

NEXT CHALLENGE. NEXT LEVEL.

NEXSEN | PRUET

COVID-19: MANAGING HR, BENEFITS, AND IMMIGRATION CHALLENGES DURING THE PANDEMIC

March 20, 2020

David Dubberly

Certified Employment and Labor Law Specialist

Bridget Blinn-Spears

Mike Brittingham

Certified Tax Law Specialist

David Garrett

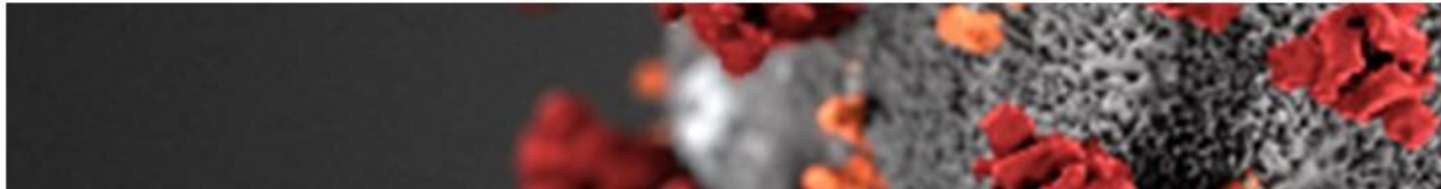
OVERVIEW

- ▶ Safety and health, wage and hour, disability discrimination, and WARN Act requirements; plus work from home/telecommute issues
- ▶ Families First Coronavirus Response Act
 - ▶ Emergency paid sick and paid family and medical leave
 - ▶ Payroll tax credits for leave; benefit coverages while on leave; coverage for testing for COVID-19
 - ▶ <https://www.nexsenpruet.com/insights/new-federal-law-provides-emergency-paid-sick-and-family-and-medical-leave>
- ▶ Considerations for employers with foreign national employees

SAFETY AND HEALTH

- ▶ OSHA webpage on COVID-19 started January 2020
 - ▶ Links to applicable standards and directives
 - ▶ ... recommendations for various industries

COVID-19



Standards

This section highlights OSHA standards and directives (instructions for compliance officers) and other related information that may apply to worker exposure to novel coronavirus, COVID-19.

There is no specific OSHA standard covering COVID-19. However, some OSHA requirements may apply to preventing occupational exposure to COVID-19. Among the most

SAFETY AND HEALTH

- ▶ OSHA 32-page booklet on COVID-19 published March 9, 2020
 - ▶ Describes “lower exposure,” “medium exposure,” and “high or very high exposure” risk occupations
 - ▶ ... and precautions employers can take to protect employees at each level

Guidance on Preparing Workplaces for COVID-19

U.S. Department of Labor
Occupational Safety and Health Administration

Introduction	3
About COVID-19	4
How a COVID-19 Outbreak Could Affect Workplaces	6
Steps All Employers Can Take to Reduce Workers' Risk of Exposure to SARS-CoV-2	7
Classifying Worker Exposure to SARS-CoV-2	18

SAFETY AND HEALTH

- ▶ OSH Act Section 5(a)(1) requires each employer to keep workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees”
- ▶ “General duty clause”
- ▶ COVID-19 is potentially such a hazard, depending on an employer’s risk exposure
- ▶ Employer can be cited under GDC if there are feasible means to abate a serious hazard that it doesn’t use

SAFETY AND HEALTH

- ▶ In COVID-19 context, abatement measures include:
 - ▶ Following OSHA's control and prevention recommendations

Control and Prevention

Measures for protecting workers from exposure to, and infection with, the novel coronavirus, COVID-19 depend on the type of work being performed and exposure risk, including potential for interaction with infectious people and contamination of the work environment. Employers should adapt infection control strategies based on a thorough **hazard assessment**, using appropriate combinations of engineering and administrative controls, safe work practices, and personal protective equipment (PPE) to prevent worker exposures. Some OSHA

Engineering Controls

Engineering controls involve isolating employees from work-related hazards. In workplaces where they are appropriate, these types of controls reduce exposure to hazards without relying on worker behavior and can be the most cost-effective solution to implement. Engineering controls for SARS-CoV-2 include:

- Installing high-efficiency air filters.
- Increasing ventilation rates in the work environment.
- Installing physical barriers, such as clear plastic sneeze guards.

SAFETY AND HEALTH

- ▶ Following CDC's Interim Guidance for Businesses and Employers

Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), February 2020

This interim guidance is based on what is currently known [about the coronavirus disease 2019 \(COVID-19\)](#). The Centers for Disease Control and Prevention (CDC) will update this interim guidance as needed and as additional information becomes available.

CDC Industry Guide

- [Resources for Airlines](#)

SAFETY AND HEALTH

- ▶ Posting CDC and state health department fact sheets about symptoms and how to prevent transmission

COVID-19 CORONAVIRUS DISEASE Share Facts About COVID-19

Know the facts about coronavirus disease 2019 (COVID-19) and help stop the spread of rumors.

FACT 1 Diseases can make anyone sick regardless of their race or ethnicity.

People of Asian descent, including Chinese Americans, are not more likely to get COVID-19 than any other American. Help stop fear by letting people know that being of Asian descent does not increase the chance of getting or spreading COVID-19.

FACT 2 The risk of getting COVID-19 in the U.S. is currently low.

Some people who live in or have recently traveled to places where many people have gotten sick with COVID-19 may be monitored by health officials to protect their health and the health of other people in the community.

FACT 3 Someone who has completed quarantine or has been released from isolation does not pose a risk of infection to other people.

For up-to-date information, visit CDC's coronavirus disease 2019 web page.



FACT 4 You can help stop COVID-19 by knowing the signs and symptoms:

- Fever
- Cough
- Shortness of breath

Seek medical advice if you

- Develop symptoms

AND

- Have been in close contact with a person known to have COVID-19 or if you live in or have recently been in an area with ongoing spread of COVID-19.

FACT 5 There are simple things you can do to help keep yourself and others healthy.

- Wash your hands often with soap and water for at least 20 seconds, especially after blowing your nose, coughing, or sneezing; going to the bathroom; and before eating or preparing food.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Stay home when you are sick.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.

For more information: www.cdc.gov/COVID19

COVID-19

If you have recently traveled to an area that has COVID-19 transmission and are experiencing symptoms mentioned below, call ahead to your health care provider before seeking medical care.

What is it?

- A new respiratory virus first identified in Wuhan, China
- It has the potential to cause severe illness and pneumonia in some people

How is it spread?

- Through the air by coughing and sneezing
- Close personal contact, such as touching or shaking hands
- Touching an object or surface with the virus on it, then touching your mouth, nose, or eyes

Who is at risk?

- Travelers to and from certain areas are at increased risk as are the close contacts of those who are ill
- Current risk to the general public is low
- See travel guidance from the Centers for Disease Control and Prevention www.cdc.gov/coronavirus/2019-ncov/travelers/index.html

What are the symptoms?

Illnesses can be mild, or in some cases be severe enough to require hospitalization. Symptoms of this respiratory illness primarily include:

- Fever
- Cough
- Shortness of Breath

How is it prevented?

Similar to prevention of other respiratory illnesses, including the flu:

- Wash hands often
- Avoid touching eyes, nose, or mouth with unwashed hands
- Avoid contact with sick people
- Stay home while you are sick; avoid others
- Cover mouth/nose with a tissue or sleeve when coughing or sneezing



Visit scdhec.gov/COVID19 for more information.

SAFETY AND HEALTH

- ▶ Abatement measures may also include:
 - ▶ Avoiding international and restricting domestic business travel
 - ▶ Providing PPE if needed
 - ▶ Requiring employees to stay home for 14 days upon return from travel to restricted areas



Travelers from Countries with Widespread Sustained (Ongoing) Transmission Arriving in the United States

SAFETY AND HEALTH

- ▶ **More abatement measures**
 - ▶ Requiring employees to stay home for 14 days if had close contact with anyone who tests positive
 - ▶ Requiring employees to stay home if sneezing and coughing or showing other symptoms until can provide return-to-work release
 - ▶ Contacting CDC and state health department if employee develops COVID-19
 - ▶ Thoroughly cleaning and disinfecting the workplace
 - ▶ Training on how to avoid transmission of infectious diseases
 - ▶ Restricting workplace visitors
 - ▶ Providing telework options

SAFETY AND HEALTH

- ▶ OSH Act Section 11(c) prohibits retaliation against employee for raising workplace safety concerns
- ▶ Section 13(a) states employee may refuse to work if he/she has good faith belief there is imminent danger of death or serious injury
- ▶ Includes if there is “reasonable expectation ... health hazards are present, and exposure to them will shorten life”

SAFETY AND HEALTH

- ▶ So be careful when responding to employee safety concerns related to COVID-19
- ▶ What if employee refuses to come to work because of fear of infection?
 - ▶ Is there a realistic threat?
- ▶ What if employee refuses to travel as part of job duties?
 - ▶ Is employee older or pregnant?
 - ▶ Review CDC, State Department, and DHS travel guidance with employee

SAFETY AND HEALTH

- ▶ OSHA's PPE Standard requires providing protective equipment, clothing, and barriers when necessary to prevent employees from being exposed to environmental hazards
- ▶ In COVID-19 context, may include:
 - ▶ Gloves, eye and face protection, and respirator for some healthcare workers
 - ▶ Same for workers using some hazardous chemicals for cleaning
 - ▶ But facemasks not needed for workers who are well, even when working close to others, per CDC and WHO

SAFETY AND HEALTH

- ▶ OSHA's Recordkeeping Regulation requires most employers to keep record of most work-related injuries and illnesses on OSHA 300 log and 301 incident report
- ▶ OSHA specifically exempts recording common cold and flu
- ▶ But COVID 2019 “is a recordable illness when a worker is infected on the job”
- ▶ Reporting requirements may apply

WAGE AND HOUR

- ▶ W&H Div. webpage on “Pandemic Flu and the FLSA”
 - ▶ Issued in 2009 during “swine flu”/H1N1 pandemic



Wage and Hour Division

[DOL Home](#) > [WHD](#) > [FLSA](#) > [Pandemic Flu and FLSA](#)

Pandemic Flu and the Fair Labor Standards Act

Questions and Answers

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

The Fair Labor Standards Act (FLSA) generally applies to hours actually worked. It does not require employers who are unable to provide work to [non-exempt employees](#) to pay them for hours the employees would have otherwise worked.

WAGE AND HOUR

- ▶ **W&D Div. webpage on “COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers”**
- ▶ **Published March 9, 2020**
- ▶ **Reaffirms and updates 2009 guidance**



U.S. DEPARTMENT OF LABOR

Wage and Hour Division

COVID-19 or Other Public Health Emergencies and the Fair Labor Standards Act Questions and Answers

WAGE AND HOUR

- ▶ **Employers affected in different ways:**
 - ▶ **Some slowing production and reducing hours or laying off employees because of either supply chain disruptions or falling demand**
 - ▶ **Others asking employees to work from home for public health reasons**
 - ▶ **Others asking employees to work longer hours because of increased demand for their products**

WAGE AND HOUR

- ▶ **Non-exempt employees**
 - ▶ **Paid for time worked**
 - ▶ **Minimum wage plus overtime**
 - ▶ **Not paid for time not worked**
 - ▶ **So if employee not at work because hours reduced or laid off, don't have to pay**
 - ▶ **But if employee works from home, have to pay for hours worked**
- * **Under FLSA; check state and local laws outside SC and applicable contracts**

WAGE AND HOUR

- ▶ **Employees who meet EAP or OS “white collar” exemptions**
 - ▶ **Paid on salary basis regardless of number of hours worked**
 - ▶ **General rule: if employee performs any work during week, must be paid full week’s salary**
 - ▶ **“Any work” includes answering e-mail or phone call**
 - ▶ **But if completely relieved of duty for week, don’t have to pay for week**
 - ▶ **Can require employee to use up accrued vacation or PTO for days when off**

***Under FLSA; check state and local laws for employees outside SC and applicable contracts**

WAGE AND HOUR

- ▶ **Exceptions: don't have to pay for ...**
 - ▶ **Full-day absences for sickness or disability if employer has paid sick leave policy**
 - ▶ **Full-day absences for personal reasons other than sickness or disability**
 - ▶ **Full-day or partial-day absences taken as unpaid leave under FMLA**

***Under FLSA; check state and local laws for employees outside SC and applicable contracts**

WAGE AND HOUR

- ▶ **Partial-week reductions in salary not allowed**
- ▶ **But can make future decreases in salary that correspond to reduced hours if practice is occasional and due to long-term business needs—with assistance of counsel**

***Under FLSA; check state and local laws for employees outside SC and applicable contracts**

WAGE AND HOUR

- ▶ Reductions in pay require seven days' advance written notice under SC Payment of Wages Act
 - ▶ Check state and local wage payment laws in other states
- ▶ If having to ask employees to work extra hours, no limit in number of hours per day or week employees can be asked to work
 - ▶ As long as employees are 16 years old or older
 - ▶ But consider morale and PR implications
 - ▶ And check wage and hour laws in other states

SC QUARANTINE LEAVE LAW

- ▶ **SC Code Ann. Sec. 44-4-530(E)**
 - ▶ Employer may not “fire, demote, or otherwise discriminate against an employee complying with an isolation or quarantine” ordered during declared public health emergency
 - ▶ Employer may require employee to use available annual or sick leave to comply with the order
- ▶ **Similar laws in some other states**

DISABILITY DISCRIMINATION

- ▶ **EEOC Pandemic Preparedness Technical Assistance Document**
 - ▶ Issued in 2009 during “swine flue”/H1N1 pandemic
 - ▶ Reaffirmed in EEOC news release on March 4, 2020
 - ▶ ADA does “not interfere with or prevent employers from following” CDC guidance



**PANDEMIC PREPAREDNESS IN THE WORKPLACE
AND THE AMERICANS WITH DISABILITIES ACT**

DISABILITY DISCRIMINATION

- ▶ **EEOC Q&A on the ADA and COVID-19**
 - ▶ Published March 16, 2020
 - ▶ “The ADA ... rules continue to apply, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19.”



What You Should Know About the ADA,
the Rehabilitation Act, and COVID-19

DISABILITY DISCRIMINATION

- ▶ EEOC addresses whether employer can take temperature of employees at work to determine if they are infected
- ▶ Q: “During a pandemic, may an ADA-covered employer take its employees’ temperatures to determine whether they have a fever?”
- ▶ A: “Generally, measuring an employee’s body temperature is a medical examination. If pandemic influenza symptoms become more severe than the seasonal flu or the H1N1 virus [], or if pandemic influenza becomes widespread in the community as assessed by state or local health authorities or the CDC, then employers may measure employees’ body temperature.”

DISABILITY DISCRIMINATION

- ▶ Under ADA, medical exams are not allowed unless they are
 - ▶ Job-related and consistent with business necessity, or
 - ▶ Employer has reasonable belief employee poses direct threat to him/herself or others
- ▶ So normally cannot require employees to submit to temperature checks, but it should be OK for as long as pandemic conditions persist

DISABILITY DISCRIMINATION

- ▶ EEOC also addresses when employer can and cannot exclude employees with disabilities from workplace
 - ▶ Q. “May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?”
 - ▶ A. “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 illness were serious enough to pose a direct threat.”

DISABILITY DISCRIMINATION

- ▶ **ADA prohibits employers from excluding employees with disabilities from workplace for health or safety reasons unless they pose “direct threat” to themselves or others (significant risk of substantial harm even with reasonable accommodation)**
- ▶ **EEOC shows employers have more leeway in deciding when employees pose direct threat in health emergency**
- ▶ **Follow guidance of federal, state, and local officials and make decisions based on objective factors**

DISABILITY DISCRIMINATION

- ▶ CDC's position on temperature cut-off
 - ▶ “Employees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever (100.4° F [38.0° C] or greater using an oral thermometer), signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g. cough suppressants).”

DISABILITY DISCRIMINATION

- ▶ CDC's position on informing fellow employees of possible exposure
- ▶ “If an employee is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA). Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.”

DISABILITY DISCRIMINATION

- ▶ **ADA confidentiality requirement:**
 - ▶ **“Information regarding the medical condition or history of an employee must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.”**

NATIONAL ORIGIN DISCRIMINATION

- ▶ When implementing health and safety measures, base decisions on objective factors like recent travel to high-risk area, not protected characteristics like national origin
- ▶ From CDC 2/05/2020 Fact Sheet: “DO NOT show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have [COVID-19].”

ADVANCE NOTICE OF SOME LAYOFFS AND CLOSINGS

- ▶ If forced to suspend operations because of COVID-19, is it necessary to provide advance notice?
- ▶ WARN Act requires 60 days' advance notice of “mass layoff” or “plant closing”
 - ▶ Applies to businesses with 100 or more full-time employees
 - ▶ Notice to employees and government entities required if 50 or more employees at a single site will experience an “employment loss” (layoff of six months or longer)
 - ▶ Partial exceptions for “unforeseeable business circumstances” and “natural disasters”
 - ▶ Some states (not SC) have “mini-WARN” laws with additional requirements

PROTECTED CONCERTED ACTIVITY

- ▶ Employee complaints related to COVID-19 may be PCA if they are made on behalf of other employees
- ▶ NLRA Sec. 7 protects employees from discipline for engaging in “protected concerted activity for mutual aid or protection”
 - ▶ Two or more employees acting together to improve terms and condition of employment
 - ▶ Or individual action expressly taken on behalf of co-workers
 - ▶ Includes talking with co-workers about working conditions
 - ▶ And “participating in concerted refusal to work in unsafe conditions”

WORK FROM HOME/TELECOMMUTING

- ▶ **Tips for complying with FLSA requirement to track hours of non-exempt employees**
 - ▶ **Set specific work schedule and hours**
 - ▶ **Require non-exempt employees to record all hours worked**
 - ▶ **Require advance written authorization for overtime**
 - ▶ **Prohibit working off-the-clock (including checking e-mail), under-reporting hours, or over-reporting hours**

WORK FROM HOME/TELECOMMUTING

- ▶ Info security important because confidential info can lose trade secret status unless affirmative steps taken to keep it secret
 - ▶ NDA
 - ▶ Computer use and confidential info policies
 - ▶ Document signed by employee acknowledging employer's right to access and search computers and mobile devices used for work, regardless of where located
 - ▶ Password protection

EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT

- ▶ In addition to regular FMLA eligibility, leave available for qualifying need related to a public health emergency with respect to COVID-19 declared by a federal, state, or local authority
- ▶ Eligible employee: employed at least 30 days
- ▶ Employer threshold: fewer than 500 employees

FMLA EXPANSION

COMPENSATION REQUIREMENTS

- ▶ Unpaid for first 10 days, but employee can elect to substitute vacation, medical or sick leave
- ▶ Paid after first 10 days
 - ▶ $2/3$ regular rate of pay X the number of hours the employee would normally be scheduled to work
 - ▶ Not to exceed \$200/day and \$10,000 in the aggregate per employee

FMLA EXPANSION

EMPLOYER SIZE AND TYPE MATTERS

- ▶ For employers with fewer than 25 employees, limitations on requirement of restoration to position
- ▶ Secretary of Labor may issue regulations excluding
 - ▶ certain health care providers,
 - ▶ emergency responders,
 - ▶ small businesses with fewer than 50 employees from these requirements would jeopardize the viability of the business as a going concern
- ▶ Multi-Employer Bargaining Agreement employers

FMLA EXPANSION

EFFECTIVENESS, ENFORCEMENT, EXPIRATION

- ▶ **Effective 15 days after enactment**
- ▶ **No civil action by employees for employers who do not have 50 employees**
- ▶ **FMLA enforcement provisions apply**
- ▶ **Expires on December 31, 2020**

EMERGENCY PAID SICK LEAVE ACT

- ▶ Paid sick leave to the extent employee is unable to work or telework because
 - ▶ Subject or caring for individual subject to COVID-19-related quarantine or isolation order
 - ▶ Advised to self-quarantine or caring for individual advised to self-quarantine due to COVID-19
 - ▶ Symptoms of COVID-19 and seeking diagnoses
 - ▶ Caring for son or daughter if school or child care closed due to COVID-19 precautions
 - ▶ Substantially similar circumstances

EMERGENCY PAID SICK LEAVE ACT

COMPENSATION REQUIREMENTS

- ▶ **Employer: fewer than 500 employees**
 - ▶ **Multi-Employer Bargaining Agreement Employers**
- ▶ **Employee: employed by employer**
 - ▶ **Health care providers/emergency responders may be excluded**
- ▶ **Paid Leave:**
 - ▶ **Full-time employees: 80 hours**
 - ▶ **Part-time employees: hours equal to two-week average**
 - ▶ **No carryover**

EMERGENCY PAID SICK LEAVE ACT CAPS

- ▶ **\$511/day up to \$5,110**
 - ▶ **Subject to COVID-19-related quarantine or isolation order**
 - ▶ **Advised to self-quarantine self-quarantine due to COVID-19**
 - ▶ **Symptoms of COVID-19 seeking diagnosis**
- ▶ **\$200/day up to \$2,000**
 - ▶ **Caring for son or daughter if school or child care closed due to COVID-19 precautions**
 - ▶ **Caring for individual subject to COVID-19-related quarantine or isolation order or advised to self-quarantine by health-care provider**

EMERGENCY PAID SICK LEAVE ACT

RESTRICTIONS AND DETAILS

- ▶ Cannot require employee to search for or find replacement to cover sick time
- ▶ No waiting period – regardless of employment length
- ▶ Cannot require exhaustion of other paid leave first
- ▶ No retaliation
- ▶ Posting requirement – poster coming from DOL no later than 7 days after enactment

EMERGENCY PAID SICK LEAVE ACT

EFFECTIVENESS, ENFORCEMENT, AND EXPIRATION

- ▶ **Effective 15 days after enacted**
- ▶ **FLSA-style damages**
 - ▶ **Liquidated damages**
 - ▶ **Attorneys' fees**
- ▶ **Construed in employee's favor**
- ▶ **Expires 12/31/2020**

REQUIRED HEALTH PLAN COVERAGE

COVID-19 TESTING AND TREATMENT LEADING TO TESTING

- ▶ **Effective upon enactment – March 18, 2020**
- ▶ **First-dollar coverage for:**
 - ▶ **In vitro diagnostic testing products and the administration of the products for the detection of COVID-19**
 - ▶ **Items and services furnished to an individual during office visits (including telehealth visits) that result in an order for or administration of an in vitro diagnostic test**
- ▶ **Expires at the end of the “emergency period”**

TAX CREDITS

PAID SICK LEAVE

- ▶ Credit against payroll taxes for each calendar quarter in an amount equal to 100% of the “qualified sick leave wages” paid by the employer during the calendar quarter
- ▶ Limitation on amount
 - ▶ Up to \$511 / day for employee sick with or quarantined due to COVID-19 (\$5,110 max – 10 days)
 - ▶ Up to \$200 / day if the leave is for caring for a family member (\$2,000 max – 10 days)
- ▶ If cost of qualified sick leave exceeds the payroll taxes then credit is “refundable”

TAX CREDITS

PAID FAMILY LEAVE

- ▶ Credit against payroll taxes for each calendar quarter in an amount equal to 100% of the “qualified family leave wages” paid by the employer during the calendar quarter
- ▶ Limitation on amount
 - ▶ Up to \$200 / day (up to \$10,000 max) if the leave is for caring for child(ren) if schools are closed or daycare unavailable and individual unable to telecommute
- ▶ If cost of qualified family leave exceeds the payroll taxes then credit is “refundable”

TAX CREDITS

HEALTH PLAN EXPENSES

- ▶ **Credit against payroll taxes for each calendar quarter in an amount equal to the employer’s “qualified health plan expenses” allocable to the qualified sick / family and medical leave during the calendar quarter**
- ▶ **Allows the employer to obtain reimbursement for the cost of assisting employees retain group medical plan coverage during the emergency leave period**

EMPLOYEE BENEFIT ISSUES

TERMINATION VERSUS LAYOFF

- ▶ Termination of employment would result in loss of coverage under plans – must determine timing of coverage loss and any obligation to extend continuation of coverage
- ▶ Layoff from active work would necessitate a review of each plan to determine coverage provisions during leave of absence / layoff – proper administration of coverage terms and ultimate termination of coverage due to reduction in hours of employment (followed by continuation of coverage).

EMPLOYEE BENEFIT ISSUES

RETIREMENT PLAN CONSIDERATIONS

- ▶ **Termination of employment –**
 - ▶ **Could trigger partial termination resulting in full vesting**
 - ▶ **Likely allows participants to seek distribution**
 - ▶ **Likely will trigger plan loan repayment obligation (often leads to default)**
- ▶ **Layoff from active work –**
 - ▶ **No partial plan termination trigger or distribution trigger**
 - ▶ **Could lead to loan default if loan payments not made**

EMPLOYEE BENEFIT ISSUES

WELFARE PLAN CONSIDERATIONS

- ▶ **Termination of employment –**
 - ▶ Will trigger loss of coverage and continuation of coverage for applicable plans
 - ▶ Review, understand, and properly administer
- ▶ **Layoff from active work –**
 - ▶ Coverage extends only as allowed under terms of plans
 - ▶ Review, understand, and properly administer

EMPLOYEE BENEFIT ISSUES

HDHP AND COVID-19 EXPENSES

- ▶ **IRS Notice 2020-15**
- ▶ **This IRS notice provides, until further guidance is issued, HSA-eligible HDHPs will not fail to be HDHPs for providing health benefits associated with testing for and treatment of COVID-19 without a deductible or with a deductible below the minimum deductible for an HDHP**

EMPLOYEE BENEFIT ISSUES

DEPENDENT CARE FLEX SPENDING CONSIDERATIONS

- ▶ **Mid-year changes in dependent care flexible spending account plans are not allowed unless there is an allowed change in family status**
- ▶ **If child care needs change due to a change in employment status of an employee or employee's spouse effecting eligibility or a change in cost of coverage, then employers may allow the employee to change their election for contributions to dependent care flexible spending account plans**

H-1B, H-1B1 & E-3 EMPLOYEES

- ▶ 20 CFR 655.732(a) – employers must afford H-1B (presumably also including H-1B1 & E-3) workers with working conditions “on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees”
- ▶ If you allow U.S. workers to work from home, you must also allow your foreign employees to work from home.
- ▶ For H-1B, H-1B1 & E-3s: No new LCA is required for the home worksite as long as it is within the same metropolitan statistical area (MSA).
 - ▶ 20 CFR 655.715 defines the MSA as “the area within normal commuting distance”
 - ▶ HOWEVER, LCA posting notices SHOULD be posted at the employee’s home for 10 consecutive business days, and the notices should be placed in the PAF.

BEWARE OF THE FINE PRINT

H-1B, H-1B1 & E-3 VISAS

- ▶ In 2017, the DOL said that they would not enforce the posting requirement at a personal residence – but these comments are not binding. Better practice is to post
- ▶ IF the employee's home is outside the MSA:
 - ▶ 20 CFR 655.735 - Short Term Placement option H-1B workers can be placed at a worksite not listed on the approved LCA for up to 30 workdays (days actually worked, not including weekends/holidays), therefore this option could cover ~6 weeks of work at a temporary location.

CAVEAT TO SHORT TERM PLACEMENT

H-1B, H-1B1 & E-3 VISAS

- ▶ 20 CFR 655.735(b)(3)(ii) – under the STP rule, the employer is also required to pay for “the actual cost of lodging for both workdays and non-workdays.”
- ▶ 20 CFR 655.735(b)(3)(iii) – requires employers to pay “the actual cost of travel, meals and incidental or miscellaneous expenses for both workdays and non-workdays”
- ▶ Under the STP rules, >30 days will mean a new LCA filing AND the filing of an amended H-1B visa petition (at least as of now).

MATERIAL CHANGES

- ▶ **Material Changes in Terms and Conditions of Employment** – generally expected to work in the locations as described in visa petitions. Whether the USCIS needs to be notified (by filing amended petitions) depends on the type of visa and whether the change would be considered to be “material” change in terms and conditions of employment
- ▶ **CHANGE IN PAY** – material would be a change in pay triggered by moving from full-time to part-time.

MATERIAL CHANGES

- ▶ **Change in pay for H-1B, H-1B1 & E-3: If H-1B workers are not being paid their salary amount that was listed on the LCA filed with the H-1B visa petition, employers can be found liable and be required to provide back pay.**
- ▶ **Other nonimmigrant visas (such as L-1, TN, OPT or STEM OPT) can be put “out of status” if there is a company shutdown and they are not working and not being paid. If out of status, must change to another status or leave the country (which may not be feasible)**

STUDENTS AND EXCHANGE VISITORS

- ▶ **Students working on OPT & STEM OPT should communicate with their schools if there are any material changes.**
- ▶ **Students on F-1 status can fall out of status if they are taking all “online” courses during a campus shutdown.**
- ▶ **DHS has indicated it is prepared to be flexible.**
- ▶ **DOS has reported it is prepared to be flexible for J-1s working as exchange visitors if they cannot leave the US at the conclusion of their programs**

FORM I-9 AND E-VERIFY

- ▶ As of today, all normal requirements apply – must continue to verify employment authorization at time of hire.
- ▶ Still requires physical examination of each document presented, reviewing or examining documents via webcam, scans, or photographs is still prohibited.
- ▶ Nothing has changed regarding an employer's Form I-9 and E-Verify requirements.

QUESTIONS/COMMENTS?

David Dubberly
803-253-8281

ddubberly@nexsenpruet.com

Bridget Blinn-Spears
919-678-7593

BBlinn-Spears@nexsenpruet.com

Mike Brittingham
803-253-8289

MBrittingham@nexsenpruet.com

David Garrett
919-653-7802

dgarrett@nexsenpruet.com