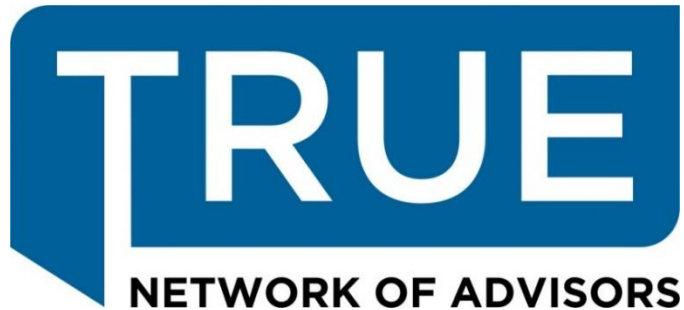


# COVID-19 Resources Webinar Series: Return to Work Considerations & Updated Guidance

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June 2020



- ▼ Employment
- ▼ Employee Benefits
- ▼ Finance
- ▼ Tax
- ▼ Business Continuity /  
Supply Chain /  
Operations
- ▼ Contracts / Insurance
- ▼ Government  
Contractors
- ▼ Non-profits

## CORONAVIRUS CONSIDERATIONS FOR EMPLOYERS



# ***NEW 125 Cafeteria Plan Guidance - FAQs***

- ▼ Are we required to amend our cafeteria plan to allow the new election change events?
  - ▼ Employers are not required to allow the new election change events
  - ▼ If an employer does allow them, it must amend the cafeteria plan **by December 31, 2021**
- ▼ What are the amendment and notice requirements?
  - ▼ Amendment window open until December 31, 2021
  - ▼ As a practical matter (and potentially as part of fiduciary duty), employers should provide notice asap
  - ▼ SMM may be required for changes affecting underlying ERISA plans

# NEW 125 Cafeteria Plan Guidance - **FAQs**

- ▼ **Does an employee have to experience a hardship or similar circumstances to change their election?** No.
- ▼ **Health Plan Elections:** For midyear elections made during calendar year 2020, a cafeteria plan may permit eligible employees to:
  - ▼ (1) make a new, prospective election for coverage if they initially declined employer-sponsored health coverage
  - ▼ (2) revoke an existing election and make a new, prospective election to enroll in different employer-sponsored health coverage
  - ▼ (3) revoke an existing election on a prospective basis, **provided that the employee attests in writing** they are or will be enrolled in other health coverage not sponsored by the employer
    - ▼ Model attestation provided in [IRS Notice 2020-29](#)
    - ▼ Employer may rely on the written attestation provided by the employee, unless the employer has actual knowledge that the employee's attestation is inaccurate
- ▼ **FSA & DCAP Elections:** Cafeteria plan may permit eligible employees to revoke an election, make a new election, or increase or decrease an election

# ***NEW 125 Cafeteria Plan Guidance - FAQs***

- ▼ **May employers tailor or limit the permissible election change events?**
  - ▼ Generally, yes
  - ▼ Examples:
    - ▼ Limit midyear FSA election changes to amounts no less than amounts already reimbursed
    - ▼ Only allow election changes to add or increase coverage

# Outbreak Period Extensions

- ▼ HIPAA Special Enrollment Period
- ▼ COBRA
  - ▼ COBRA Election Period
  - ▼ COBRA Premium Payment Period
  - ▼ COBRA Notices from Employees regarding Divorce/Legal Separation, Dependent Child's Eligibility Ceases, and Disability
  - ▼ **COBRA Election Notice Deadline**
- ▼ Claims Procedures
  - ▼ Plan's Benefit Claim Filing Deadline
  - ▼ ERISA Adverse Benefit Determination Appeal Deadline
  - ▼ ERISA External Review Request Deadline
  - ▼ Deadline to Submit Additional Information Related to External Review Request

# Outbreak Period Extensions - FAQs

- ▼ **Are we required to amend our plan(s) to allow the extended deadlines?**
  - ▼ Employers **must** provide the extensions
  - ▼ Likely no requirement to amend plans, but may depend on particular plan language
- ▼ **What are the notice requirements?**
  - ▼ Unclear, but general recommendation is to provide notice of extended deadlines
  - ▼ All employees? All participants? Affected participants only? Upon Request or “need to know”?

# Outbreak Period Extensions - FAQs

- ▼ **Does an employee have to experience a hardship or similar circumstances to take advantage of the extensions? No**
- ▼ **May employers tailor, limit, or expand the extensions?**
  - ▼ Employers may not limit the extensions, but likely no issue with providing additional relief
- ▼ **Special Issue: COBRA Premiums and Claims**
  - ▼ **Must the plan continue paying benefits if the COBRA beneficiary does not pay his or her COBRA premiums during the Outbreak Period?**
    - ▼ Unclear, but most resources say plan may hold on claims payment until premiums are paid



# Assessing Return to Work Risks

- ▼ There is **no one-size-fits-all** approach to re-open and manage risks
- ▼ Employers will **have to assess risks** based on:
  - ▼ State and local orders
  - ▼ OSHA/CDC recommendations
  - ▼ Industry
  - ▼ Work environment and culture
  - ▼ Employment exposure history
  - ▼ Interaction with customers
  - ▼ **\*Employee reaction to employer compliance**
- ▼ Have a **designated COVID-19 response officer** (probably HR) who:
  - ▼ Is familiar with **employee benefits and policies** and has regular access to **CDC and OSHA websites**
  - ▼ Has **benefits consultant and employment lawyer** on speed dial

# Critical CDC & OSHA Guidelines for Employers

## ▼ What Rules Do I Need in Place for Return to Work:

- ▼ Follow **state and local** orders

- ▼ Review applicable **CDC guidelines for your industry**

## ▼ The more the experts learn about COVID-19, their guidance changes. Make sure you use the most recent CDC recommendations for employers and businesses:

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>

## ▼ OSHA's guidance for employers:

<https://www.osha.gov/Publications/OSHA3990.pdf>

## ▼ EEOC's ADA guidance for employers:

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

# NEW CDC Guidelines for Office Buildings

<https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html>

- ▼ Create a COVID-19 Health and Safety Plan
- ▼ Before resuming office operations:
  - ▼ Ensure properly functioning ventilation systems
  - ▼ Increase circulation of outdoor air by use of windows, fans, doors
  - ▼ Check for hazards associated with prolonged shutdown
- ▼ Modify or adjust seats, furniture, work stations for social distancing
- ▼ **Replace high-touch communal items with alternatives**

# OSHA Reverses Course on COVID-19 Recordables

- ▼ Previously COVID-19 employee infections were only reportable only where **objective evidence** showed the infection was work-related
- ▼ May 26, 2020, **OSHA obligates all employers subject to maintaining OSHA 300 logs** that they must conduct an **investigation** to determine whether contraction of COVID-19 is **work related and comply with recordkeeping**
  - ▼ Employers with ten or fewer employees at all times during the previous calendar year and employers that operate in a **low-hazard industry** are **not** subject to these requirements
  - ▼ Low hazard industries:  
**<https://www.osha.gov/recordkeeping/ppt1/RK1exempttable.html>**

\*CAL-OSHA adopted new rule May 27, 2020

# OSHA Reverses Course on COVID-19 Recordables cont'd

- ▼ Employee's COVID-19 positive diagnosis is recordable IF the case:
  - ▼ is a **confirmed case (not necessarily positive test result)** of COVID-19;
  - ▼ is **“work-related”**; and
  - ▼ involves one or more of the general recording criteria in OSHA regulations (for example, if it results in **days away from work or medical treatment beyond first aid**). Note: days spent in quarantine are not considered “days away from work” for OSHA purposes.
- ▼ Reportable if results in **serious illness, serious injury, or death**

# OSHA Reverses Course on COVID-19 Recordables cont'd

- ▼ Employers must make a **good faith** effort to determine whether the employee's COVID-19 case is **work-related**:
  - ▼ event or exposure in the work environment either **caused or contributed** to the resulting condition; or
  - ▼ **significantly aggravated** a pre-existing injury or illness.

# OSHA Reverses Course on COVID-19 Recordables cont'd

- ▼ OSHA will consider the employer's efforts as follows:
  - ▼ **Reasonableness of employer's investigation:**
    - ▼ ask the employee where he/she believes he/she contracted the virus; and
    - ▼ review the employee's work environment for potential exposure.
  - ▼ **Evidence Available to the Employer:** employers cannot be held responsible for what they do not know and what is not reasonably accessible
  - ▼ **The Evidence COVID-19 was Contracted at Work**

# OSHA Reverses Course on COVID-19 Recordables cont'd

## ▼ Evidence COVID-19 was Contracted at Work:

### ▼ Likely:

- ▼ Two or more contemporaneous cases among workers who work closely together
- ▼ Employee's illness is contracted shortly following exposure to a coworker/customer/vendor who tested positive
- ▼ Employee's job involves frequent exposure to the general public with ongoing community transmission and there is no alternative explanation for the illness

### ▼ Unlikely:

- ▼ Employee is only worker to contract COVID-19 in vicinity and job does not require frequent contact with general public
- ▼ When away from work Employee associates with someone who: (i) has COVID-19; (ii) is not a coworker; and (iii) exposes the employee



# OSHA Reverses Course on COVID-19 Recordables cont'd

## ▼ OSHA's Review of Evidence Requires Employers to Ask Additional Questions of COVID-19 Positive Employee:

***1. How do you believe you contracted COVID-19? Date, time, location, persons, witnesses? What PPE were you wearing and what PPE or protective measures (masks, etc.) were being used by others when this occurred?***

# OSHA Reverses Course on COVID-19 Recordables cont'd

## ▼ OSHA's Review of Evidence Requires Employers to Ask Additional Questions of COVID-19 Positive Employee:

***2. Are you aware of any other employee/customer/vendor, with whom you worked in close proximity, having symptoms or being diagnosed COVID-19 positive? If so, who, what knowledge do you have of the symptoms or test result, when did you learn of the test result or observe the symptoms, when did you work in close proximity?***

# OSHA Reverses Course on COVID-19 Recordables cont'd

## ▼ OSHA's Review of Evidence Requires Employers to Ask Additional Questions of COVID-19 Positive Employee:

***3. Are you aware of any family member/household member/significant other/close friend, with whom you have been in close proximity, having symptoms or being diagnosed COVID-19 positive? If so, who, what knowledge do you have of the symptoms or test result, when did you learn of the test result or observe the symptoms, how did this person contract the virus (if you know), and when were you last in close proximity?***

# OSHA Reverses Course on COVID-19 Recordables cont'd

▼ OSHA's Review of Evidence Requires Employers to Ask Additional Questions of COVID-19 Positive Employee:

*4. Have you received any advice from a medical provider or public health authority concerning what may have caused you to contract COVID-19?*

# OSHA Reverses Course on COVID-19 Recordables cont'd

## ▼ OSHA's Review of Evidence Requires Employers to Ask Additional Questions of COVID-19 Positive Employee:

***5. Have you or any household member traveled out of state in the last 30 days? If so, where, when, mode of transportation? What personal protection (masks, etc.) from COVID-19 did you or the household member use during this travel?***

# OSHA Reverses Course on COVID-19 Recordables cont'd

## ▼ OSHA's Review of Evidence Requires Employers to Ask Additional Questions of COVID-19 Positive Employee:

***6. Have you or any household member been to a health care facility other than for treatment of your COVID-19 symptoms during the last 30 days? If so, where, when, for what purpose? What personal protection (masks, etc.) from COVID-19 did you or the household member use during this visit?***

# OSHA Reverses Course on COVID-19 Recordables cont'd

▼ OSHA's Review of Evidence Requires Employers to Ask Additional Questions of COVID-19 Positive Employee:

*7. During the last 30 days, have you or any household member shopped at any retail or grocery stores, dining establishments, etc., without wearing a mask that covers your nose and mouth?*

# OSHA Reverses Course on COVID-19 Recordables cont'd

- ▼ The Employer must **document each investigation and its determination of work-relatedness** regardless of whether it treats the COVID-19 case as OSHA Recordable



# What else can 2020 throw at us?

▼ **Protests and Riots**

▼ **Employer considerations for free speech in the workplace?**



▼ **June 16: PPP Forgiveness Guidance and Application**

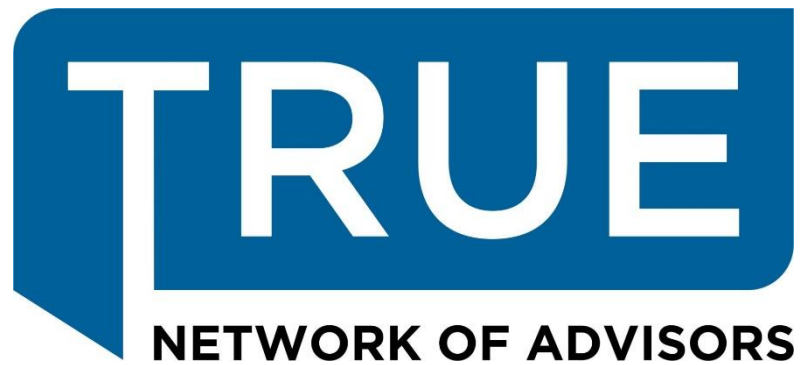


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