Webinar Q&A

Zywave Compliance 5.1.2020 Webinar Questions:

COVID-19 Compliance Update for Employers Q&A

Employee Symptoms and Testing

1. If an employee shows up for work with a fever or notifies the employer that he or she is having COVID-19 symptoms, can the employer send that person home and/or require a negative test before coming back to work? Must the employer pay the employee during that period?

a. Yes, an employer can send home an employee who has COVID-19 or symptoms associated with it, or tell the employee not to come in to work. An employer can also administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus, and employers can require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work.

However, the EEOC notes that, as a practical matter, 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.

Whether employers must pay employees for time away from the workplace due to symptoms of COVID-19 will depend on the leave laws that apply to the employer. Under the Families First Coronavirus Response Act (FFCRA), an employee who has COVID-19 symptoms may take paid sick leave only to seek a medical diagnosis or if a health care provider advises the employee to self-quarantine because the employee has or may have COVID-19 or is particularly vulnerable to COVID-19. Note that state leave laws may provide additional protections to employees.

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Also, employers should keep in mind that exempt employees must receive their weekly salary regardless of the number of hours they work during the week. However, the Fair Labor Standards Act does not require employers to compensate exempt employees for any week in which they do not perform any work.

2. Can employers require periodic testing for employees due to concerns about individuals who are asymptomatic but are infected?

a. EEOC guidance permits employers to take steps to determine if employees entering the workplace have COVID-19. This is allowed because an individual with the virus will pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus. The EEOC does not require employees to be symptomatic prior to being tested.

However, the EEOC states that employers should ensure that the tests are accurate and reliable, to be compliant with the Americans with Disabilities Act (ADA).
For example, employers may review guidance from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from the Centers for Disease Control (CDC) or other public health authorities, and check for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Finally, note that accurate testing only reveals whether the virus is currently present; a negative test does not mean the employee will not acquire the virus later.

Based on guidance from medical and public health authorities, employers should still require – to the greatest extent possible – that employees observe infection control practices (such as social distancing, regular handwashing and other measures) in the workplace to prevent transmission of COVID-19.

3. What medical tests can be administered before employees go to work? Are you referring to checking their body temperature? Can we require antibody testing for employees coming back to work, and are such tests available for worksites at this time?

a. Employers may check employees' body temperature or administer other types of COVID-19 tests. The general consensus is that this includes antibody tests. However, according to recent reports, both the availability and reliability of these tests is currently in question. The EEOC states that employers should ensure that the tests are accurate and reliable to be compliant with the ADA. Zywave is not able to comment on the availability or reliability of any medical tests. We recommend consulting with local public health authorities regarding recommended tests.

4. May an employer send an employee home if he or she has been in contact with another employee who has tested positive? Must the employer pay the employee in this situation? Is the employee eligible for sick leave during that time frame?

a. It is generally up to the employer to adopt and implement reasonable precautions in the employer's workplace. This can include sending employees home if they have been in contact with an employee who has tested positive. However, employers should consider current guidance from the CDC or local public authorities.

For example, the CDC has provided recommendations on community exposure, for asymptomatic individuals who have been exposed to individuals with known or suspected COVID-19 or possible COVID-19. Separate guidance has been issued for employees in critical infrastructure positions.

In general, employers are not required to pay employees for time they do not work, unless paid leave is required for a specific reason. The FFCRA does not provide paid leave when an employee cannot work due to exposure to an individual who tests positive for COVID-19. Note that state leave laws may provide additional protections to employees.

Also, employers should keep in mind that exempt employees must receive their weekly salary regardless of the number of hours they work during the week. However, the Fair Labor Standards Act does not require employers to compensate exempt employees for any week in which they do not perform any work.

5. How do you handle HIPAA issues for employees that test positive?

Information about an employee's medical symptoms or tests must be kept confidential under the ADA. Employers can inform employees that an employee of the company has tested positive for COVID-19, but they should not release the employee's name to anyone who does not need to know the employee's identity.

According to the EEOC, which individuals in an organization need to know the identity of the employee will depend on each workplace and why a specific official needs this information. For example, an employer's designated representative may need to interview the employee to compile a list of people with whom the employee possibly had contact through the workplace, so t the employer can then notify those people. Employers should make every effort to limit the number of people who get to know the name of the employee.

HIPAA does not necessarily apply to health information that an employer has about its employees, unless that information is related to the health plan, or the employer is a health care provider. Information that constitutes protected health information (PHI) under HIPAA, which is created or maintained by a HIPAA covered entity such as a health plan or health care provider, may only be used or disclosed as permitted by the HIPAA Privacy Rule. Electronic PHI must be protected as required by the HIPAA Security Rule.

6. If an employer provides four weeks of PTO to employees, do they have to provide emergency paid sick leave in addition to the four weeks of PTO?

a. Yes. Paid sick leave under the FFCRA is in addition to an employer's other leave policies. Employers may not require their employee to use provided or accrued paid vacation, personal, medical, or sick leave before the paid sick leave, or concurrently with the paid sick leave under the FFCRA. However, an employer and employee can agree that the employee may use preexisting leave entitlements to supplement the amount he or she receives from paid sick leave, up to the employee's normal earnings.

Note that an employer is not entitled to a tax credit for any paid sick leave that is not required to be paid or exceeds the limits set forth under the FFCRA.

7. Is the amount an employee must be paid while taking emergency paid sick leave the employee's full pay or current paid family leave rate?

a. Paid sick leave under the FFCRA is in addition to other leave provided under federal, state, or local law. For paid sick leave that is taken under the FFCRA, the rate of pay will depend on the reason the employee is taking paid sick leave.
The employee is due full pay if the employee is taking leave because he or she is subject to a federal, state, or local quarantine or isolation order related to COVID-19, has been advised by a health care provider to self-quarantine related to COVID-19, or is experiencing COVID-19 symptoms and is seeking a medical diagnosis. Total pay for these reasons is capped at $511 per day or $5,110 in total.

The employee is due two-thirds pay if the employee is taking leave because he or she is caring for an individual subject to a federal, state, or local quarantine or isolation order related to COVID-19, 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, or is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services (HHS). Total pay for these reasons is capped at $200 per day or $2,000 in total.

8. Can employees taking expanded FMLA leave take up to 12 weeks off and not use PTO?

a.After the first two workweeks (usually 10 workdays) of expanded family and medical leave under the FFCRA, an employer may require an employee to concurrently take leave that would be available to the employee under the employer's existing leave policies in that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if your employee (or a covered family member) is not ill.

If the employer requires employees to take other leave concurrently with the expanded

FMLA leave, the employer must pay employees the full amount to which they are entitled under the employer's existing paid leave policy for the period of leave taken.

9. Employees can be eligible for paid sick leave if they are "experiencing any other substantially similar condition, as determined by the Secretary of Health and Human Services." Can you define what a "substantially similar condition" is and give examples?

a. HHS has not yet identified any "substantially similar condition" that would allow an employee to take paid sick leave. This provision of the law is a placeholder in case another reason arises where paid leave would be appropriate. In that case, the federal government could require paid sick leave to be provided without additional action by Congress. If HHS does identify any such condition, the U.S. Department of Labor (DOL) will issue guidance explaining when employees may take paid sick leave on the basis of a "substantially similar condition."

10. Are employees able to take paid sick leave or expanded FMLA leave intermittently? Can an employer deny the employee's request to take intermittent leave?

a. The answer depends on whether an employee is teleworking or working at the employer's worksite and why the employee needs leave. In any case, the employer does not have to permit the employee to take leave intermittently. However, the DOL encourages employers and employees to collaborate to achieve flexibility and meet mutual needs, and is supportive of voluntary arrangements that allow intermittent leave when it is permitted by law.

If the employee is teleworking, the employer and employee can agree that the employee may take the leave intermittently and can agree that leave be taken in any increment, regardless of the reason that the employee needs leave.

Also, if the employee is working at the employer's worksite, but is taking leave to care for his or her child whose school or place of care is closed (or whose child care provider is unavailable) because of COVID-19-related reasons, leave can be taken intermittently if the employer agrees. Leave can also be taken in any increment agreed to by the employer and employee in this situation.

However, if the employee is working at the employer's worksite and does not have the option of teleworking, paid sick leave for the other qualifying reasons related to COVID-19 cannot be taken intermittently.

Specifically, an employee cannot take intermittent paid sick leave if he or she cannot telework and needs leave because he or she:

- ***Is subject to a federal, state, or local quarantine or isolation order related to***

COVID-19;
• Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
• Is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
• Is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
• Is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Unless the employee is teleworking, once he or she begins taking paid sick leave for one or more of these qualifying reasons, the employee must continue to take paid sick leave each day until the full amount of paid sick leave is used or the employee no longer has a qualifying reason for taking paid sick leave. This limit is imposed because, if the employee is sick or possibly sick with COVID-19, or is caring for an individual who is sick or possibly sick with COVID-19, the intent of FFCRA is to provide such paid sick leave as necessary to keep the employee from spreading the virus to others.

If the employee no longer has a qualifying reason for taking paid sick leave before it is exhausted, the leave may be taken at a later time, until December 31, 2020, if another qualifying reason occurs.

11. With the school year ending soon, how does an employer address expanded FMLA leave if the child's normal summer daycare is open? If an employee requests the full 12 weeks of expanded FMLA leave, can the employer request new documentation?

a. An employee may be able to take paid sick leave or expanded FMLA leave during the summer if his or her child's care provider during the summer—a camp or other program in which the employee's child is enrolled—is closed or unavailable for a COVID-19-related reason. However, if the child's normal child care provider is available, the employee would not be eligible for paid sick leave or expanded FMLA leave.

When an employee requests paid sick leave or expanded FMLA leave, he or she must specify the dates for which leave is requested along with the child's name, the name of school or child care provider, and a statement that no other suitable person is available to care for the child. When approving leave, employers should specify the period for which leave is approved, and they should take into account the period for which employees would be eligible for the leave (for example, the period remaining in the school year). Employees that need to request additional leave due to closure of a summer child care provider would have to include the information related to that provider in the request.

Employee Benefits

12. Is there any guidance on how dependent care FSA balances will be handled during the COVID-19 pandemic? Many employees have discontinued their contributions to those accounts as allowed by law because their daycare providers are closed. However, employees have been unable to use the existing funds because of the lack of access to daycare. Does the "use it or lose it" rule still apply?

a. The IRS issued Notice 2020-29 to address this issue (and other health plan issues) after our webinar took place. This notice provides that, for unused amounts remaining in a health FSA or a dependent care assistance program under a section 125 cafeteria plan as of the end of a grace period or plan year ending in 2020, the cafeteria plan may permit employees to apply those unused amounts to pay or reimburse medical care expenses or dependent care expenses, respectively, incurred through Dec. 31, 2020.

An employer that chooses to permit this longer reimbursement period must amend its cafeteria plan to provide for it. An amendment for the 2020 plan year must be adopted on or before Dec. 31, 2021, and may be effective retroactively to Jan. 1, 2020, provided that the cafeteria plan operates in accordance with IRS guidance and the employer informs all employees eligible to participate in the cafeteria plan of the changes to the plan. Any amendment adopted pursuant to this notice must apply only to an extended period to apply unused health FSA amounts or dependent care assistance program amounts for the payment or reimbursement of medical care expenses or dependent care expenses incurred through Dec. 31, 2020.

13. Do furloughed employees need to be given the chance to stay on the active group health plan vs. being offered COBRA? Must the employer contribution for group health coverage continue?

a. Whether employee benefits are provided during furloughs will depend on the terms of each plan. In many cases, employees must work a specific number of hours to remain eligible for benefits. However, in some situations, furloughs are being treated differently than other types of hours reductions. During the COVID-19 pandemic, some insurance carriers and state regulators are providing additional flexibility to help employers maintain coverage for employees on furlough. Whether employers must continue their contributions to health plans will also depend on the terms of the plan and may be affected by insurance carrier requirements.

14. Does the new guidance on deadline extensions during the outbreak period allow employers to offer a special enrollment period for employees to enroll mid-year and pay for coverage on a pre-tax basis?

a. No, this guidance does not address special enrollment due to COVID-19 and does not change the IRS restrictions on mid-year election changes. As of now, the IRS has not released any guidance permitting mid-year election changes for any situation related to COVID-19 reasons. The existing IRS rules continue to apply.

The guidance referenced extends the time frames for health plan participants to:

- ***Request HIPAA special enrollment under HIPAA;***
- ***Elect and pay for COBRA coverage and notify the plan of COBRA-qualifying events; and***
- ***File benefit claims and appeals and request external review of denied claims.***

Related guidance extends the time for plan officials to furnish benefit statements and other notices and disclosures required under ERISA, if good faith efforts are made to provide the documents as soon as administratively practicable.

These deadlines are extended by disregarding the period from March 1, 2020, until 60 days after the announced end of the National Emergency (or such other date announced by the IRS and DOL). This is referred to as the "Outbreak Period" and cannot exceed one year. To the extent there are different end dates for different parts of the country, additional guidance is expected.

Return to Work Issues

15. What are the criteria that states need to satisfy to open up? Will Zywave be providing state guidelines as they are developed?

a. Each state will determine its own criteria for permitting businesses to open. Some states may have clear guidelines in place that are similar to the White House guidelines, but others will not. For states that do have guidelines, whether they are considered requirements or simply best practices will depend on each state. Links to state information are available in Zywave's client portal sites.

16. Is there any guidance for employers on dealing with an employee who is afraid to return to work, or refuses to return, even if work is available? If employees are healthy and there are no extenuating circumstances, can they be laid off or terminated? Are there any implications for unemployment benefits?

a. Whether an employee can be laid off or terminated in this situation will likely depend on a number of factors. There is no federal general job protection for employees who are afraid to return to work or who refuse to work when work is available. In some cases, state or local laws may provide certain protections for employees.

Any effect on unemployment benefits will depend on the specific state unemployment program and its requirements for benefit eligibility.

Whether an employee may be able to challenge an employment action for failing to return or report to work may depend on whether the employee has any legitimate complaints regarding how the employer is handling health and safety concerns for employees. Applicable workplace safety laws require employers to provide a safe workplace. Employers should be sure to follow all applicable requirements and state or local public health guidelines regarding employee safety during the COVID-19 pandemic, and to document all safety practices and protocols.

17. What will be the employer's responsibility to provide PPE (masks) for employees? Can employers require wearing of masks, even in an office environment? What can employers do if employees refuse to wear a mask?

a. The EEOC has stated that an employer may require employees to wear personal protective equipment (such as face masks, gloves or gowns) designed to reduce the transmission of COVID-19. However, where an employee with a disability needs a related reasonable accommodation under the ADA (such as non-latex gloves or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

If an employee refuses to wear a mask, the employer should assess the situation to determine whether there are any legitimate issues that may need to be addressed, such as a religious objection or concerns about ability to perform required functions of the employee's job. However, if an employee refuses to wear a mask or face covering without a legitimate issue, the employer can prohibit the employee from working and apply any disciplinary policies for not following the employer's workplace requirements.

18. Can you confirm that office cafeteria and employee break rooms should be closed under Phase Two as these are places where employees gather?

a. The White House guidelines specify that common areas where personnel are likely to congregate and interact should be closed, or that moderate social distancing protocols should be enforced, during Phase Two. These common areas can include office cafeterias and break rooms. Note that the White House guidelines are recommendations for state or local public health agencies to use in determining guidelines or requirements for their areas. Employers should generally follow their state or local public health recommendations, which may differ from the White House guidelines.

19. If an employer has temporarily furloughed employees and needs to extend the furlough, is that acceptable and what is the process?

a. Whether to extend a furlough is a business decision for the employer to make. There are no specific requirements regarding the length of a furlough. However, any changes should be clearly communicated to employees.

20. What are an employers' responsibilities when they have an employee whose doctor has said is at a higher medical risk to COVID-19? Should they allow the employee to continue to work from home even when other employees have returned?

a. An employer may be required to provide a reasonable accommodation to an employee who is at higher medical risk related to COVID-19 under the ADA. Providing a telework option can be an appropriate reasonable accommodation. An employer that allows disabled or high-risk employees to telework, either due to legal requirements or employer policy, does not necessarily have to allow all employees to telework. However, state or local public health agencies may encourage telework to continue for a period of time for all employees when possible.

21. Can an employer with reduced revenue due to COVID-19 furlough employees who are scheduled to return to work from partial maternity leave that lasted 3 ½ months?

a. Whether to furlough employees, and which employees to furlough, is a business decision for the employer to make. However, employers should use caution in furloughing only employees who have recently taken leave that is required by law (such as FMLA leave or leave required by other state or federal law). Targeting only these employees could be seen as retaliation for exercising employee rights.

While employees on protected leave are generally not protected from employment actions that would have affected them if they were not on leave (such as elimination of a particular shift or decrease in overtime hours), employers generally must show that an employment action would apply regardless of the leave. In general, it is a best practice for employers to treat similarly situated employees consistently. Singling out employees who have taken maternity leave for a furlough could be problematic. However, if the employee is part of a larger group of employees that are being furloughed, the recent leave would not necessarily affect the employer's ability to furlough that employee as well.

22. Is there any guidance on public swimming pools or HOA swimming pools opening up and do you have any suggestions or recommendations?

a. Whether swimming pools are permitted to open will depend on state and local requirements. Organizations that operate public or communal swimming pools should consider local public health guidance in making decisions about reopening and follow any applicable requirements.