2020. The notice is available at https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf. Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. For remote workforces, an employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.

Covered employers employing only health care providers and/or emergency service providers under the FFCRA must still comply with all posting obligations.

7. Additional Leave & Compensation Issues (but also see FFCRA guidance above)

(a) Does FMLA leave apply for employees, or immediate family members, who may contract Coronavirus?

Yes, assuming that the FMLA applies to the employer, Coronavirus would qualify as a "serious health condition" under FMLA, allowing an employee to take FMLA leave if either the employee contracts the disease or an immediate family member contracts the disease. The employee would be entitled to job reinstatement as well. State law may provide additional leave benefits. For union-represented employees, applicable collective bargaining agreements should be consulted regarding relevant employment terms.

(b) Would I need to pay employees who go on leave during a quarantine period or because they have contracted Coronavirus?

Perhaps. The employee may be required to be paid if the employee is subject to a contract or collective bargaining agreement that requires pay when employees go on work-required leave. In the absence of a contract, hourly employees work at-will and are not guaranteed wages or hours. In other words, these employees do not need to be paid. However, many organizations are looking at supplemental paid sick leave or other paid benefits to assist employees during this time. Employees also may be eligible for full or partial state unemployment benefits or state disability benefits, depending the parameters of the particular state program. For exempt employees, these employees do not have to be paid if they are sent home for an entire workweek. However, if exempt workers work for part of the work week, they would have to be paid for the entire week.

(c) Would I need to pay workers' compensation for employees who contract Coronavirus?

Perhaps, if the employee contracted the disease in the course of their employment. Like any toxic chemical condition at work, the employee must prove their illness from the disease was the direct and proximate cause of the particular work exposure.

First determine if the employee's work required them to be exposed to persons who are infected at the worksite such as health care workers.

If an employee incidentally contracts the disease from a co-worker, that will be incurred in the course and scope of employment and subject workers' compensation liability on the employer.

If there is workers' compensation liability, employers are responsible for covering the costs of reasonable and necessary medical care, temporary disability (total or partial), and permanent disability if there are any incurable residuals that effect work performance.

The employer must provide a Claim Form (DCW-1) if exposure occurred. The form must be provided within 24 hours from the time of notice to or from the employee. Employers should advise the carrier or TPA to engage a competent medical

professional such as an infectious disease specialist for advice to determine if the disease is work related based on the facts of exposure. Concurrently the employer is to provide the adjuster with an Employer's First Report of Injury (5020 Form).

(d) Can employees donate paid sick leave to other employees who may not have sufficient time to cover the 14-day quarantine period?

If permitted by the employer, there is no legal reason why an employee could not donate paid sick leave to other employees. However, unless the employer has a qualified medical emergency leave-sharing plan or a qualified major disaster leave-sharing plan, the donor employee, and not the recipient employee, would be taxed on the amount of donated leave. To have the recipient employee and not the donor employee taxed on the donated leave, the leave plan must be a qualified medical emergency leave-sharing plan or a qualified major disaster leave-sharing plan.

Medical Emergency Leave-Sharing Plan: a medical emergency leave-sharing plan is a plan under which employees donate accrued paid time off (PTO) to be used by other employees who have exhausted all of their PTO and who need more PTO because of a "medical emergency." For this purpose, a "medical emergency" is generally a medical condition of the employee or a member of the employee's family that requires a prolonged absence from work and will result in a substantial loss of income, or if an employee requires extended time off following the death of the employee's parent, spouse or child. It is currently unclear whether a distribution of donated time to an employee who is quarantined but who is not (and whose family is not) actually infected with the Coronavirus would be a permitted distribution of donated PTO by a medical emergency plan. Although one could argue that being quarantined should constitute a medical emergency, the IRS rulings and guidance regarding qualified leave donation programs define a medical emergency as a medical condition, and simply being quarantined without infection would arguably not be a medical condition. It is hoped that the IRS will issue guidance on this matter.

Major Disaster Leave-Sharing Plan: a major disaster leave-sharing plan is a plan that allows employees to donate leave time to assist employees adversely affected by a major disaster as declared by the president under Section 401 of the Stafford Act that warrants individual assistance or individual and public assistance from the federal government under that Act, so long as the plan satisfies a number of other requirements. An employee is considered to be adversely affected by a major disaster if the disaster has caused severe hardship to the employee or a family member that requires the employee to be absent from work. As of this writing, the president has declared COVID-19 to be a major disaster that warrants individual assistance in the following states: California, Florida, Illinois, Louisiana, Massachusetts, Michigan, New Jersey, New York, Texas and Washington. Currently, a plan can qualify as a major disaster leave-sharing plan only with respect to employees adversely affected by COVID-19 in these states.

(e) Final Pay Obligations

There is some question as to whether a furlough may trigger final pay obligations. Certain states mandate that employers provide an employee who is terminated with their final pay within a certain period of time (and in some cases the same day as the

termination).[1] In addition, some state laws require an employer to payout accrued, unused vacation time upon termination or consistent with the employer's vacation policy. [2] Because furloughs by nature are "temporary," there is an argument that this type of job action should not require final pay or immediate payout of vacation time. However, as noted below, there are at least three states that require employers to make these payments when employees are furloughed under certain circumstances. To avoid any risk, employers would need to satisfy any timing obligation with respect to final pay (in relation to when an employee is placed on furlough) and pay out vacation in any state which requires by statute that accrued vacation be paid to employees upon termination. Many other states permit forfeiture of accrued vacation only if expressly provided by policy; most companies do not provide for such forfeiture. Employers in those jurisdictions should make pay-outs consistent with their vacation policy.

Employers will need to assess the benefit of paying employees for vacation time when furloughed versus any penalty that they might face for non-compliance. In jurisdictions like California that have waiting time penalties, the exposure could be significant.

As set forth below, enforcement agencies in California and Massachusetts have taken the position that accrued vacation/PTO must be paid out at the time an employee is placed on furlough (although the Massachusetts Attorney General has indicated under the current circumstance they would not enforce this provision). The wording of Oregon's law requires payment to be made if the employee returns within 35 days. Given the uncertain nature of when employees will return to work, employers may not be able to make this assessment at the time of furlough.

- California. The California Division of Labor Standards Enforcement (DLSE) has taken the position that unless the employee is provided a specific return to work date within the pay period (and within 10 days), the employee must be paid out final wages at the time of the furlough. Final wages include any unused accrued vacation or paid time off. For each day that the wages/vacation are late, the employee would be entitled to a day of full pay, up to 30 days. This includes all calendar days, including weekends and days the employee would not be scheduled to work. The penalties cut off when the employee receives full final pay or 30 days, whichever is sooner. There is a question concerning whether the DLSE has correctly stated the current law on the topic.
- Massachusetts. Although not necessarily consistent with the wording of the Massachusetts Wage Act, the Attorney General has stated that employees are entitled to all earned wages including accrued vacation/PTO on the day they are furloughed. The AG's office stated that it will not take enforcement action for untimely payment of vacation under the current circumstance, but that employers may still be subject to a private suit regarding delayed payments.
- Oregon. If employees are laid off with no reasonable expectation that they will return to work, this is considered a termination triggering final pay obligations. When an employee is laid off and the employee

returns to work within 35 days, the layoff is not considered a termination. Accordingly, for any furlough (without pay) that is greater than 35 days, employees should receive final pay. This will include vacation/PTO unless the employer's policy states that vacation/PTO will not be paid out upon termination.

[1] The following states require final pay immediately upon termination: CA, CO, HI, MA (last working day), MI, MO (last working day), MT, and NV.

[2] The following states require payout of accrued vacation upon termination regardless of company policy: CA, CO, IL, LA, MA, MT, NE, and ND (ND has exceptions).

8. Wage and Hour Issues

(a) How many hours must an employer pay a non-exempt employee who works a partial week because the business shut down during the week?

Under the FLSA, an employer need only pay a non-exempt employee for hours worked. There's no requirement to pay for hours the employee was available to work if, in fact, no work was provided or performed.

That said, employers must be mindful of potentially applicable fair workweek, reporting / show-up pay, and call-back requirements, which emanate from state and local laws. Generally, these laws may require an employer to pay a non-exempt employee for a minimum amount of hours when he or she is called in or called back to work or when his or her schedule is changed on short notice.

(b) If an employer bars employees from coming to the workplace and requires them to work at home, will it have to pay employees who are unable to work from home?

Salaried exempt employees must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. Non-exempt employees, however, need only be paid for the hours they actually work, whether at home or at the employer's office.

(c) May an employer prospectively reduce an exempt employee's salary on a temporary basis?

Yes, but there are several important caveats to keep in mind:

- If the employee's salary is reduced below the minimum threshold for exempt classification, then the employee will lose his or her exempt status. Of course, being exempt from overtime laws might not be a major concern for the employer if the employee will not be working any overtime (including daily overtime in states with daily overtime requirements).
- Employers should remember that the FLSA regulations, as recently amended, allow employers to use nondiscretionary bonuses and

incentive payments (including commissions) paid on an annual or more frequent basis to satisfy up to 10% of the minimum salary level. If after the 52-week period, the employer has not met its financial obligation, it can make a final "catch-up" payment within one pay period after the end of the 52-week period to bring an employee's compensation up to the required level. Note, however, that some state overtime laws deviate from the FLSA with respect to salary level as well as the 10% bonus allowance.

- Employers should be clear that an exempt employee's salary is, as always, intended to compensate them for all hours worked, whether few or many. As a best practice, salary reductions should not be tied to a specific number of hours worked (or not worked) because a salaried exempt employee is not compensated for working a specific number of hours.
- As noted above, some states impose requirements about notice that must be provided before changing an employee's rate, method, frequency, or timing of pay.

(d) May an employer assign an exempt employee to perform duties of a non-exempt team members (e.g., a non-exempt team member who has been furloughed)?

Yes, employers may assign additional tasks to exempt employees. That said, employers must take care to avoid altering the exempt employee's primary function in a way that risks calling their exempt status into question.

As a general matter, the FLSA mandates that an exempt employee's primary duty must be exempt work. An employee's "primary duty" means his or her "principal, main, major or most important" duty. While percentage of time is not a dispositive factor in the FLSA's primary duty analysis, it's relevant. Burdening an exempt employee with too many non-exempt tasks increases the risk of a claim that the employee was misclassified as exempt and should have received overtime compensation for hours worked in excess of 40.

It's worth noting that the FLSA's implementing regulations contemplate emergency scenarios in which an exempt employee might temporarily perform non-exempt work without jeopardizing exempt status. Notwithstanding this recognition, if an exempt employee is expected to spend the bulk of his or her time on non-exempt tasks for the foreseeable future as a result of the COVID-19 outbreak, then the employer should consider reclassifying the employee during that period.

Finally, note that some state overtime laws enforce a more rigid definition of "primary duty" that is dependent on where the employee spends his or her time. For example, in California, a duty is not an employee's primary duty if it accounts for less than 50% of his or her time. Colorado follows a similar rule.

(e) May an employer provide bonuses or extras to exempt workers who are performing more or different work than usual as a result of the COVID-19 outbreak?

Yes. The FLSA's implementing regulations contemplate that a salaried exempt employee may be paid extras, on virtually any basis, without rupturing the "salary basis" component of their compensation. employer can provide additional pay to workers in this scenario, but it is not required to do so.

That said, employers should remain mindful of a few risks and associated best practices in undertaking this sort of plan.

First, for salaried employees, employers should be clear that their salary is, as always, intended to compensate them for all hours worked, whether few or many. If the bonus is tied to hours worked, an employer must take precautions to avoid suggesting to exempt employees that they are in some ways an hourly employee. To avoid the implication, a better practice is tie bonuses/extras—where they need to be tied to the amount of work—to days worked instead of hours worked.

Second, it's a best practice to ensure that the bonus/extras are not so heavy that they comprise more than half the employee's total compensation. The reason for this is to avoid scrutiny under the so-called "reasonable relationship" test, which—if it applies—says that a salaried employee's total compensation should be reasonably related to their salary. Regulatory guidance indicates that a relationship of up to 1.5 to 1 (total compensation to salary) is reasonable, but more might not be.

(f) If an employer requires salaried exempt employees to use paid leave during office closures, does this impact the employee's exempt status?

As a general matter, salaried exempt employees must receive their full salary in any week in which they perform any work, subject to very limited exceptions. That said, under the FLSA, a private employer may direct an exempt employee to use paid time off, whether for a full or partial day, as a means of ensuring that the employee receives at least his or her predetermined salary. If, however, an exempt employee has no (or insufficient) accrued paid leave, the employee still must receive his or her predetermined salary for any absence occasioned by the office closure in order to remain exempt.

(g) May an employer establish two rates of pay for non-exempt employees who are performing distinct types of work during the COVID-19 crisis?

Yes. Employees who perform two different types of tasks, or work in two or more different positions, in the same workweek may be paid different hourly rates. It's important, of course, to only make changes to an employee's pay on a prospective basis. Also, note that some states impose requirements about notice that must be provided before changing an employee's rate, method, frequency, or timing of pay. Thus, it's important to assess the laws of the state where a change might be made to assess any potentially applicable requirements.

(h) How do you calculate overtime compensation for a non-exempt employee who is paid at two or more different rates of pay in a workweek?

All hours worked in the workweek (or during the workday in states with daily overtime requirements) should be added together to determine if the employee worked overtime hours.

If the overtime threshold is met, and if the employee worked in different jobs with different rates of pay, then the default rule—known as the "weighted average" approach—requires payment of overtime at a rate of 1.5 times the weighted average of the rates involved. To determine the weighted average, add all remuneration across the multiple jobs during the workweek and divide the sum by hours worked in the workweek.

Some employers utilize a "rate in effect" method rather than the weighted average approach. This means that the rate in effect when the employee worked overtime hours is the rate used to determine his or her overtime rate. Certain requirements must be satisfied to use this method under the FLSA, and it is not allowed in all states.

(i) Are employers required to cover any additional costs that employees may incur if they work from home (internet access, computer, additional phone line, increased use of electricity, etc.)?

Under the FLSA, employers may not require employees to pay for items that are really business expenses of the employer if doing so reduces the employee's earnings below the required minimum wage or cuts into overtime compensation. Consequently, it's important for employers to be mindful of expenses shifted to the employee as a result of any teleworking arrangement and implement a policy to reimburse such expenses, particularly where they would otherwise drive the employee's wages below minimum wage or cut into overtime compensation.

Moreover, it's important to note that some states, such as California, Illinois, Iowa, Montana, Massachusetts, New Hampshire, North Dakota, and South Dakota, as well as Washington, D.C., require employers to reimburse business-related expenses irrespective of the impact the expenses, if unreimbursed, would have on minimum wages or overtime compensation. Illinois, New Hampshire, North Dakota, South Dakota, and Washington, D.C. also have specific expense reimbursement legislation. Please contact your Seyfarth attorney for guidance in those states.

For union-represented employees, applicable collective bargaining agreements should be consulted regarding relevant employment terms. If not covered, such provisions likely would need to be bargained with the union. It's also important to note that employers may not require employees to pay or reimburse them for such items if telework is being provided to a qualified individual with a disability as a reasonable accommodation under the Americans with Disabilities Act.

From a tax perspective, the goal is typically to exclude reimbursed amounts from employees' taxable income. As a general matter, that requires that the payment be made under an "accountable plan," which requires the employee to substantiate the

expense (i.e., provide a receipt) to show there was a business purpose for the expense, and to return any amounts advanced that would exceed the amount substantiated. That said, the IRS has a policy of permitting reasonable fixed reimbursements for required cell phone use to be made without documentation. Assuming this policy would extend to landline telephones or internet access, which seems reasonable, one option is to adopt a policy providing a reasonable fixed reimbursement to cover a WFH employee's likely reasonable expenses. If an employee seeks reimbursement for a larger amount or other business expenses, they would be required to provide substantiation and satisfy the other accountable plan requirements.

Given these various and layered nuances, we often advise nationwide employers to proactively provide employees a preset reimbursement amount that is configured to approximate business-related expenses for personal cell phones used for work purposes, coupled with a protocol for submitting substantiated expense reports in the event that actual expenses exceed the preset amount. Internet would be treated the same if the employee works from home. Given the complexity of these issues, however, you should consult with your Seyfarth attorney before establishing a reimbursement policy or protocol for these types of expenses.

9. Labor & Management Rights

(a) What obligations exist to notify or negotiate with a union regarding Coronavirus policies, including leave due to quarantine?

Under the NLRA employers with a union-represented workforce have a duty to bargain with the union regarding wages, benefits, and other terms and conditions of employment. A potential, narrow limitation to this duty to bargain may arise where there are "compelling economic exigencies" requiring prompt action. The NLRA limits compelling economic exigencies to extraordinary, unforeseen events having a major economic impact on the employer that compel the employer to act immediately and unilaterally to change certain employment terms or working conditions. Even in the highly narrow circumstances where economic exigencies arguably exist, an employer typically still must afford as much notice and opportunity to bargain as is practicable under the circumstances. Moreover, such exigencies do not permit an employer to ignore contractual commitments in a collective bargaining agreement, i.e., changing existing terms (as opposed to filling gaps in terms) typically cannot be undertaken unilaterally.

An employer's duty to bargain otherwise will turn on the specific language of the CBA, including management-rights and force-majeure language. Depending on the CBA's terms, an employer may have more--or less--latitude to act unilaterally under these circumstances.

(b) If I have union-represented employees, how does COVID-19 impact my duty to bargain with the union before making any changes to terms and conditions of employment?

The COVID-19 pandemic is causing many health care employers to assess whether changes in employment terms and working conditions are necessary or desirable to directly combat the virus or to maintain operations. Examples of such changes include

mandatory testing, questionnaires regarding travel, sending employees home, modifying schedules, applying attendance policies, PPE requirements, pay adjustments, and the like.

Under the National Labor Relations Act (NLRA or Act), an employer ordinarily is obligated to provide a union with notice and a reasonable opportunity to bargain over wages, hours, and other material employment terms and working conditions. These are known under the Act as "mandatory subjects of bargaining." It is possible that an existing collective bargaining agreement (CBA) does not address certain mandatory subjects, and they are open and unresolved. If so, the employer must bargain over them to the point of an agreement or a lawful bargaining impasse (i.e., exhausting all reasonable possibilities of an agreement with negotiations conducted in an atmosphere free of employer unfair labor practices).

However, if there is a CBA in effect, its terms already may "cover" the subject of the change. This most commonly occurs where the CBA contains an expansive management rights article affording the employer discretion to make unilateral changes -- to the extent they do not conflict with other express terms of the CBA. An employer's management rights will be stronger where the CBA explicitly affords it those rights. There is more likely to be a contract dispute if the employer is relying upon broader and more general (and vaguer) rights.

An employer should recognize that even if it wants to make changes that are improvements to existing terms and conditions, unless the CBA already grants the employer the right to act unilaterally, legally it cannot do so, and still must provide the union with notice of the proposed changes and a bargaining opportunity. Of course, if the proposed changes indeed are improvements, the union likely will agree to them.

Most CBAs do not contain force majeure provisions which allow an employer to repudiate or modify existing contract terms. Where such force majeure language does not exist, an employer should recognize that it is bound by its contractual commitments unless it can persuade the union that the ultimate alternative to change could be unfavorable. If the union cannot be persuaded, it is not obligated to bargain over modifications to previously agreed-upon terms.

Generally, in first contract situations, or successor CBA bargaining, an employer cannot simply reach a lawful bargaining impasse on discrete subjects apart from the overall deal, and then implement only those changes. Rather, it would have to wait for the final, comprehensive CBA to be agreed upon. However, a narrow and highly limited exception to this principle arises where there are "compelling [economic] exigencies" requiring immediate action. The National Labor Relations Board (NLRB) has limited such exigencies to extraordinary, unforeseen events having a major economic impact on the employer that compels it to act immediately (or with very little lead time) and unilaterally to change certain aspects of employment. The existence of "exigent circumstances" is generally disfavored by the NLRB; however, such circumstances are more likely to be recognized with respect to health-related issues, particularly where an employer is attempting to follow government or established public-health standards, e.g.. CDC/OSHA/WHO.

To the extent that an employer is compelled by a government mandate to take certain actions, if there is discretion/are options as to how the mandate can be carried out, the employer is obligated to bargain over the effects of the directive, i.e., the possible compliance approaches.

Similarly, to the extent that the government may enact legislation that provides greater or different benefits than in a CBA (e.g., as may be the case with the Families First Coronavirus Response Act), and there is no carve out to simply maintain the terms or benefits that are in the CBA, then to the extent that the improvements/differences are a clear mandate, there likely is no bargaining obligation. However, to the extent the changes have effects on other terms and conditions, an employer must provide notice to the union and a reasonable opportunity to effects bargain.

(c) What COVID-19 specific issues might an employer expect a union to raise?

The possibilities are numerous, including the following:

- Comprehensive contingency plans to address the crisis
- Unions insisting that employers provide paid sick leave for any reason, including when an employee's parent must stay home due to cancelled schools. Unions may also ask for an employer to provide for childcare or childcare-assistance under such circumstances.
- Unions urging employers to provide full protective gear to employees, including hazmat suits, N95 respirators, or face masks, or otherwise raising concerns about PPE. This is particularly common among healthcare employers.
- Unions maintaining that employers provide wage increases for employees to facilitate those employees being able to stay home when sick or obtain and pay for emergency childcare
- Modifications to attendance policies
- Protocols for when employees can refuse to work without loss of pay or potential discipline
- Hazardous duty-type pay increases or bonuses
- Subsidized alternatives to public transportation

(d) Should employers prepare for union information requests on this topic?

Yes. As part of bargaining, CBA administration, or adequately representing its members, a union has the right under the NLRA to request information from an employer that is relevant to its performing its responsibilities in those areas. Given the current situation, an increasing number of unions are making wide-ranging information requests so they can understand how the employer is addressing certain situations. You should anticipate receiving such requests, and should consider how you can rapidly respond. An employer's failure to promptly and sufficiently respond to information requests can be an unfair labor practice, and can prevent the employer

from reaching a lawful bargaining impasse where one is needed to undertake unilateral changes.

We are aware of an increasing number of unions making such requests. Employers should be prepared to answer questions regarding its contingency plans, safety protocols, safeguards for customer-facing employees, how payment to employees might be handled in the event of a shutdown, and how the employer plans to treat coronavirus-related absences, among others.

(e) Can we rely on a CBA no-strike clause to discipline or discharge union employees if they refuse to work because of COVID-19?

In many circumstances, no. Section 502 of the Taft-Hartley Act provides that it is not a "strike" for employees to refuse to work in "abnormally dangerous conditions." Under NLRB case law, if employees have a reasonable belief they are in danger, and such belief has at least some objective basis, they may refuse to work. An emergency situation such as a confirmed outbreak/global pandemic, and in which the employees objectively could be exposed to COVID-19, may well satisfy Section 502. Accordingly, an employer should take whatever steps it can to educate employees about the extent of any dangers and to ameliorate them. Of course, as with a strike, employees are not required to be compensated if they do not perform work unless there is a contractual basis for doing so, e.g., their absence qualifies for paid leave.

(f) Our CBA expires at the end of the month. Can--or should--we insist that the union continue meeting for face-to-face bargaining? What about conducting grievance meetings?

These are unusual times and all of our clients are concerned about the increased likelihood of contagion associated with travel and large-group meetings. NLRB case law holds that a party may not unilaterally insist on remote bargaining. However, where possible, and with the union's consent, conducting bargaining via phone and over e-mail is advisable. We have also seen clients and unions agree on contract extensions to defer bargaining until a later--and safer--date. Likewise, it may be advisable to try to agree that grievance meetings -- especially involving union business agents or other non-employee personnel -- be conducted remotely.

(g) What if an employer has to lay employees off?

Most CBAs have provisions that allow an employer to lay off (at least under certain conditions) according to particular rules (e.g., seniority), and likewise describe how recalls are to take place. To the extent an employer wants to depart from such provisions where they exist, it will have to convince the union to modify CBA terms, which the union can refuse to do. If an employer is in a first contract situation, ordinarily it cannot lay off -- at least outside the boundaries of an established, status quo practice -- until the overall CBA is reached. An exception may be if exigent circumstances exist. See No. 1 above.

If the CBA does not address whether or not a laid off employee is entitled to benefits, or if this subject was not clearly addressed in CBA bargaining, the employer may have to engage in bargaining over the effects of the layoff (not the decision itself if

the decision is covered by the CBA). Effects bargaining also would be required to the extent there is no CBA in place. In such circumstances, the union should be given as much advance notice as possible of the layoffs and an opportunity to effects bargain. As with other forms of bargaining under the NLRA, an employer is not required to agree to all -- or even any -- of the union's proposals. Rather, it just must negotiate in good faith consistent with those standards under the NLRA.

(h) What if an employer has to temporarily or permanently close a facility, department, or function, or desires to transfer operations to another location?

Those decisions are mandatory bargaining subjects unless an employer's CBA covers their ability to undertake those actions unilaterally, or the union otherwise has waived its decision bargaining rights. Many CBA management rights provisions address such restructuring actions and should be consulted.

Even where, e.g., a CBA management rights provision gives an employer the ability to implement such a decision, ordinarily the employer still must engage in timely and adequate bargaining over the effects of the decision upon union-represented employees. In effects bargaining, a union is free to raise virtually any subject it chooses, e.g., severance pay, health insurance continuation, transfer rights, to the extent it is not already covered by the CBA. However, as with any effects bargaining, an employer does not have to agree to all or any of the union's proposals, but must bargain in good faith consistent with NLRA standards.

(i) What are some other rules regarding strikes by union-represented and non-union employees in the health care industry?

In the health care industry, if the employer has a reasonable belief that a strike will occur, for staffing purposes, it may ask employees whether they intend to work or strike.

If a strike is not prohibited by a CBA no-strike provision (but see No. 6 above), Section 8(g) of the NLRA prohibits a union from engaging in a strike, picketing, or other concerted refusal to work at any health care institution without first giving at least 10 days' notice in writing to the institution and the Federal Mediation and Conciliation Service. Importantly, however, Section 8(g) does not apply to non-union employees, and such employees can engage in a Tact-Hartley Section 502 safety action (see No. 6 above), or other concerted activity protected by the NLRA. Employees cannot be treated adversely for undertaking such actions, but do not need to be compensated for time when they refuse to work unless it is pursuant to some type of contractual guarantee or vested right/

(j) What steps can an employer take to maintain the best-possible relationship with a union during this crisis?

An employer's relationship with the union will continue after the current crisis has passed, so we recommend that employers endeavor to preserve a good faith, open, and constructive bargaining relationship. Along those lines, we recommend that employers:

- Follow standard good faith bargaining principles as much as possible, e.g., meet, listen to the union with an open mind, promptly respond to union information requests, consider whether any compromises make sense, be prepared to explain why you disagree.
- Even where exigent circumstances arguably exist, be prepared to provide as much advance notice of proposed changes as possible. Also try to anticipate and have the resources to rapidly respond to union information requests. To the extent practicable, consider providing certain types of information in advance of negotiations/without being asked that you would want to see if you were on the other side of the table.
- Tell the union that you are willing and able to meet at any time to address questions (and via phone if agreed to by the union).

If there is a genuine impasse that needs a quick resolution, consider whether proposing FMCS or other mediation is desirable.

(k) How should an employer respond to a union's request for the identity of an employee who has tested positive for COVID-19?

As outlined elsewhere in these FAQs, employers should avoid divulging the identity of an employee with a COVID-19 diagnosis, even where requested by the union. Similar to other requests for confidential information, an employer should work with the union to accommodate its request--for example, agreeing to solicit the consent of individual employees to disclose their identities to the union or agreeing to provide as much information as possible without identifying specific individuals.

10. Disability/Discrimination/Privacy/Hiring Implications

(a) Does the ADA restrict how I interact with my employees due to the Coronavirus?

Voluntary medical exams are always permitted, if performed confidentially. The EEOC has suggested materials to distribute to the workforce in the event of global health emergency or pandemic.

The ADA protects qualified employees with disabilities from discrimination. A disability may be a chronic physical condition, such as breathing. Employees may be entitled to an "accommodation" such as leave or be allowed to work remotely for a limited period. Employees who have contracted the virus must be treated the same as non-infected employees, as long as the infected employees can perform their essential job functions. If the employee poses a health or safety threat to the workforce, the employer may place the employee on leave.

Now that a pandemic has been declared, here is some additional EEOC Guidance employers should be mindful of:

May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?

Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.

During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?

ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

If pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, these inquiries are not disability-related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.

During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear personal protective equipment during a pandemic, but must also be compliant with OSHA regulations regarding respirator use if respirators are provided to employees. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

> *May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?*
>
> Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus."

In these situations, we recommend the employee go to an urgent care facility or other accessible outpatient clinic if one is available to at least be screened to determine if the employee may be infected.

If the employee is asymptomatic and has received a negative COVID-19 test result, some employers may use these factors to allow an employee to return to work without requiring a doctor's note.

EEOC recently confirmed that this guidance remains current and applies to Coronavirus: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

(b) Can employers take employee temperatures as they arrive for work and send them home if they have a fever?

Taking an employee's temperature is normally a prohibited medical exam under the ADA unless it is considered job-related and consistent with business necessity. This standard may be met, for example, in the healthcare industry.

However, because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature as they arrive for work and send them home if they have a fever. See EEOC's updated guidance at:

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

It is important to keep in mind, though, that not all individuals infected with COVID-19 have a fever, or even show any symptoms at all. Thus, employers should have a measured approach when deciding to take employees' temperatures. Employers should consider things like what industry they are in (healthcare, customer facing v. non-customer facing), has the workplace had any confirmed COVID-19 cases, are there many employees reporting symptoms and the like.

When doing temperature testing, employers should take care to ensure the information collected is kept as confidential medical information. In addition, privacy and social distancing needs to be implemented when determining how to take temperatures. For example, an employer would not want to have a long line of employees outside the facility lining up for testing where employees are not engaging in social distancing and where an employee who had a temperature is sent home in plain view of others. Employers also need to make sure that for non-exempt employees, time spent before the start of regular work hours is considered compensable time.

For union-represented employees, unless the ability to require such temperature testing is covered/addressed through management rights in the applicable collective bargaining agreement, it may be subject to bargaining, although arguably this may be accomplished on an expedited basis.

(c) Is there an obligation to accommodate employees who do not want to work in public facing positions due to risk of infection?

This is a combination of a reasonable refusal to work (OSHA) and accommodation (ADA) question.

As to OSHA, if somebody is in a high-risk health group and comes forward to say they need to be separated from others to avoid contracting Coronavirus, the most reasonable course of action would be to approve the request until there is reliable information suggesting that it is unnecessary. If non-high risk employees make a similar request, each request should be considered on a case-by-case basis based upon the reasonableness of the concern. Employees should not be disciplined for refusing to work if they reasonably believe that there is a risk of infection because an employee making such a complaint may be engaging in protected activity. If the employer can establish that a reasonable person, under the circumstances then confronting the employee, would not conclude that there is a real danger of death or serious injury, the employee does not have to be paid during the time period the employee refuses to work.

On the accommodation issue, the employer could require confirmation of need for the accommodation from the person's healthcare provider, and the employer may ask the employee to stay home provisionally while awaiting the accommodation information from the healthcare provider.

(d) I am considering going cashless to help prevent the spread of COVID-19 by touching paper money. Is this legal?

According to the Federal Reserve, it is not illegal under federal law for private businesses to refuse cash for the payment of goods and services. However, individual state and local laws may vary. For example, San Francisco, Philadelphia, New York City, New Jersey, and Massachusetts (in 1978!), among others, have passed prohibitions on going cashless as being discriminatory.

(e) How much information can we give other employees about a documented/confirmed case of COVID-19 at one of our locations?

Employers must be careful not to divulge the identity of the employee with a COVID-19 diagnosis. Employers should simply say: "an employee in this location who we think may have had contact with you has been diagnosed." Employers should feel free to ask the diagnosed employee the names of other employees with whom they had close contact. The employer should also be careful not to confirm the identity of the diagnosed employee if other employees "guess."

(f) If an employer is hiring, may it screen applicants for symptoms of COVID-19?

Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability. May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?

(g) May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?

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

(h) May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?

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

(i) May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?

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

11. Worker Health and Safety (OSHA)

(a) Has OSHA provided guidance on how to handle Coronavirus?

Yes, OSHA has issued guidance regarding protecting workers in the case of a global health emergency and specifically Coronavirus. The guidance puts the burden on employers to identify risks specific to their workplace settings and to determine the appropriate control measures to implement.

OSHA's guidance also identifies jobs that it considers very high or high risk, medium risk and lower risk. Very high or high risk workers include those who interact with

potentially infected travelers from abroad, including those involved in healthcare, travel, or waste management.

OSHA provides examples of how to reduce the risk of obtaining the virus, including washing hands with soap and water, avoiding close contact with people who are sick, and avoiding touching your eyes, nose or mouth with unwashed hands. Additionally, the guidance includes discussion on appropriate engineering or administrative controls.

OSHA has also indicated that while no specific standard covers COVID-19 exposure, some OSHA requirements may apply to preventing occupational exposure, including OSHA's personal protective equipment standards and OSHA's general duty clause. However, the guidance document does not discuss what, if any, enforcement activities OSHA may undertake

OSHA has also issued a fact sheet, indicating that employers should train employees on the following:

- Differences between seasonal epidemics and worldwide pandemic disease outbreaks;
- Which job activities may put them at risk for exposure to sources of infection;
- What options may be available for working remotely, or utilizing an employer's flexible leave policy when they are sick;
- Social distancing strategies, including avoiding close physical contact (e.g., shaking hands) and large gatherings of people;
- Good hygiene and appropriate disinfection procedures;
- What personal protective equipment (PPE) is available, and how to wear, use, clean and store it properly;
- What medical services (e.g., vaccination, post-exposure medication) may be available to them; and
- How supervisors will provide updated pandemic-related communications, and where to direct their questions.

(b) Can OSHA cite an employer for exposing my workforce to Coronavirus without protective measures?

Perhaps. OSHA regulates safety hazards through its "general duty" clause that applies to "recognized hazards" in the workplace. OSHA will look to the CDC as authority when issuing such citations. The agency will determine whether the employer's industry, "recognized" that exposure to infected individuals in the workplace is a hazard. If so, the agency would expect the employer to take feasible measures to protect the employees and, if not does not take such action, the employer could be subject to citation. Employers should conduct a hazard assessment for potential exposures and develop an action plan that includes hazard identification, hazard prevention procedures, employee training, medical monitoring surveillance and recordkeeping.

OSHA may also look to applicable Personal Protective Equipment and Bloodborne Pathogen regulations in an attempt to cite employers for COVID-19 related issues.

(c) Do I need to record cases of Coronavirus on my OSHA 300 Log or report a diagnosis to OSHA?

Diagnosed cases of Coronavirus will likely not be "recordable" on the Company's OSHA 300 Log (or state equivalent) or "reportable" to OSHA.

Generally speaking, an illness is not "reportable" in a federal OSHA jurisdiction unless the employer can prove the disease was contracted while at work through an occupational exposure AND results in an inpatient hospitalization for medical treatment within 24 hours of exposure.

However, if an employer has information that the illness was contracted due to an occupational exposure, the employer would be required to record the illness on their OSHA 300 Log if it resulted in days away from work or restricted duty. We believe it will be difficult for employers to tie an employee's diagnosis of COVID-19 to a specific occupational exposure.

There are several industries where OSHA may try to claim that an infected employee was exposed while at work. For example, where employees are *expected* to come into contact with or be in close proximity to a person who has contracted the disease as part of their job duties, such as at a hospital, nursing homes, emergency responders, or laboratories that handles the disease. In these cases, employers should likely err on the side of caution and record or report the illness as necessary.

(d) What obligation, if any, do employers have to report confirmed cases of COVID-19 to government authorities?

For purposes of reporting to local health departments, obligations vary on a state, county and city level. Currently, there is no obligation to directly report to the CDC. The majority of states require that healthcare related industries and laboratories have an obligation to report confirmed cases. Many states also require schools, day care facilities, camps and similar institutions to report any confirmed cases. A small number of states require food establishments to report a confirmed case. Finally, a handful of states have statutes written broadly enough that most employers *arguably* have to report, including:

- Illinois
- Maine
- Minnesota
- Montana
- Nevada
- New Hampshire
- New Mexico
- Tennessee

- Utah
- Wisconsin

Regardless of any requirement to report, we recommend voluntarily reporting to the health department as the health department can provide guidance related to the workplace response. The health department will learn of the infection and engage with the employer regardless of whether the employer notifies the department and following the health department's guidance on response provides a measure of cover.

12. Returning to Work (RTW)

As the national experience with COVID-19 continues, questions are beginning to arise about "what's next" as the country's essential infrastructure continues to run and the business community begins to consider a return to normal operations. We are in the process of preparing a thorough, comprehensive guide of the issues that companies are likely to face as business resumes. The below represent some of the introductory questions we are hearing most frequently at this time.

(a) What does the CDC recommend for the return to work of critical infrastructure employees who have been potentially exposed to COVID-19 but are not showing symptoms themselves?

The CDC has provided updated guidance on April 8th: https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html

This guidance only relates to those workers who are members of the 16 workforce sectors identified by the Cybersecurity & Infrastructure Agency (CISA) as being essential and critical parts of the infrastructure.

For these potentially exposed critical infrastructure workers, the CDC no longer recommends 14 days of self-quarantine of workers who have been potentially exposed - i.e. have had household or close contact within 6 feet of an individual with confirmed or suspected COVID-19, including up to 48 hours before the individual became symptomatic.

Rather, CDC now recommends that these employees may return to work subject to certain screening and monitoring requirements set forth below.

(b) What practices should an employer follow in allowing a worker to resume their shift?

As a threshold matter, the worker must remain asymptomatic. If the worker begins showing symptoms, they must be sent home immediately. Beyond that, employers should take the employee's temperature and assess symptoms, ideally before the individual enters the facility each day. Workers should continue to self-monitor their symptoms, especially temperature.

Despite returning to work, the potentially exposed worker should wear a face mask while in the workplace for 14 days after the potential exposure (employers can issue masks or approve employee-supplied cloth face coverings in the event of shortages).

All employees should continue to practice social distancing as work duties permit, and the employer must regularly clean and disinfect all shared work spaces and equipment.

(c) Should employers keep records of their employees' statements regarding exposure to the virus.

As a best practice, we recommend "yes." This applies to employees returning to work after potential exposure, high risk travel, or having either tested positive for COVID-19 or demonstrating flu-like symptoms in the past 14 days.

(d) What about an essential employee who is refusing to return (or come) to work, citing fear of becoming ill?

Presuming there are no ADA claims due to disability, nor FMLA claims due to needing to care for a family member with a serious health condition, the employee can be required to report for duty or face disciplinary action. To avoid a retaliation claim under OSHA, the employer should ensure there is not a legitimate complaint that the workplace is unsafe and assure the employee of the safety measures in place (in keeping with the CDC guidelines outlined above). Regardless of the employee's belief, they are not in imminent danger so long as the employer is following CDC and OSHA guidance. Upon the employer's demonstrating of this compliance, ongoing refusal to perform work would no longer be protected under OSHA-sanctioned safety concerns.

13. International

(a) What requirements apply outside of the United States?

The specific requirements for locations outside of the United States vary. If you require advice on matters outside of the U.S., please let us know and we can connect you with members of our International Team within the Seyfarth COVID-19 Task Force.

14. Implications to Benefit Programs

(a) Is Coronavirus testing and treatment covered under the employer's medical plan?

The Families First Act (FFCRA), as amended by the CARES Act, requires that all group health plans cover COVID-19 testing and any admission, lab or service fees relating to the testing, at no cost to participants. The testing mandate applies for both network and non-network providers, as well as telehealth services. The Act does not require health plans to waive cost sharing or even provide coverage for medical services and supplies provided relating to a COVID-19 diagnosis (e.g., subsequent hospital admissions, ventilator, etc.).

(b) What about coverage for medical services under our High Deductible Health Plan?

A covered person under a High Deductible Health Plan (HDHP) cannot get medical services covered under the plan (other than preventive services, like the flu vaccine) before satisfying his/her deductible. If services are covered before the deductible is met, the plan will fail to be a HDHP, rendering the covered person ineligible to make tax-favored contributions to a Health Savings Account (HSA) for that year. In Notice 2020-15, the Internal Revenue Service has issued relief to individuals who have medical coverage under an HDHP. Until further notice, a medical plan intended to be an HDHP will not fail to be an HDHP if it covers medical costs associated with testing and treating COVID-19 without application of the deductible or otherwise-applicable cost-sharing.

(c) Can we cover telemedicine under our medical plans?

Many employers are looking at ways for covered participants to access medical care without having to travel to their doctor's office (and risk infection or spreading infection). Telemedicine may provide an answer to this concern, and may generally be covered under a group medical plan. Further, the FFCRA appears to mandate that telehealth be covered and at no cost-sharing, at least for purposes of diagnosing/testing for COVID-19. Under IRS Notice 2020-15, any telemedicine services related to COVID-19 may be covered at no cost without impacting Health Savings Account (HSA) eligibility. Further, the CARES Act provided that through 2021, plans may cover telemedicine of any sort (COVID-19 related or otherwise) at no cost without impacting HSA eligibility.

(d) If expenses are not covered under the group medical plan, can employees get reimbursed for coronavirus-related expenses from their Flexible Spending Account?

Certain supplies, like facemasks and hand-sanitizer, might be covered as an eligible medical expense depending on the circumstances (including whether they're used due to personal illness or the need to treat a family member who has illness). Purchasing surgical masks while healthy and not near people who have contracted the virus (which the CDC has asked the public not to do) would generally not be covered. If in doubt, request a letter of medical necessity.

Further, the CARES Act provides that, effective for expenses incurred on or after January 1, 2020, medical reimbursement accounts (including health care FSAs, HRAs, HSAs and Archer MSAs) may reimburse participants for over-the-counter drugs and menstrual products. Employers should be sure to amend their plans to provide for such reimbursements sooner rather than later, because unless the IRS provides for retroactive relief, typically plans must be amended in advance of any such changes taking effect.

(e) What about HIPAA - what can I say or disclose?

Medical Information. To the extent employers are getting information about employees who may have been exposed to SARs-CoV-2 or tested positive for

COVID-19, that information will generally not be protected by HIPAA privacy where it is not accessed through the group health plan. Much of this information may be either self-reported from employees to their managers or Human Resources, which would not implicate the health plan. Other information may be received as a result of medical exams conducted at the work place, such as taking temperatures, which is discussed above.

Medical Inquiries. If workers for your company test positive for COVID-19, your organization may be contacted by public health authorities seeking information about the worker's symptoms, who they may have interacted with in the workforce, and where they may have traveled. Or, companies may seek to obtain verification from a worker returning from an at-risk country that the worker isn't showing any symptoms of coronavirus. It's important to understand that most of these types of inquiries are not governed by HIPAA because the request does not include a request to the health plan (the covered entity) for protected health information (PHI). That said, other employment laws or privacy laws may come into play (e.g., ADA restrictions on medical exams or inquiries, OSHA concerns, etc.), which have been discussed above.

Health Plan Disclosures to Public Health Entities. It is possible that the CDC, HHS or a state agency may directly request information from the group health plan to determine whether other persons have experienced symptoms consistent with COVID-19. HIPAA generally permits a health plan to disclose PHI to a public health authority to prevent or control the spread of an infectious disease. Such a public health authority can also request that the health plan disclose such PHI to a foreign government agency. If a health plan is unsure whether this permitted use exception applies, it could always seek an authorization from the participant to disclose the information. To be clear, even though an exception would permit a health plan sponsor to disclose PHI without the participant's consent in this context, other HIPAA rules continue to apply, including the minimum necessary rule (limiting the scope of the disclosure) and the record-keeping requirements (tracking such disclosures and making them available upon request).

Further, HHS recently released guidance providing enforcement discretion relating to business associate disclosure of COVID-19 related information to public health authorities even where the business associate agreement does not provide for such disclosure, as long as the business associate did so in good faith and notifies the covered entity within ten days of the disclosure.

HIPAA Policies – Remote Work Planning. Many health plan HIPAA privacy and security policies limit or prohibit employees within the HIPAA "firewall" from bringing home materials containing PHI or from accessing EPHI or creating paper copies of PHI remotely. Health plan administrators should consider whether to relax this requirement (and amend their policies accordingly) to facilitate remote-working/quarantine-type situations. To ensure proper safety standards exist (and depending on the nature/scope/sensitivity of PHI workers will be accessing), some health plan administrators might determine that it is appropriate to invest in equipment (software, locking file cabinets, etc.) to facilitate this remote-work shift.

(f) Would I need to pay my employee disability benefits if they contract the Coronavirus?

If an employee contacts COVID-19, that illness would often be covered by an employer's sick/disability benefit program. Many employers have a three-pronged approach of offering sick pay (or PTO), then short-term disability (STD) after so many days of sick leave, followed by long-term disability (LTD) after a several month elimination period. Sick pay and STD are typically self-funded payroll continuation arrangements while LTD is insured. STD and LTD will define when an employee is considered to be disabled, thus allowing him/her to access disability benefits. Given what is currently known of COVID-19, it is not likely that employees will remain disabled long enough to trigger LTD benefits (which often require a 6-month elimination period). However, employers should review the terms of coverage in their disability programs to ensure they understand when such benefits should be paid for periods of absence. Additionally, there are various paid leave laws that may come into effect. You should check the laws in your jurisdiction to ensure you are affording employees all of their paid leave rights.

(g) If an employee's dependent care needs change as a result of the coronavirus outbreak, can they change their dependent care flexible spending account (DC FSA) election outside of the plan's open enrollment period?

The permitted election change rules for DC FSAs are very broad. For example, mid-year DC FSA election changes are generally permitted if there is a change in the dependent care provider or a loss of or gain in access to free dependent care, provided the requested change is consistent with the reason for the change. For example, if a childcare provider is no longer providing the care (e.g., day care is closed or summer day camp is cancelled) and a parent will be watching the child instead, the DC FSA election can be reduced or eliminated. Before allowing employees to change their DC FSA elections mid-year, it's important to confirm that your cafeteria plan document permits DC FSA election changes consistent with the IRS guidance (most do).

(h) Are my employees covered by a severance plan if they are laid off due to economic stress to my business as a result of COVID-19?

Many employers already have a severance plan in place that can include monetary assistance when employees are laid off. Check the terms of eligibility for severance benefits to see if the laid off employees qualify for severance benefits. If they do, you may follow the terms of the severance plan to award them this income replacement benefit. If you do not wish to trigger severance benefits, you may be able to amend your severance plan to avoid paying severance benefits. If no plan is in place, it may be worthwhile to explore establishing a plan to provide for systematic severance payments in the event of layoffs if you are considering offering severance.

(i) Do employees laid off due to COVID-19 still need to receive COBRA notices?

Yes. Employers who provide group health coverage generally are required to provide notice to terminating employees of their right to continue coverage at their own

expense, assuming active coverage is terminating pursuant to the layoff/furlough. (We're aware of many employers that are bridging active coverage for populations impacted by a COVID-19-related furlough.) Severance plans may provide healthcare continuation for a month or longer after work ends, especially for people with families. There is no requirement for the amount of benefits under a voluntary severance plan. Employers may provide severance pay of 1-3 months and a lump sum to pay for COBRA coverage for the same period. Regardless of whether an employer is subsidizing its laid off employees for COBRA, it is particularly important during this pandemic that employers provide COBRA notices and the ERISA required opportunity to apply for COBRA continuation coverage. If the COBRA subsidy is not already in the severance plan, employers may also consider amending their severance plans to include a lump sum payment for these unanticipated monthly COBRA premiums to ease the health care cost burden to these laid off employees.

15. Impact on Retirement Plans and Executive Compensation

(a) What should employees with 401(k) plan balances do in a volatile market due to the Coronavirus?

The spread of COVID-19 has caused the market to lose quite a bit of value in a short time-frame, resulting in corresponding drops in value of retirement accounts. Employers should not be giving investment advice to their 401(k) plan participants, although employers can expect jittery employees looking for reassurance that their retirement plan balances will weather the storm. If employers want to do something, they could remind participants that the 401(k) plan is a long term savings vehicle and that participants should be investing with a long-term view and not having a knee-jerk reaction to volatile markets. If the 401(k) plan has investment advice or managed accounts available through the plan, plan participants can be reminded of this professional help that is available to them.

(b) Can employees access their 401(k) balances to help cover expenses as a result of this crisis?

Yes, there are several ways that an employee may be able to access his or her 401(k) plan balance, provided these options are available under the 401(k) plan.

The CARES Act allows for newly available "coronavirus-related distributions" for 401(k) plans of up to $100,000 (taking into account all plans sponsored by the employer and members of its controlled group). If adopted by a plan sponsor, these distributions are available to certain participants affected by the coronavirus, namely: (i) participants diagnosed with the SARS-CoV-2 virus ("virus") or COVID-19, (ii) participants whose spouse or dependent is diagnosed with the virus or COVID-19, or (iii) participants who experience adverse financial consequences stemming from the virus as a result of being quarantined, furloughed, laid off, having reduced work hours, or being unable to work due to lack of child care. Employees may self-certify that they are eligible for these distributions, and are not required to provide substantiating documents (e.g., medical bills, COVID-19 test results).

These distributions will not be subject to the 10% tax penalty that normally applies to withdrawals before age 59-1/2, and the participant may choose to include the

distribution in income over three years, spreading out the tax liability. Also, participants who take a coronavirus-related distribution may choose to pay it back within three years.

Many 401(k) plans offer loans, which are paid back from payroll deductions and include both principal and interest (i.e., the participant pays interest to himself). The CARES Act allows plan sponsors to increase the limit on loans to $100,000, and to suspend loan repayments otherwise due in 2020 for one year for certain participants affected by the coronavirus as outlined above.

Even without the CARES Act relief, some 401(k) plans allow in-service distributions for those who are over 59 1/2. Many 401(k) plans also allow for withdrawals in the case of unreimbursed medical expenses or to prevent the eviction of the participant from the participant's principal residence or foreclosure on the mortgage of the residence, which cause a financial hardship to the participant.

(c) Does an employee on furlough have to pay off a 401(k) loan?

Generally, a participant must pay off a plan loan in substantially equal installments over a period of time not more than five years (longer in the case of primary residence loans). If s/he does not, the loan goes into default and is taxed as a deemed distribution. However, if the participant is on an unpaid leave (or a paid leave, but the level of pay will not cover the loan), the loan repayments may be suspended for up to one year. When the participant returns from the leave, the loan will be re-amortized and the loan payments will resume. As noted above, the CARES Act allows a suspension of 401(k) loan repayments otherwise due in 2020 for one year for certain participants affected by the coronavirus.

(d) Can employers reduce or suspend employer matching contributions under their 401(k) plan as a result of the economic impact of the coronavirus outbreak?

Employers with 401(k) plans that do not rely on a safe harbor plan design (i.e., to pass nondiscrimination testing) can reduce or suspend matching contributions on a prospective basis at any time, through a corresponding plan amendment.

Employers with 401(k) plans that rely on a safe harbor plan design can reduce or suspend safe harbor matching contributions as of the first day of any plan year (e.g., January 1 for a calendar year plan); however, if the employer wants to reduce or suspend safe harbor matching contributions *during* a plan year, the employer must satisfy one of the following alternatives:

1. The employer must be "operating at an economic loss" for the plan year; or

2. The employer must have included a statement about the possibility of reducing or suspending safe harbor contributions mid-year in its safe harbor notice (regardless of the employer's financial condition).

Under either alternative, the employer must also provide a supplemental notice to participants at least 30 days in advance of the effective date of the mid-year

reduction/suspension and must give impacted participants a reasonable opportunity to change their deferral elections. A corresponding plan amendment is also required, and must provide that the plan will pass the applicable nondiscrimination tests for the entire plan year, using the current-year testing method. Participants still must receive all safe harbor matching contributions through the effective date of the amendment but the plan will lose its safe harbor status for the entire plan year (thus requiring that it pass the ADP and/or ACP tests for the year) and may also lose any exemption to the top-heavy rules for the plan year.

If an employer has updated its 401(k) plan safe harbor notice (which is required to be provided to participants when they first become eligible for the plan and annually thereafter) to incorporate the statement referenced above, that employer would avoid the issue of having to prove it is "operating at an economic loss" if it wishes to reduce or suspend safe harbor matching contributions mid-year.

(e) Are employers required to pay 2020 required minimum distributions ("RMD") under a 401(k) plan?

Generally no. The CARES Act waives all RMDs for 2020 from 401(k) plans. An RMD is generally calculated using the balance of a 401(k) plan participant's account as of the last day of the year prior to the date it must be distributed to a participant - in this case, *before* the severe market decline in connection with the coronavirus pandemic. If this optional relief is adopted by the plan sponsor, participants (likely retirees) are not forced to take a distribution from their 401(k) plan account during an extreme market decline.

(f) How will the crisis impact defined benefit pension plans?

Coronavirus could significantly impact the funding levels of defined benefit pension plans for two reasons. First, broadly put, future benefit liabilities are determined based on mortality and interest rate assumptions. The lower the interest rate assumption, the higher the projected liabilities will be. Because the Federal Reserve continues to lower interest rates in response to the crisis, the projected defined benefit plan liabilities will also increase. Second, for purposes of determining plan funding requirements, projected future liabilities are measured against plan assets. The coronavirus has significantly reduced plan assets as a result of the recent market crash. As a result, the coronavirus crisis is both increasing the projected future liabilities while simultaneously reducing the assets available to pay such liabilities.

The CARES Act provides two different pieces of relief for defined benefit pension plans. First, under the CARES Act, a company can delay to January 1, 2021 any required contributions otherwise due in 2020 (plus interest) to meet funding standards. This provision will provide cash conscious companies with the ability to conserve their cash in 2020 by delaying contributions to the plan until January 1, 2021.

Second, the CARES Act provides that a pension plan can use its funding status for the plan year ending in 2019 when determining whether it must impose benefit restrictions for plan years which include calendar year 2020. Generally, a pension plan must impose restrictions on certain benefit distributions (for example, lump sums) when the plan's funding status falls below 80 percent. The primary intent of

these restrictions is to prevent retirement-eligible participants from drawing down a large portion of the plan's assets at the expense of participants who are not yet retirement-eligible and unable to draw benefits. The CARES Act allows the pension plan to use its 2019 funding status to determine whether the restrictions apply, recognizing the current, unique circumstances that could adversely impact a plan's funded status.

(g) Are there any restrictions on executive compensation?

For companies that receive Federal loans under the CARES Act, their executive compensation practices will be reshaped for quite some time. The following limits are in effect for the period the loan remains outstanding (up to a maximum of 5 years) and for one year after the loan is paid off ("Compensation Limit Period").

Compensation Limits

For any officer or employee of an eligible business whose "total compensation" exceeded one of the following thresholds in calendar year 2019, total compensation during any 12 consecutive months of the Compensation Limit Period is capped at the following amounts: (a) if compensation exceeded $425,000, total compensation is capped at the amount received in calendar year 2019 or (b) if compensation exceeded $3,000,000, total compensation is capped at $3,000,000 plus 50% of the excess over $3,000,000 of compensation received in calendar year 2019.

Severance Pay Limits

Severance pay and other benefits cannot exceed two times the maximum total compensation received by the individual in calendar year 2019. The provision is somewhat ambiguous as to whether it applies to terminations during this period or severance pay received during the period, but suggests it is pay received.

(h) How will the crisis impact incentive compensation arrangements?

Most incentive compensation arrangements are tied to the underlying performance of the employer offering the incentive. Most programs were set based on performance metrics that no longer correlate to the current economic environment (e.g., performance stock units will be well below target and threshold measures, stock options will be underwater and restricted stock units will payout a fraction of what they would have two weeks ago). Additionally, and for purposes of new incentive compensation grants, compensation committees are faced with defining performance metrics (often for the next three years) and choosing the grant levels based on short-term devaluation that may be resolved soon or have a lasting impact on the employer's core business objectives. Employers should consider creating added flexibility to their future awards and consider adjusting existing awards to account for the dramatic change in award values.

As a final point on incentive compensation, we're anticipating less shareholder challenges to the current proxy solicitations on executive pay (i.e., solicitations for proxies occurring between April and June) based on the nature of the crisis and the practical problems in carrying through with such a challenge. We would, however,

anticipate future challenges to increase once a new normal for establishing incentive compensation forms.

(i) What about tax filing and related deadlines - any relief there?

The IRS has extended the individual income tax filing deadline to July 15, 2020. Additionally, there are a number of upcoming benefit plan-related deadlines to keep in mind. Below are a few of them:

- ***End of Initial Remedial Amendment Period for 403(b) Plans.*** Tax-exempt employers originally had until March 31, 2020 to adopt an IRS pre-approved 403(b) plan document or adopt a custom plan document to fix any plan document errors retroactively to 2010. The IRS extended the deadline for making these changes to June 30, 2020. This is a one-time "free-pass" so to speak. After that deadline passes, any document errors will need to be corrected under the IRS's Voluntary Correction Program, which requires payment of a fee and possible other sanctions.
- ***Close of IRS Determination Letter Program Window for Hybrid Plans.*** Last year, the IRS issued guidance re-opening its determination letter program to hybrid plans (e.g., cash balance plans and pension equity plans) for a limited 12-month period. That period is set to expire on August 31, 2020.
- ***SECURE Act Guidance.*** The SECURE Act contains a number of provisions impacting employer-sponsored retirement plans, many of which are already in effect. There are many unanswered questions about how to actually administer the changes and incorporate them into existing employer-sponsored retirement plans, and additional guidance is needed. Our understanding is that Treasury is working on guidance. However, it is unclear at this point what, if any, impact the coronavirus outbreak will have on this process, as potential government office closures loom and resources are shifted to focus on more immediate virus-related relief, like guidance for the recently passed CARES Act.
- ***Retirement Plan Periodic Notice and Filing Requirements.*** Retirement plans are subject to numerous notice and filing requirements, including annual fee notices and annual Form 5500 filing requirements. While some of the deadlines for sending such notices or making such filings are a ways down the road, if offices are to close or business operations otherwise disrupted, it would be a good idea for the IRS and DOL to extend notice and filing deadlines well in advance. For example, if the commencement of the annual independent audit for qualified retirement plans is delayed, it could impact whether reports be ready for filing with the annual Form 5500.
- ***Qualified Disaster Relief.*** The CARES Act provides relief for those impacted by the coronavirus that is similar to its previously granted disaster relief for victims of hurricanes, wildfires and other natural disasters. This relief generally includes an increased limit for plan loans, a suspension of plan loan repayments for up to one year, and the

availability of qualified distributions up to a certain amount without the 10% early withdrawal penalty (and the ability to recontribute such distributions for a period of time after the distribution). It appears that it will be up to plan sponsors to decide whether to offer any or all of these relief provisions.

(j) What if my plan is currently under audit?

If your retirement plan is currently under an IRS or DOL audit, your ability to meet the agency's response deadline may be adversely impacted. The first thing that you should do is to write to the agent working on your case to request an extension. Follow up any phone calls by documenting such a communication in writing. We are fairly confident that neither the IRS nor DOL agent you are working with will strictly enforce any response deadlines in this current environment.

16. Immigration

(a) In light of the COVID-19 pandemic, have there been any changes to the Form I-9 and E-Verify related rules?

Yes, on March 20, 2020, the Department of Homeland Security (DHS) announced interim guidelines to temporarily ease Form I-9 compliance for employers that are operating remotely. Basically, DHS relaxed the physical in-person review requirements for the Form I-9 completion for qualifying employers. The guidance allows for a virtual review of identity and work eligibility documents when completing Form I-9 Section 2 verification or Section 3 reverification. DHS stated that this exception is not available when employees are physically present at an employer's work location. DHS also noted "if newly hired employees or existing employees are subject to COVID-19 quarantine or lockdown protocols, DHS will evaluate this on a case-by-case basis." Accordingly, nuanced exceptions should be discussed with counsel.

DHS guidance and related Seyfarth suggestions are as follows:

- Employers operating remotely may inspect documents remotely/virtually ("video link, fax, or email") for Section 2 verification or Section 3 reverification. Section 2 must be completed within 3 business days of the hire date. Section 3 on or before the date of the employee's work expiration. We recommend that the person completing Section 2 enter **"COVID-19"** in the *Additional Information Box,* at the time the Form is initially executed.
- This is now a "two-touch" process. Physical inspection must take place within three business days after normal operations resume; employers should ensure that **"COVID-19"** was previously written on the Form I-9 as the reason for the physical inspection delay. When updating the I-9 during the physical inspection, we suggest that the person conducting the in-person review of the identity and work eligibility document(s) add **"Documents Physically Examined by [Last Name, First Name] on [date of the inspection]"** to the Section 2 *Additional Information Box* on the Form I-9 or to Section 3 as appropriate. It will be critical to

watch timing here as DHS implied that "[a]ny audit of subsequent Forms I-9 would use the 'in-person completed date' as a starting point…" for timeliness violations.

- Employers using a Remote/Virtual Section 2 verification, or Section 3 reverification, must provide written documentation of their remote onboarding and telework policy for each employee. This should reference the company's overall policy in light of COVID-19 and should also describe any temporary use of a remote/virtual onboarding process, including completion of the Form I-9, as well as the necessary re-inspection of Form I-9 documents when the business reopens.

The temporary relaxation of the in-person requirement is only in effect until either May 19, 2020 or within 3 business days of the termination of the National Emergency declared on March 13th, whichever date is earlier.

(b) If our HR staff is unavailable to complete Forms I-9, but our business has been deemed essential and is still operating, what other choices do we have to complete the Form I-9?

Employers are able to designate an Authorized Representative to act on their behalf to complete Section 2 or Section 3 of the Form I-9. Use of an Authorized Representative has always been an acceptable alternative to the employer directly completing the form. The recent DHS guidance reminds employers of this option but also states employers are liable for any violations in connection with the form or the verification process committed by the Authorized Representative.

(c) Who can serve as an Authorized Representative?

Any third party, including a service vendor, a friend, or family member can act as an Authorized Representative to complete, or update, the Form I-9. We suggest that the person be over 18 years of age. In light of social distancing and shelter in place orders, it is likely that the selection will be an immediate family member. There is no government related prohibition related to such a choice. Regardless of who completes the I-9, it is critical to provide clear instructions to the employee and the representative, outlining the completion, collection, and copying/scanning of the identity and work eligibility documents, as well as transmitting the complete package to the appropriate party, after normal operations resume.

(d) Can you share insight on options other than completing a Form I-9 in person, and how other companies are thinking about the I-9 process, in light of almost overnight remote working and office closures?

Companies are looking at three basic options during the COVID-19 state of emergency:

1. Continuing to complete I-9s timely and in person

2. Use of an Authorized Representative to complete the Form I-9 (and Reverifications of expiring work authorization).

3. Complete Form I-9 and Reverifications virtually/remotely via Skype, Zoom, FaceTime or by fax or email (with an in-person update within three days of normal operations resuming)

(e) What should companies be considering when completing Form I-9 during COVID-19?

In any of the three scenarios, we recommend having processes in place for a secondary review of the Forms. As a result of the pandemic, we anticipate there will be lack of attention to detail when completing the forms, which could translate into fines and penalties later on. We also suggest the following:

- Making copies/scans of all identity and work authorization documents and retaining them with the Form I-9;
- Implementing a tracking system identifying all Form I-9s (and related E-Verify cases) not completed in-person, to ensure that:
- Forms are reviewed for accuracy;
- necessary reverifications are tracked as well as receipts and other deadlines; and
- any missing I-9s are completed with in-person document review.
- Placing a "note" (electronically or by hand) on any Form I-9s completed virtually, stating the "documents were examined virtually, not physically, in-person; and
- For any requests made to third party, remote completers, including friends and family, serving as Authorized Representatives, directions should include reminders to take care when conducting the review, to follow government safety guidelines and to delay in-person meetings if either party is feeling ill. Companies should work with experienced counsel when appointing "Authorized Representatives" to ensure the process is not only compliant, but also user friendly. The third party process should consider a host of issues including:
- How to safeguard PII (i.e., should the completer be allowed to copy the identity /work authorization documents);
- The logistics of timing and the specific SOP to receive the scan of the Form I-9 (i.e., email, shared site) should be detailed for the employee;
- Identifying how the Forms will be reviewed for completion and accuracy, and how necessary corrections will be addressed where mistakes were made;
- Directives regarding where the original I-9s will be sent (i.e., centralized location, a specific site) should be detailed in the instructions to the employee.
- In cases where the company uses an electronic I-9 system, assess what is offers and understand its limitations (can it help track I-9s completed virtually? Will it allow me to make updated to a virtually completed I-9 in section 2, etc.)

- Where the I-9 cannot be completed during the crisis and will be completed late, companies should consider attaching a memo to the Form I-9, explaining the special circumstances surrounding the delay, including the remote work arrangement and the suspension of normal business operations during the COVID-19 crisis.
- Due to expected layoffs and terminations in certain industry sections, there will a shifting of the workforce. It is advisable that companies are prepared to ensure fraudulent documents are not accepted during the I-9 process.

(f) Is it true that Immigration and Customs Enforcement issued a moratorium on I-9 Notices of Inspection (audit notices)?

Yes, in fact employers that had been served NOIs during the last wave of worksite enforcement actions that took place during the month of March 2020 were granted an automatic extension until May 19, 2020. While Homeland Security Investigations (HSI) will not issue any further administrative NOIs, the agency will still move forward on criminal related matters. In general, aside from HSI working on older backlogged cases, employers can expect a hiatus of I-9 related matters during the COVID-19 emergency.

(g) My company participates in E-Verify. The Social Security Administration offices are closed, do we still need to run an E-Verify query?

Yes, E-Verify has implemented the following guidance to minimize the burden on both employers and employees:

- Employers are still required to create cases for their new hires within three business days from the date of hire.
- Employers must use the hire date from the employee's Form I-9 when creating the E-Verify case. If case creation is delayed due to COVID-19 precautions, select "Other" from the drop-down list and enter "COVID-19" as the specific reason.
- Employers may not take any adverse action against an employee because the E-Verify case is in an interim case status, including while the employee's case is in an extended interim case status.

(h) Many states are extending the expiration date of state IDs and/or driver's licenses. How should the extension be documented in Section 2 of the Form I-9?

If the employee's state ID or driver's license expired on or after March 1, 2020, and the document expiration date has been extended by their state due to COVID-19, then it is acceptable as a List B document for Form I-9. US Citizenship and Immigration Service (USCIS) has directed employers to enter the document's expiration date in Section 2 and enter "COVID-19 EXT" in the Additional Information field. Employers may also attach a copy of the state motor vehicle department's webpage or other notice indicating that their documents have been extended. We are still awaiting

guidance on whether or not expired documents can be accepted when issued by states that have not announced automatic extensions.

(i) Can we temporarily furlough an H-1B worker?

Due to the intricate laws, governing the H-1B program, generally meant to protect U.S. workers, a furlough would be considered a 'benching' of the H-1B employee. Benching is unlawful. Basically wage obligations will continue until an H-1B worker is terminated (with the appropriate notice to the government) or an amended petition is filed reducing hours and changing to part-time employment.

17. WARN

(a) What is WARN and does it apply in the COVID-19 pandemic if an employer conducts mass layoffs, furloughs or temporarily closes the business? What are the potential penalties?

Furloughs, layoffs, mass employment separations, and/or facility closures resulting from COVID-19 can trigger obligations under the federal Worker Adjustment and Retraining Notification ("WARN") Act and/or state mini-WARN Acts. Ordinarily, WARN liability exists for failure to provide at least 60 days' advance notice of covered mass layoffs and closures to designated government representatives, as well as to affected employees, and any labor unions representing the impacted employees.

WARN liability for failure to give required notice can be significant, i.e., back pay, benefits, and out of pocket medical expenses for each affected employee for up to 60 days, as well as the possibility of a $30,000 civil fine. Liability is similar under most state WARN-type statutes. Prevailing employees in WARN-type litigation are entitled to attorney's fees, and such litigation is readily susceptible to class actions. Unions typically have standing to bring WARN class claims on behalf of their bargaining unit members.

(b) What are WARN's triggering thresholds?

Many employment loss situations will not trigger WARN -- either because they do not involve enough employees or temporary employment losses are not long enough. (Some state triggering thresholds are different and we will highlight some of those below.) The following is a broad, generalized explanation -- the actual statutory definitions are more refined.

First, truly small employers (assessed on essentially a control group basis) may be excluded from potential coverage. For example, under federal WARN, a business enterprise has to employ at least 100 full time employees (FTEs) or the hours equivalent across all of its facilities and related businesses to be subject to WARN.

Next, even if an employer is a large enough employer to potentially be covered by federal WARN, most of them look at the number of "full-time" employment losses that occur at a "single site of employment" (or roughly similar location-dependent concept, not across an employer's separate facilities) over a rolling period (typically 30 or 90 days). The single site of employment requirement means that even if a large

national employer were forced to lay off a few employees at, e.g., 100 different locations, a WARN-type statute would not be triggered because not enough employment losses occurred at a single location.

For WARN-type purposes, employees who work at home or remotely typically are sited at the bricks-and-mortar employer location from where they are supervised, to where they report, and/or where they are allocated within the employer's self-organization.

WARN has two prongs that must be analyzed separately: a "mass layoff" test and a "plant closing" test.

In a nutshell, a "mass layoff" is a headcount reduction where either the entire facility is not being closed, or enough discrete departments, functions, product lines, or other organizationally distinct units at the site are not being closed. To qualify as a "mass layoff," an employer must lay off for at least 6 months or discharge at least 50 full-time employees (defined under WARN as employees who average at least 20 hours of work per week and have worked for the employer or its predecessor for at least 6 of the 12 months prior to when notice, if it is required, would be due) at an employment site, with those employment losses comprising at least 1/3 of the full-time workforce at the location, within any rolling 30-day period. (For example, then, at a facility with 300 full-time employees, at least 100 employment separations would need to occur.) Alternatively, a mass layoff would occur if at least 500 employment losses occur at a site within a rolling 30-day period.

Even if there is no mass layoff, an employer also must assess whether a covered "plant closing" exists. A plant closing under federal WARN occurs if at least 50 full-time employees at a site (regardless of the percentage of full-time workers at the site) experience an employment loss within any rolling 30 day period -- and those losses are the result of the closure or substantial closure (maintaining a skeleton crew will not avoid liability) of the entire site, or a building on the site, or one or more departments, product lines, functions, or other organizationally distinct units on the site. In other words, there can be a qualifying "plant closing" even if the entire location is not closed, e.g., the closure of 5 departments with 10 full-time employees each.

Importantly, the federal WARN mass layoff and plant closing tests have an alternative 90 day employment loss aggregation test which provides that if the employer does not have enough losses at a site within any rolling 30 day period to trigger the statute, but does have enough causally related losses within any rolling 90 day period to trigger, there is a WARN event.

(c) Will a reduction in employee hours result in a WARN event?

Under WARN, an hours reduction of at least 50% in each month of a 6-month period constitutes an employment loss. Importantly, some states may find an employment loss has occurred with a smaller or shorter hours reduction.

(d) How do I treat employees who were discharged for cause?

Under WARN, a discharge for "cause" is not an employment loss. However, an employer should be cautious in not counting such a termination because if it is scrutinized, the employer may need to show that the discharge was not an attempt to evade the purposes of WARN.

(e) What if I don't know how long a layoff will last, e.g., if it will last at least 6 months?

Under WARN, and pursuant to 20 CFR 639.4(b), "[a]n employer who has previously announced and carried out a short-term layoff (6 months or less) which is being extended beyond 6 months due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff is required to give notice when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months from the date the layoff commenced for any other reason shall be treated as an employment loss from the date of its commencement."

In other words, if at the time of a layoff an employer -- based upon the best information available to it, and exercising commercially reasonable judgment -- reasonably concludes that a layoff will not last at least 6 months, it will not have to provide WARN notice at that time. If, based upon circumstances reasonably unforeseeable at the time of the beginning of the layoff, the layoff is to be extended beyond 6 months, the employer then must give WARN notice as soon as possible, while presumably invoking the UBC notice reduction provision.

Many but not all state WARN-type statutes include similar provisions.

(f) What information must a WARN notice contain? What about state WARN-type statutes?

WARN requires employers to provide

(i) all affected non-union employees

(ii) union representatives of affected employees

(iii) the "dislocated workers unit" of the state in which the affected employment site is located

(iv) the chief elected official of the municipality in which the affected employment site is located; and

(v) the chief elected official of the county in which the affected employment site is located

with at least sixty (60) calendar days advance written notice prior to any covered "plant closing" or "mass layoff" occurring at a "single site of employment."

Content-wise, the same notice can be utilized to comply with most state WARN-type statutes. California, New Jersey, and New York are especially notable (but not the only) exceptions.

(g) What if I need to postpone employment separations previously announced in a WARN notice?

If certain employees will need to be retained beyond the dates of separation announced in an employer's initial WARN notices, supplemental notices may be required under WARN. The DOL's applicable regulations under WARN address postponement of previously announced closing dates. This section states:

> Additional notice is required when the date or schedule of dates of a planned plant closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice as follows:
>
> (a) If the postponement is for *less than 60 days*, the additional notice should be given as soon as possible to the parties identified in Sec. 639.6 [*i.e.*, affected non-union employees, union representatives, and state and local governmental units] and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement. The notice should be given in a manner which will provide the information to all affected employees.
>
> (b) If the postponement is for *60 days or more*, the additional notice should be treated as new notice subject to the provisions of [Sections] 639.5, 639.6 and 639.7 [general regulations specifying when notice is required, who must receive notice, and what notices must contain] of this part. Rolling notice, in the sense of routine periodic notice, given whether or not a plant closing or mass layoff is impending, and with the intent to evade the purpose of the Act rather than give specific notice as required by WARN, is not acceptable.

20 C.F.R. § 639.10 (emphasis and explanatory brackets added).

The DOL added the following explanation in its commentary that accompanied the issuance of its regulations:

> To ensure that the parties who are due notice have the most current and helpful data available and, thus, can make appropriate plans, additional notice is due if the original date or the ending date of the 14-day period is not met. If the postponement is for less than 60 days, the notice need only contain a reference to the earlier notice, the date to which the planned action is postponed, and the reasons for the postponement. This type of notice will provide the parties with needed information and be less burdensome to the employer. If the postponement extends for 60 days or more, the additional notice should be treated as new notice and meet the specified requirements."

54 Fed. Reg. at 16063 (April 20, 1989).

(h) What states have WARN-type statutes, and what are some notable differences from federal WARN?

The following is not a complete and comprehensive list for private employers, but highlights some notable provisions. The specific laws must be consulted:

California: different triggering thresholds, no explicit minimum length of layoff, some different notice content requirement and recipients (notice also must be given to local workforce investment board). San Francisco has its own ordinance for certain retail establishments.

Delaware: many similarities to federal WARN

Hawaii: much of its statute is related to transfers of business interests

Illinois: some different triggering thresholds

Iowa: different triggering thresholds and notice length

Kansas: applies to only certain industries

Maine: 90 days' notice and certain mandatory severance requirements

New Hampshire: different triggering thresholds and other provisions

New Jersey: notice required on a designated form. As of July 1, 2020, substantial changes and differences from federal WARN, including mandatory severance requirements.

New York: different triggering thresholds, 90 days' notice, significantly different notice content

North Carolina: essentially follows federal WARN

Oregon: essentially follows federal WARN

Tennessee: some different triggers and provisions from federal WARN

Vermont: some different triggers and provisions from federal WARN

Wisconsin: lower triggering thresholds and other provisions different from federal WARN

Additionally, other states or municipalities have either voluntary WARN-type statutes, or require notice to state unemployment compensation agencies in the case of mass employment separations: Georgia (unemployment compensation notice), Maryland (voluntary), Massachusetts (unemployment compensation notice), Michigan (voluntary), Minnesota (voluntary), Ohio (unemployment compensation notice), and Philadelphia (WARN-type statute with differences from federal WARN).

It is of course possible that other states and municipalities could enact WARN-type legislation in real time given the current crisis.

(i) Does the COVID-19 pandemic qualify for one or more of the notice reduction provisions under WARN and/or state WARN-type statutes, e.g., "unforeseeable business circumstance" and/or "natural disaster?" If so, what are the implications? What about under state WARN-type statutes?

Workforce reductions caused by sudden and dramatic business losses outside an employer's control due to COVID-19 likely constitute an "unforeseeable business circumstance" (UBC) under WARN. This includes employment losses resulting from government-ordered shutdowns.

The DOL's "natural disaster" regulation does not explicitly reference pandemics; but, rather mentions floods, earthquakes, and other disasters. If a particular natural calamity qualifies, the employment losses must be the "direct result" of the disaster itself. If COVID-19 is a natural disaster under WARN, it is unclear what constitutes a "direct" causal result, e.g., employees themselves becoming infected, an employer's facility becoming unusable for health reasons, etc.

Importantly, where WARN's UBC and/or natural disaster provisions are properly invoked in a situation where there is a WARN event, it does not mean that an employer need not give WARN notice. Rather, the employer still must provide as much advance notice as possible under the circumstances. If commercial reasonableness (e.g., following a rapid unforeseeable government shutdown) would not permit advance notice, notice after the reductions are implemented may be compliant.

Most -- but not all -- state WARN-type statutes also have some form of UBC and/or natural disaster-type notice reduction provisions. Notably, ordinarily California WARN does not contain a UBC provision, although it includes an undefined "physical calamity" exception. However, on March 17, 2020, California Governor Newsom issued an Executive Order (N-31-20) which essentially imported the federal UBC concept into California WARN for the duration of the current emergency. The Executive Order permits employers to comply with California WARN respect to covered mass employment separations resulting from the current pandemic if they provide as much notice of employment losses as possible, while also including additional information regarding unemployment benefits described in the Order.

Ordinarily, invoking natural disaster/UBC provisions is not a preferred compliance strategy, because if an employer is challenged regarding the existence of such a condition and/or whether as much as notice as practicable was given, these can be highly fact intensive issues that make summary judgment challenging.

(j) What are some other common WARN considerations?

If there are sufficient employment losses – based on counting only "full time" employees – to trigger WARN, any "part time" employees who also suffer

employment losses as part of the same WARN event are entitled to notice on the same basis as full-time employees.

Temporary employees hired with the understanding that their employment would be limited to a particular project or undertaking do not need to be provided WARN notice. However, such project-based temporaries are counted in determining whether other employees may be entitled to WARN notice if they are otherwise "full time" (as defined under WARN). Temporary employees hired for an indefinite duration are counted for WARN purposes if they are otherwise are "full time" and are entitled to WARN notice if part of a WARN-covered event.

Bona fide contractor employees (i.e., individuals employed by and paid by a contractor who have an ongoing employment relationship with the contractor) are not counted in determining whether WARN notice is due and are not entitled to notice. An important caveat, however, is that many purported contractor employees arguably are joint employees of the contractor and the employer for which services are being provided.

WARN expressly encourages employers to give voluntary WARN notice in situations where notice is not required. Therefore, in "close situations," an employer should consider providing WARN notice; it is not conceding liability if it does so.

The fact that affected employees will be receiving severance pay does not obviate the need to provide notice of a WARN-covered event. Moreover, pre-existing severance obligations cannot be used to offset liability for a failure to give WARN notice. (However, in certain circumstances, WARN liability can be integrated with/"backed out" of the amount of severance to be paid).

18. Additional Corporate and Transactional Considerations

(a) ***Remote and Electronic Notarization

The "Full Faith and Credit" clause of the US Constitution requires each state to respect the "public acts, records, and judicial proceedings of every other state." Every state has also passed laws that recognize notarial acts taken in other states (summary of such statutes can be found here: https://www.notarize.com/availability)

Certain states, most notably Virginia, specifically authorizes its licensed notaries the ability to notarize documents from people outside of Virginia. If your state has not also enacted similar legislation, then you can rely on the "Full Faith and Credit" clause and certain online services, to complete your remote online notary. (e.g. NotaryCam.com, Notarize.com)

STATE REMOTE AND ELECTRONIC NOTARIZATION LAWS			
State	**Electronic notarization (e.g. documents able to be signed and notarized digitally)**	**Remote online notary (e.g. allows documents to be signed without the requirement that the notary is physically present with signatory)**	**Comments**
Alabama	No	No (temporarily allowed)	Proclamation dated 3/26/2020 allows remote notarizations through the state of emergency. Limited to notaries who are licensed attorneys or who are operating under the supervision of licensed attorneys. DMS #62854536
Alaska	No	No	
Arizona	No	Yes	Passed but not yet in effect; AZ law permits electronic notarization so long as they are signed in the presence of a notary
Arkansas	Yes	No (temporarily allowed)	Proclamation EO 20-12 dated 3/30/20 permits remote notarization through the end of the state of emergency. DMS # 62984872
California	Yes	No	Electronic notarization permitted as long as the requirements for a traditional paper-based notarial act are met. The party must be physically present before the notary public. CA Online Notary Act approved by Assembly Committee on Business and Professions April, 2019 (Assembly Bill 199) While remote online notarizations are currently not permitted in California, you can safely advise signers to use an out of state RON service if they need it. "California citizens who wish to have their documents notarized remotely can obtain notarial services in another state that currently provides remote online notarization. California Civil Code 1189(b) provides that any certificate of acknowledgment taken in another place shall be sufficient in this state if it is taken in accordance with the law of the place where the acknowledgment is made,"

STATE REMOTE AND ELECTRONIC NOTARIZATION LAWS			
State	**Electronic notarization (e.g. documents able to be signed and notarized digitally)**	**Remote online notary (e.g. allows documents to be signed without the requirement that the notary is physically present with signatory)**	**Comments**
			according to the SOS statement. DMS #62891975
Colorado	Yes	No (temporarily allowed)	Bill introduced. Temporarily allowed through at least 4/27/20 per Notice of Temporary Adoption dated 3/30/20 - DMS #62935605
Connecticut	No	No (temporarily allowed)	Executive Order No. 7K allows remote notarization through June 23, 2020 unless modified, extended or terminated. DMS #62848254
Delaware	No	No	State is in the early stages of implementing an eNotary program. Delaware will honor remotely notarized documents from other states
District of Columbia	No	No	
Florida	Yes	Yes	Effective 1/1/2020 (notaries must be registered to perform online notarizations). Administrative Order No. AOSC20-17 dated 3/24/2020 allows any Florida Notary to administer an oath remotely through 4/17/2020. DMS #62848804
Georgia	No	No (temporarily allowed)	However, a document that is eligible to be recorded in the land records may be electronically signed, notarized and filed as an electronic document per GA Real Property Electronic Recording Act. Per Executive Order dated 3/31/2020 remote notarization is allowed through the end of the public emergency. Limited to real estate transactions. DMS #62948041.
Hawaii	No	No (temporarily allowed)	H.B. 77 and S.B. 562 introduced in 2019 regarding remote notarization. Executive Order No. 20-02 dated 3/29/2020 allows remote notarizations through the state of emergency. DMS #62985282
Idaho	Yes	Yes	Went into effect 1/1/2020

STATE REMOTE AND ELECTRONIC NOTARIZATION LAWS			
State	**Electronic notarization (e.g. documents able to be signed and notarized digitally)**	**Remote online notary (e.g. allows documents to be signed without the requirement that the notary is physically present with signatory)**	**Comments**
Illinois	No	No (temporarily allowed)	Executive order 2020-14 dated 3/26/2020 provides for remote notarization during the duration of the Gubernatorial Disaster Proclamation. DMS #62847369
Indiana	Yes	Yes	
Iowa	Yes	Yes	Passed but not yet in effect. Proclamation of Disaster Emergency, Section 16 temporarily suspends the personal appearance requirement currently in effect until 4/16/2020. DMS #62848997
Kansas	Yes	No	
Kentucky		Yes	Went into effect 1/1/2020
Louisiana	No	No (temporarily allowed)	Bill introduced. Temporarily allowed until 4/13/2020, or as extended by subsequent Proclamation, per Proclamation Number 37 JBE 2020 - DMS 62935961
Maine	No	No (temporarily allowed)	Remote notarization allowed per executive order 37FY 19/20 effective 4/8/2020. Expires 30 days after termination of state of emergency. DMS #63246436
Maryland	Yes	Yes	Passed, but not yet in effect. Bill would also permit electronic notarization. Order number 20-03-30-04 permits remote notarization during the state of emergency - DMS 62936056
Massachusetts	No	No	Bill introduced. Per L. Rochwarg, the language regarding remote notarization has been pulled from the current bill.
Michigan	Yes	Yes	
Minnesota	Yes	Yes	
Mississippi	No	No (temporarily allowed)	Bill introduced. Remote notarization allowed 4/6/2020 per executive order 1467; In effect for 14 days beyond state of emergency. DMS #63246603
Missouri	Yes	No (temporarily allowed)	Senate bill 409, HB 495 and SB 140 submitted but not passed. Emergency order 20-08 allows for remote notarization

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			effective 4/6/2020 and expires 5/14/2020; DMS #63246664
Montana	Yes	Yes	
Nebraska	Yes	Yes	Passed, but not yet in effect; executive order signed allowing for early implementation of the Online Notary Public Act. In effect until 6/30/2020. https://sos.nebraska.gov/business-services/notary-public
Nevada	Yes	Yes	
New Hampshire	No	No (temporarily allowed)	Emergency Order 2020-04 #11 dated 3/23/20 grants temporary authority to perform secure remote online notarization for the duration of the state of emergency. DMS #62849101
New Jersey	No	No	Bill introduced and passed legislature. Needs to be signed by Governor. https://www.assemblydems.com/downey-houghtaling-and-swain-bill-to-allow-notaries-to-work-remotely-heads-to-governor/
New Mexico	Yes	No (temporarily allowed)	HB 470 was introduced in 2019 permitting remote notarization, but was not adopted as of 2/24/19. Executive Order 2020-015 permits remote notarizations through 6/20/2020. DMS #62985370
New York	No	No (temporarily allowed)	A.4076 allowing electronic and remote notarizations was introduced in 2019, but no action was taken as of February, 2019. Executive Order No. 202.7 allows remote online notarization through 4/18/2020. DMS #62674527
North Carolina	Yes	No	
North Dakota	Yes	Yes	
Ohio	Yes	Yes	
Oklahoma	No	Yes	Went into effect 1/1/2020
Oregon	Yes	No	

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Pennsylvania	Yes	No (temporarily allowed)	Bill introduced. On 3/21/20, the governor suspended the physical presence of notaries who are court reporters or stenographers participating in criminal, civil and administrative proceedings. The suspension will last only until the duration of the disaster emergency. DMS #62853156
Rhode Island	Yes	No (temporarily allowed)	Effective 4/3/2020, temporarily allowed through the state of emergency. DMS #63246896
South Carolina	No	No	Bill introduced
South Dakota	No - as of 2/23/19	Yes	Limits remote notarizations to paper documents only and signers for remote notarizations may only be identified through the Notary's personal knowledge.
Tennessee	Yes	Yes	
Texas	Yes	Yes	HB1217 authorizes remote online notarization - doc #62729068
Utah	No	Yes	Accepting applications to perform remote notarizations
Vermont	Yes	Yes	Law enacted in 2018, however, the law did not allow remote online notarizations to be performed until the Secretary of State published rules to implement the new law. The state enacted emergency administrative laws in the interim. DMS #62853439
Virginia	Yes	Yes	First state to authorize its notaries to notarize documents remotely via live audio-video technology and specifically allows for its notaries to notarize documents during executed outside of Virginia.
Washington	Yes	Yes	Passed but not to take effect until 10/1/2020. Proclamation 20-27 makes the new law effective temporarily from

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			3/27/2020 through 4/26/2020. DMS #62853587
West Virginia	Yes	No (temporarily allowed)	Executive Order 11-20 dated 3/25/20 permits remote notarizations through the state of emergency. DMS #62985460
Wisconsin	Yes	Yes	Awaits governor's signature as of 2/20/20. The legislation goes into effect June 1, 2020, however, COVID-19 emergency guidance specifically allows the public to utilize NotaryCam and Notarize.com. DMS #62853999
Wyoming	No	No (temporarily allowed)	Remote online notarization temporarily allowed per Guidance on Temporary Remote Notarization issued 3/24/2020. The Secretary of State office will re-evaluate this guidance on or before July 1, 2020 or when the governor lifts the present state of emergency, whichever comes first. DMS #62847867

Other resources:

https://www.jdsupra.com/legalnews/update-covid-19-real-estate-and-81096/

https://www.nationalnotary.org/notary-bulletin/blog/2018/06/remote-notarization-what-you-need-to-know

https://www.proplogix.com/blog/remote-online-notarization-a-brief-history-and-how-its-changing-real-estate-closings

https://narfocus.com/billdatabase/clientfiles/172/24/3357.pdf

The foregoing information is provided based upon currently known information. The progress of this disease is constantly evolving. The foregoing information is subject to change based upon such evolving information. If you have any questions regarding this matter, please contact your Seyfarth attorney.