

COVID-19: Employment Law Implications & Response Strategies

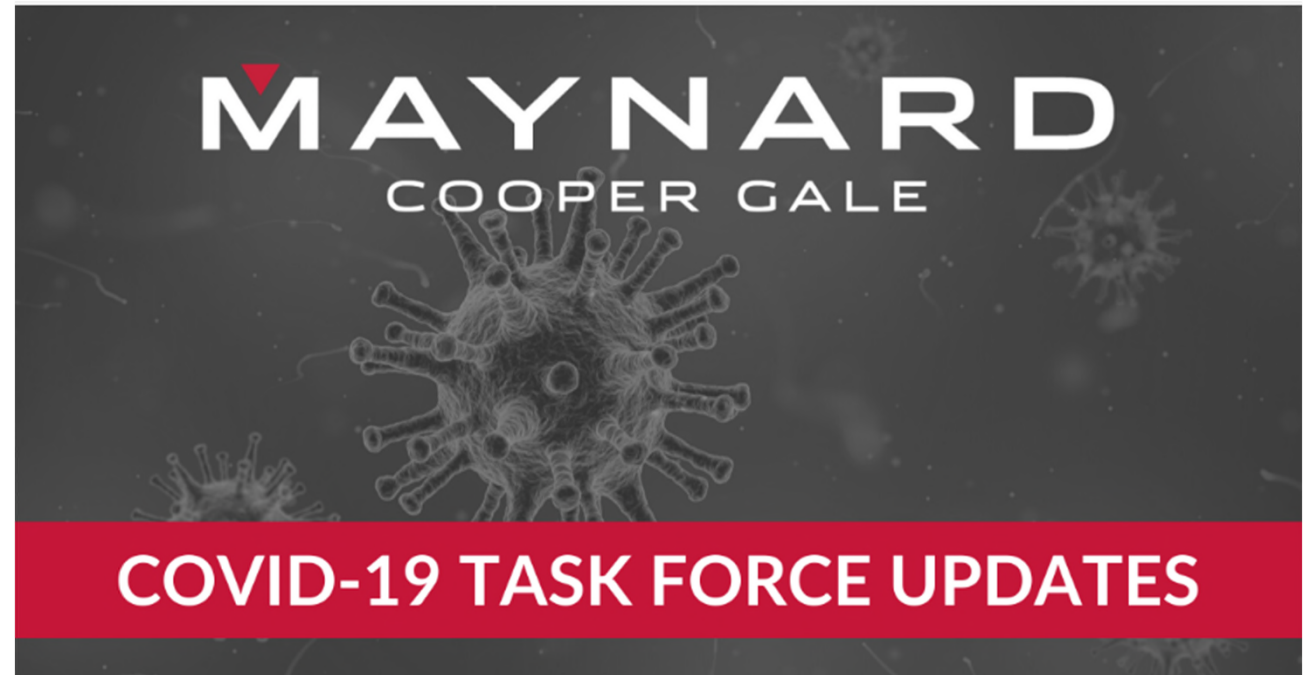


Presented By
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April 2020



- ▼ Employment
- ▼ Employee Benefits
- ▼ Finance
- ▼ Tax
- ▼ Business Continuity /
Supply Chain /
Operations
- ▼ Contracts / Insurance
- ▼ Government
Contractors
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CORONAVIRUS CONSIDERATIONS FOR EMPLOYERS



Extended Benefits Deadlines

- ▼ IRS Notice 2020-23 delays certain specified filing obligations, including the deadline for Forms 5500, due **between April 1 and July 15, 2020**
 - ▼ Extends the due date for specified actions to **July 15, 2020**
 - ▼ The relief is automatic—no extension form, letter, or other request needs to be filed with the IRS
 - ▼ Further filing extensions beyond July 15, 2020, may be sought using the appropriate extension form, but the extension will not go beyond the original statutory or regulatory extension date
- ▼ **Form 5500**
 - ▼ The relief window covers Form 5500 filings for plan years that ended in September, October, or November 2019, as well as Form 5500 deadlines within the window as a result of a previously filed extension request
 - ▼ No help for calendar year plans with July 31 Form 5500 deadline

What are *Qualified Health Plan Expenses*?

- ▼ The FFCRA and CARES Act use the same definition—amounts paid or incurred under a **group health plan** (as defined in Code section 5000(b)(1)) but only to the extent those amounts are excluded from employees' income under Code section 106(a)
- ▼ **What plans are counted as group health plans for this purpose?**
 - ▼ Code section 5000(b)(1) defines a “group health plan” broadly to mean any plan (including a self-insured plan) sponsored by an employer or employee organization to provide health care to employees, former employees, or their families
 - ▼ Likely includes **medical, dental, and vision** group health plans
 - ▼ **Might** include EAPs, Wellness Programs, and On-site Medical Clinics
 - potentially depends on whether the program is an excepted benefits or would be considered group health plans
- ▼ **NOT Included**
 - ▼ Contributions to health savings accounts and Archer medical savings accounts are not included in group health plan expenses

What are *Qualified Health Plan Expenses*?

- ▼ Does the amount of qualified health plan expenses include both the portion of the cost paid by the employer and the portion of the cost paid by the employee?
 - ▼ **YES**, includes employer contributions as well as **pre-tax salary reduction contributions** made by employees (including pre-tax employee contributions and employer flex contributions to health flexible spending accounts)
 - ▼ Would **NOT** include amounts employees pay with **after-tax contributions**
 - ▼ Would also include employer contributions to health reimbursement arrangements (HRAs), including individual coverage HRAs (but not qualified small employer HRAs)

What are *Qualified Health Plan Expenses*?

- ▼ What if the employer sponsors more than one plan?
 - ▼ The qualified health plan expenses are determined separately for each plan
 - ▼ For each plan, those expenses are allocated to the employees who participate in that plan
 - ▼ In the case of an employee who participates in more than one plan, the allocated expenses of each plan in which the employee participates are aggregated for that employee

Calculating *Qualified Health Plan Expenses*

- ▼ **Fully-insured** group health plans may determine expenses
 - ▼ using the applicable COBRA premium for each employee,
 - ▼ using a blended average rate for all employees, or
 - ▼ using two separate blended average rates, one for self-only coverage and one for other than self-only coverage
- ▼ **Self-funded** group health plans may determine expenses
 - ▼ using the applicable COBRA premium for each employee or
 - ▼ using any reasonable actuarial method to determine estimated annual expenses of the plan
 - ▼ Use of a reasonable actuarial method allows employers to use a single blended rate for all employees, as the estimated annual expenses would be divided by the number of covered employees to determine the annual cost-per-covered employee

Benefits & Pay Shortages

- ▼ What if an employee has no paycheck or the paycheck has insufficient funds to cover the employee's required contributions?
 - ▼ Plan Document?
 - ▼ Establish a uniform administrative practice
 - ▼ Order of priority (e.g., prioritize benefits for which a lapse in payment could cause a cancellation of coverage) and method of payment and collection
 - ▼ Catch-up contributions?
- ▼ Consider payment agreement
 - ▼ Eligibility condition?

What Happens Next & Return to Work

- ▼ When the order of stay at home is rescinded, does everyone just go back?
- ▼ What if an employee refuses to return to the office because they are still fearful?
- ▼ If they do return and end up with the virus, will the employer have any liability?
- ▼ We are planning for employees to return to work. Can we start taking their temperatures to check for fevers? Should we?

What Happens Next & Return to Work

▼ Employees who won't be tested:

- ▼ Should be without fever for at least 72 hours;
- ▼ Do not suffer from cough or shortness of breath; and
- ▼ At least 7 days have passed since their last symptoms first appeared

▼ Employees who have been tested may return after they:

- ▼ No longer have a fever (without medicine);
- ▼ No cough or shortness of breath; and
- ▼ Have received two negative tests in a row, 24 hours apart, consistent with CDC guidelines

What Happens Next & Return to Work

- ▼ Employees who tested positive but have had no symptoms may return when:
 - ▼ 7 days since first positive with no subsequent illness;
 - ▼ 3 days following end of isolation, continue to limit contact (6 feet) and wear nose/mouth covering.
- ▼ Employees exposed but isolated may return to work after 14 days of quarantine after exposure without symptoms

Unemployment Compensation

- ▼ \$600/week in extra unemployment \$ has resulted in some of my employees refusing to return to work. What can I do about that?
- ▼ How does an independent contractor receive unemployment benefits. From what I can tell it looks like they have to file like a regular worker, GET DENIED and then file again. Is there a different form the second time? Sounds like it will take forever to receive any benefits if you are a contractor...
 - ▼ Can an independent contractor can file for the PPP loan and unemployment or one or the other?
 - ▼ What should I tell my independent contractors?

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

► **PAID LEAVE ENTITLEMENTS**

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- $\frac{2}{3}$ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at $\frac{2}{3}$ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

► **ELIGIBLE EMPLOYEES**

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). *Employees who have been employed for at least 30 days* prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

► **QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19**

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to **telework**, because the employee:

- | | |
|---|---|
| <ol style="list-style-type: none">1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;2. has been advised by a health care provider to self-quarantine related to COVID-19;3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); | <ol style="list-style-type: none">5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services. |
|---|---|

FFCRA Emergency Family Medical Leave (EFMLA)

- ▼ What happens to EFMLA once the school year is over?
 - ▼ Does an employee get paid time beyond the school year under the Expanded FMLA?
 - ▼ If gatherings are going to be 10 or less for a while, I don't see many daycare facilities having openings. I worry it's going to be a fight with employees with young children.
- ▼ Can I require an employee to use accrued paid leave instead of EFMLA?

FFCRA Emergency Paid Sick Leave (EPSL)

- ▼ Can Emergency Paid Sick Leave be used intermittently for caring for children because school is closed?
 - ▼ OR if they have used five days only and come back to work, they cannot use the remaining five days?
 - ▼ They have to use the EFMLA that they will be paid after 14 days?

FFCRA and PPP

- ▼ We have two employees out on FFCRA leave and just receive our PPP funding. We want to bring them back to work.
- ▼ Should we cover the Paid leave under the PPP? Will this impact our granting if we bring back the paid leave people at full payroll for the 2nd pay period in April and going forward through June 30?
- ▼ If one employee on paid leave does not want to come back to work, how does this impact granting the loan? Can they stay on Paid Leave? Do they need to resign? Do they have until June 30 to come back at full pay?
- ▼ Once an employer received PPP funding, shouldn't they stop using FFCRA and just pay full wages?

CARES Act:

Financing Developments

April 21, 2020

Financing Options

- ▶ Small (Not Greater than 500)
 - ▶ Economic Injury Disaster Loans
 - ▶ Payroll Protection Program
- ▶ Mid-Size (Greater than 500, but less than 10,000)
 - ▶ Mid-Size Credit Facility
 - ▶ Main Street Lending Program
- ▶ Large (Greater than 10,000)
 - ▶ Large Company Credit Facility
 - ▶ Main Street Lending Program

PPP Timeline

- ▶ March 27 - Law Adopted
- ▶ April 3 - Applications Opened
- ▶ April 13 - 60% (\$250BB) Approved
- ▶ April 16 - \$349BB Approved (100%) - SBA Ceased Accepting Applications
 - ▶ Distinguish “Approved” v. “Funded”
 - ▶ Bank v. SBA Acceptance
- ▶ 2nd Round??? - \$370BB
 - ▶ \$310BB - PPP - \$60B Set-Aside
 - ▶ \$60BB - EIDL
 - ▶ Potential to Address Eligibility

Frequent Topics of Discussion

- ▶ Timing
 - ▶ Application
 - ▶ Funding
 - ▶ Covered Period
- ▶ Guidance (or Lack of Guidance)
 - ▶ Companies
 - ▶ Banks
 - ▶ Cash v. Accrual
- ▶ Furloughs, Re-Hires, New Hires
- ▶ Forgiveness
- ▶ Eligibility

FAQs and Best Practices for Forgiveness

- ▶ Isolate PPP Funds
- ▶ Document Use of PPP Funds
- ▶ Retain Precise Records
- ▶ Forgivable Items
 - ▶ Payroll Costs (Apply PPP Methodology)
 - ▶ Interest on Covered Mortgage Obligations
 - ▶ Exclude Principal
 - ▶ Covered Utilities
 - ▶ Covered Rent Obligations



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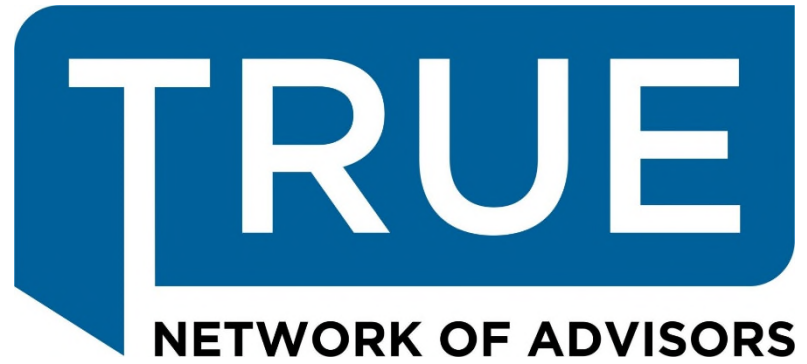


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