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## **Compliance Connection**

**March 28, 2020**

### **COVID – 19 Update**

#### ***Required FFCRA Poster***

The Department of Labor (DOL) has released a [mandatory employee rights poster](#) for the FFCRA. It should be posted or distributed to employees electronically (via email or online portal) by April 1. More information on the requirements can be found [here](#).

#### ***Coronavirus Aid, Relief, and Economic Security Act (CARES Act)***

On Friday, March 27, the President signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The new law is a \$2 trillion economic stimulus package designed to repair the economic damage caused by COVID-19 and provide additional protection to individuals and businesses who may lose income due to the pandemic. While most of the act pertains to direct payments and loans, there are some sections that affect employers.

#### ***Providing Alternatives to Closure and Layoffs***

The **CARES Act** gives employers the following options and benefits, which may allow them to stay open and keep more people employed:

- Small businesses may be eligible for emergency grants of up to \$10,000 to cover immediate operating costs.
- The Small Business Administration (SBA) may provide loans of up to \$10 million per business; any portion of that spent to pay employees, keep workers on payroll, or pay for rent, mortgages, or existing debt could be forgiven, provided workers remain employed through the end of June.
- Small businesses with existing SBA loans may have up to six months of payments waived.
- Businesses who have experienced a decline in gross receipts of 50% as compared to the same quarter of 2019 or who have been fully or partially shut down by order may be eligible to receive a refundable tax credit for 50% of qualified employee wages up to \$10,000 per employee. This is unrelated to the dollar-for-dollar payroll tax credit that can be taken for FFCRA leaves.
- Businesses may defer payment of employer payroll taxes imposed between the enactment of this law and December 31, 2020 with half of the deferred taxes due by December 31, 2021 and the rest due by December 31, 2022. This is unrelated to the dollar-for-dollar payroll tax credit that can be taken for FFCRA leaves.

We are unable to advise on these topics as they are outside the scope of our expertise. We encourage you to follow the [IRS Coronavirus Tax Relief](#) page and the [SBA Coronavirus Loan Resources](#) page, as well as consult with your tax professional or financial advisor. Detailed guidance on how to access these financial resources should be coming soon from those sources.

## ***Impact on Unemployment Insurance***

The act expands unemployment benefits by 13 weeks and adds \$600 to the weekly amount an individual would usually receive. While these unemployment benefits are generous, employers should still consider their options and incentives under the CARES Act mentioned above before making decisions about reduced hours, furloughs, or layoffs.

Employees who experience reduced hours, furloughs, or layoffs should be encouraged to file for unemployment insurance as soon as possible. We recommend that both employers and employees visit their state's unemployment insurance department website and track local and state news, as departments across the country are updating their rules to facilitate displaced workers during this time.

## ***Enforcement of FFCRA***

The DOL will not bring enforcement actions against employers for violations of the FFCRA prior to April 17, 2020, provided that the employer has made reasonable, good faith efforts to comply with the Act. You can read more about the brief non-enforcement period [here](#).

## ***New Guidance from the DOL on Administering FFCRA Leaves***

We strongly suggest that employers read through the entire [Question and Answers document](#) prior to Wednesday, so they have an understanding of how the leaves work. The following are some highlights from the updated guidance:

- These leaves are not available to employees with reduced hours, furloughed employees, or employees' whose workplaces are closed. See questions 23-28.
- These leaves are not available to employees whose workplaces are closed due to a federal, state, or local shelter-in-place or stay-at-home orders, or due to business slowdowns. See questions 23 and 27.
- These leaves (and payroll tax credit) are not retroactive. Employees are not entitled to pay under these leaves if they were absent or out of work (for any reasons) prior to April 1. See question 13.
- Both emergency paid sick leave (EPSL) and emergency Family and Medical Leave (EFMLA) can be taken on an intermittent basis in certain situations. See Questions 20-22 for explanations about when intermittent leave is allowed.
- Employees may not be required to use other forms of paid leave prior to or concurrently with EPSL or EFMLA. See questions 32 and 33.

Employers should keep documentation to show that employees who received leave were actually in need of leave. The documentation requirements will be outlined in soon-to-be-released IRS guidance. See Questions 15 and 16.

## **Other Considerations and Regulations**

### ***Filing Deadline and Federal Tax Payments Extended to July 15, 2020***

On March 21, 2020, the Treasury Department and Internal Revenue Service announced that the federal income tax filing due date is automatically extended from April 15, 2020, to July 15, 2020. Taxpayers may also defer federal income tax payments due on April 15, 2020, to July 15, 2020, without penalties and interest, regardless of the amount owed. This deferment applies to all taxpayers, including individuals, corporations and other non-corporate tax filers as well as those who pay self-employment tax. Taxpayers do not need to file any additional forms or call the IRS to qualify for this automatic federal tax filing and payment relief.

Read the [announcement](#), review related [FAQs](#), and read other [COVID-19 related news](#)

## ***FFCRA Payroll Tax Credit — Easing the Burden for Employers***

On Friday, March 20, the U.S. Treasury, IRS, and U.S. Department of Labor announced their plans for making the paid leave provisions in the Families First Coronavirus Response Act (FFCRA) less burdensome for small businesses. Key points include:

- To take immediate advantage of the paid leave credits, businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes. If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form that will be released next week.
- The Department of Labor will release “simple and clear” criteria for businesses with fewer than 50 employees to apply for exemptions from the leave provisions related to school and childcare closures; and
- There will be a 30-day non-enforcement period for businesses making a reasonable effort.

We know that for many of our clients, business slowdowns related to the spread of COVID-19 have made it hard to imagine how they could bear any additional expenses. We encourage anyone with these concerns to read the linked announcement carefully.

The full announcement can be found here: [Treasury, IRS, and Labor Announcement on FFCRA Implementation](#).

Including the information in the link above, this is all we currently know about the payroll tax credit under the FFCRA and how to access or administer it. We will update Comply as soon as new information or guidance is available. You can learn more about the details of the leaves (who is covered, what it's for, duration, etc.) in the materials on this page.

## ***COVID-19 and Flexibility in Mandatory, In-Person Signatures***

### ***Form I-9***

On March 20, 2020, the Department of Homeland Security [announced](#) that effective immediately, the physical presence requirement of the *Employment Eligibility Verification, Form I-9*, has been temporarily suspended for employers and workplaces that are operating remotely due to COVID-19 related precautions. In other words, employers with employees taking physical proximity precautions due to COVID-19 (and operating remotely) **are not required** to review the employee's identity and employment authorization documents in the employee's physical presence.

The physical presence requirement that was temporarily suspended mandated that employers, or an authorized representative, physically examine, in the employee's physical presence, the unexpired document(s) the employee presents from the Lists of Acceptable Documents to complete the Documents fields in Form I-9's Section 2.

Employers must also be aware of the following regarding the temporary suspension:

- If there are employees physically present at a work location, then in-person verification of identity and employment eligibility documentation for Form I-9 continues to be required. However, 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.
- Employers may designate an authorized representative to act on their behalf to complete Section 2 and may be any person the employer designates to complete and sign Form I-9 on their behalf. However, employers are liable for any violations in connection with the form or the verification process, including any violations in connection with the form or the verification process, including any violations of the employer sanctions laws committed by the person designated to act on the employer's behalf.

## ***Form I-9, Section 2 Documents Must Be Inspected Remotely***

Employers must still inspect the Section 2 documents but may do so remotely (for instance, over video link, fax or email). Employers must also obtain, inspect, and retain copies of the documents they inspect, within three business days so as to complete Section 2. Employers are also directed to:

- Enter “COVID-19” as the reason for the physical inspection delay in the additional information field of Section 2 once physical inspection takes place after normal operations resume; and
- Add “documents physically examined,” with the date of inspection to either the additional information field of Section 2 or to section 3 (as appropriate) once the documents have been physically inspected.

Employers may implement remote document inspections until May 19, 2020 (“up to 60 days from the date of the announcement”) or within three business days after the termination of the National Emergency, whichever comes first. Importantly, employers who implement remote onboarding and telework policies must provide documentation for each employee. This burden rests solely with the employers.

## ***In-Person Verification Required After Normal Operations Resume***

Once normal operations resume, all employees who were onboarded using remote verification must report to their employer within three business days for in-person verification of identity and employment eligibility documentation they presented for their Form I-9. Once the documents have been physically inspected, the employer should add “documents physically examined” with the date of inspection to the Section 2 additional information field or to section 3, as appropriate.

Any audit of subsequent Forms I-9 would use the “in-person completed date” as a starting point for these employees only.

## ***Extension on Inspections***

Effective March 19, 2020, any employers who were served Notice of Inspections (NOI) by DHS during the month of March 2020 and have not already responded will be granted an automatic extension for 60 days from the effective date. At the end of the 60-day extension period, DHS will determine if an additional extension will be granted.

Employers are required to monitor the DHS and ICE websites for additional updates regarding when the extensions will be terminated, and normal operations will resume.

## ***USCIS and Benefits Forms***

On March 20, 2020, the U.S. Citizenship and Immigration Services (USCIS) [announced](#) that it will accept all benefit forms and documents with reproduced original signatures, including the Form I-129, *Petition for Nonimmigrant Worker*, for submissions dated March 21, 2020, and beyond. This flexibility is in response to the ongoing COVID-19 National Emergency. This means that a document may be scanned, faxed, photocopied, or similarly reproduced provided that the copy must be of an original document containing an original handwritten signature, unless otherwise specified.

For forms that require an original “wet” signature, per form instructions, USCIS will accept electronically reproduced original signatures for the duration of the National Emergency. This temporary change only applies to signatures. All other form instructions should be followed when completing a form. Individuals or entities that submit documents bearing an electronically reproduced original signature must also retain copies of the original documents containing the “wet” signature. USCIS may, at any time, request the original documents, which if not produced, could negatively impact the adjudication of the immigration benefit.

## ***SBA Disaster Assistance in Response to COVID-19***

The U.S. Small Business Administration (SBA) is offering designated states and territories low-interest federal disaster loans for working capital to small businesses suffering substantial economic injury as a result of the

Coronavirus (COVID-19). Upon a request received from a state's or territory's Governor, SBA will issue under its own authority, as provided by the Coronavirus Preparedness and Response Supplemental Appropriations Act that was recently signed by the President, an Economic Injury Disaster Loan declaration.

Read more on the [SBA's website](#)

## ***IRS, Coronavirus (COVID-19), and High-Deductible Health Plans***

On March 11, 2020, the Internal Revenue Service (IRS) released Notice 2020-15 for high deductible health plans and expenses related to 2019 novel coronavirus (COVID-19) stating that, until further guidance is released, a health plan that otherwise satisfies the requirements of a high deductible health plan (HDHP) under I.R.C. § 223(c)(2)(A) will not fail to be an HDHP merely because it provides health benefits associated with testing for and treatment of COVID-19 without a deductible, or with a deductible below the minimum deductible (self only or family) for an HDHP. Therefore, an individual covered by the HDHP will not be disqualified from being an eligible individual under § 223(c)(1) who may make tax-favored contributions to a health savings account (HSA).

This does not modify previous guidance with respect to the requirements of an HDHP in any manner other than with respect to the relief for testing for and treatment of COVID-19. Vaccinations continue to be considered preventive care under § 223(c)(2)(C) for purposes of determining whether a health plan is an HDHP. Rather, the notice provides flexibility to HDHPs to provide health benefits for testing and treatment of COVID-19 without application of a deductible or cost sharing. Individuals participating in HDHPs or any other type of health plan should consult their particular health plan regarding the health benefits for testing and treatment of COVID-19 provided by the plan, including the potential application of any deductible or cost sharing.

Read [Notice 2020-15](#)

## **CDC, OSHA, and Coronavirus**

In response to the COVID-19 (coronavirus) outbreak, the U.S. Centers for Disease Control (CDC) issued:

- [Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease](#), providing recommended workplace strategies for employers and guidance on how to decrease COVID-19 spread, how to respond to outbreaks, and additional resources; and
- [Public Health Response to the Coronavirus Disease 2019 Outbreak](#), providing a chronological timeline and summary of the virus, cases reported in the United States, and the agency's public health response to the illness.

The CDC has also created the following posters for download:

- What you need to know ([English](#), [Spanish](#), [Chinese](#))
- What to do if you are sick ([English](#), [Spanish](#), [Chinese](#))
- Stop the spread of germs ([English](#), [Spanish](#), [Chinese](#))
- Symptoms of coronavirus ([English](#), [Spanish](#))

Additionally, the U.S. Occupational Safety and Health Administration (OSHA) has created a COVID-19 [website](#) for workers and employers addressing the disease, providing guidance, and other resources for preventing exposure to and infection with the virus. We recommend that employers review the CDC and OSHA websites frequently, as the COVID-19 outbreak continues to develop.

Read more on the [CDC](#)

## HIPAA and COVID-19

In February 2020, the Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (HHS) released a bulletin to ensure that Health Insurance Portability and Accountability Act (HIPAA) covered entities, and their business associates, are aware of the ways that patient information may be shared under the HIPAA Privacy Rule in an outbreak of infectious disease or other emergency situation. The bulletin also reminds covered entities that the protections of the Privacy Rule are not set aside during an emergency and discusses the following HIPAA topics:

- Sharing patient information
  - Treatment.
  - Public health activities.
  - Disclosures to family, friends, and others involved in an individual's care and for notification.
  - Disclosures to prevent a serious and imminent threat.
  - Disclosure to the media or others not involved in the care of the patient/notification.
  - Minimum necessary (for most disclosures, a covered entity must make reasonable efforts to limit the information disclosed to that which is the "minimum necessary" to accomplish the purpose).
- Safeguarding patient information.
- HIPAA's application to only covered entities and business associates.

The bulletin also provides links to the following resources:

- [HIPAA and Public Health](#)
- [HIPAA and Emergency Preparedness, Planning, and Response](#)
- [HIPAA Privacy Rule](#)
- [How federal civil rights laws apply in an emergency](#)

Review the [bulletin](#)

## DOL Wage and Hour Opinion Letters Addressing Regular Rate of Pay Under the FLSA

On March 26, 2020, the U.S. Department of Labor (DOL) announced the following three new opinion letters addressing compliance issues related to the Fair Labor Standards Act (FLSA):

- Excludability of longevity payments from the regular rate of pay. ([FLSA2020-3](#))
  - This opinion letter answers whether payments made by a city, under an official city resolution, to full-time employees at Christmas which were based on their length of service (longevity payments) must be included in the employees' regular rate when calculating overtime pay under the Fair Labor Standards Act (FLSA). The determination was, based on the specific facts, that these longevity payments are not excludable as payments in the nature of gifts and must be included in the employee's regular rate of pay.
- Excludability of referral bonuses from the regular rate of pay. ([FLSA2020-4](#))
  - This opinion letter answers whether referral bonuses (when a current employee refers an applicant for hire and the applicant gets hired) paid to current employees, in two equal installments and with different terms for each installment, must be included in their regular rate when calculating overtime pay under the FLSA. The first installment would be paid to the referring employee when the employer hired the employee they referred. The second installment would be paid to the referring employee at the one-year employment anniversary of the employee they referred if the referring employee is still actively employed. The determination was that, based on the specific facts, the first installment of the referral bonus is not included in the employee's regular rate (is not remuneration for employment). But whether the second installment is remuneration depends on facts not presented. If the payment of the second installment is not contractually enforceable, then it may be excluded from the

employee's regular rate. If the payment of the second installment is contractually enforceable, then it must be included in the employee's regular rate.

- Excludability of an employer's contributions to a group term-life insurance policy from the regular rate of pay. ([FLSA2020-5](#))
  - The opinion letter answers specifically whether the regular rate for a non-exempt employee under the FLSA must include amounts that the Internal Revenue Code (IRC) requires be included in the employee's taxable gross income when the employer contributes to group-term life insurance coverage of over \$50,000 for the employee. The determination was that, based on the specific facts, it is not necessary to separately evaluate income imputed to an employee for an employer's cost of providing group-term life insurance coverage in excess of \$50,000. This is because whether an employer's contributions to a benefit plan satisfy statutory or regulatory requirements are the key to determine whether the contributions are included in or excludable from an employee's regular rate. The IRC's designation of such amounts as taxable income has no impact on the exclusion of these amounts from an employee's regular rate under the FLSA.

These opinion letters clarify the DOL's [Final Rule on FLSA regular rate requirements](#), because employers were uncertain how perks and benefits play when calculating the regular rate of pay. FLSA regular rate requirements define what forms of payment employers include and exclude in the FLSA's "time and one-half" calculation when determining overtime rates.

An opinion letter is an official, written opinion by the DOL's Wage and Hour Division on how a particular law applies in specific circumstances presented by the person or entity that requested the letter.

Read the [announcement](#)

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