Federal Law Alerts - May 2020

Department of Labor's COVID-19 Updates

On May 15, 2020, the U.S. Department of Labor (DOL) announced all of the following COVID-19 updates and resources:

- Up to $100 million will be made available for states to implement or improve short-time compensation programs, which aim to avoid layoffs by reducing hours for a group of workers
- Additional guidance for states on the Federal Pandemic Unemployment Compensation Program
- Guidance and reminders to help states ensure the integrity of their unemployment insurance programs
- Occupational Safety and Health Administration (OSHA) alert on protecting dental industry workers
- OSHA alert on protecting rideshare and taxi workers
- OSHA alert on protecting retail pharmacy workers
- Information on the Pandemic Emergency Unemployment Compensation program for states updated
- OSHA video demonstrating the proper use of respirators in Spanish
- Fact sheets, FAQs, posters, webinars and more to help employers comply with the paid leave requirements of the Families First Coronavirus Response Act
- DOL COVID-19 tips, updates, and resources

EEOC Delays EEO-1 Data Collection

On May 7, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) announced the delay of the 2019 EEO-1 Component 1 data collection and the 2020 EEO-3 and EEO-5 data collections due to the COVID-19 public health emergency.

The EEO surveys collect data from employers in different sectors of the workforce. The following surveys were scheduled to open in 2020:

- 2019 EEO-1 Component 1, (Employer Information Report);
- 2020 EEO-3, (Local Report); and
- 2020 EEO-5, (Elementary-Secondary Staff Information Report).

EEO-1, EEO-3, and EEO-5 filers will now submit data in 2021. The EEOC anticipates that data collection will begin:

- In March 2021 for 2019 and 2020 EEO-1 Component 1 data; and
- In January 2021 for 2020 EEO-3 and EEO-5 data.

The EEOC will notify filers of the precise date the surveys will open as soon as it is established.

Read the press release

Payroll Protection Program and Employee Retention Credits

On May 7, 2020, the Internal Revenue Service (IRS) updated its frequently asked questions (FAQs) about the Payroll Protection Program (PPP) and the Employee Retention Credit under the Cares Act. The ***Employee Retention Credit*** (ERC) is a tax credit equal to 50 percent of the qualified wages that eligible employers paid to employees (up to $5,000 per employee) after March 12, 2020 and before January 1, 2021. Employers that receive a PPP loan are not qualified for the ERC.

The IRS clarified in its updated FAQ that an employer that repays its PPP loan by May 14, 2020 will be treated as though they did not receive it and may still receive the ERC (if otherwise eligible). This updated FAQ is important because the repayment date was originally May 7, 2020.

See the FAQs and read about the Employee Retention Credit

EEOC, COVID-19, ADA, the Rehabilitation Act, and Other EEO Laws

On May 5, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) updated the following technical assistance questions and answers addressing return to work and the Americans with Disabilities Act (ADA), the Rehabilitation Act, and other equal employment opportunity (EEO) laws:

(G.3) What does an employee need to do in order to request reasonable accommodation from their employer because they have one of the medical conditions that CDC says may put them at higher risk for severe illness from COVID-19? (updated 5/5/20)

An employee – or a third party, such as an employee's doctor – must let the employer know that they need a change for a reason related to a medical condition (here, the underlying condition). Individuals may request accommodation in conversation or in writing. While the employee (or third party) does not need to use the term "reasonable accommodation" or reference the ADA, they may do so.

The employee or their representative should communicate that they have a medical condition that necessitates a change to meet a medical need. After receiving a request, the employer may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided.

(G.4) The CDC identifies a number of medical conditions that might place individuals at "higher risk for severe illness" if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that his health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation? (5/7/20)

First, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer act.

If the employer is concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow the employer to exclude the employee – or take any other adverse action – solely because the employee has a disability that the CDC identifies as potentially placing them at "higher risk for severe illness" if they get COVID-19.

Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to their health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard. As an affirmative defense, direct threat requires an employer to show that the individual has a disability that poses a "significant risk of substantial harm" to their own health under 29 CFR § 1630.2(r). A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about this employee's disability – not the disability in general – using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm. Analysis of these factors will likely include considerations based on the severity of the pandemic in a particular area and the employee's own health (for example, is the employee's disability well-controlled), and their particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the virus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if an employer determines that an employee's disability poses a direct threat to his own health, the employer still cannot exclude the employee from the workplace – or take any other adverse action – unless there is no way to provide a reasonable accommodation (absent undue hardship).

The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee. If there are not accommodations that permit this, then an employer must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to themselves that cannot be reduced or eliminated by reasonable accommodation.

(G.5) What are examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self? (updated 5/5/20)

Accommodations may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others. Another possible reasonable accommodation may be elimination or substitution of particular "marginal" functions (less critical or incidental job duties as distinguished from the "essential" functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

These are only a few ideas. Identifying an effective accommodation depends, among other things, on an employee's job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (www.askjan.org) also may be able to assist in helping identify possible accommodations.

As with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

See the updated questions and answers and all EEOC materials related to COVID-19

Revised Voluntary Self-Identification of Disability Form for Federal Contractors

On May 5, 2020, the Office of Federal Contract Compliance Programs (OFCCP) announced the release of a revised Voluntary Self-Identification of Disability Form (Form CC-305). Contractors have until August 4, 2020, to implement this revised form into their applicant and employee systems and processes. Contractors must continue use of the 2017 version of the form until they have incorporated the revised form.

See the revised form

OSHA Safety Alert for Restaurants and Food and Beverage Businesses

On May 1, 2020, the Occupational Safety and Health Administration (OSHA) issued an alert with the following safety tips for restaurants and food and beverage businesses to protect their workers from COVID-19 exposure while they provide curbside pickup and takeout service:

- Reserve parking spaces near the front door for curbside pickup only;
- Avoid direct hand-off when possible;
- Display a door or sidewalk sign with the services available (for instance, take-out and/or curbside), instructions for pickup, and hours of operation;
- Practice sensible social distancing by maintaining six feet between co-workers and customers, mark six-foot distances with floor tape in pickup lines, encourage customers to pay in advance via phone or online, and temporarily move workstations to create more distance and install plexiglass partitions, if feasible;
- Allow workers to wear masks over their nose and mouth to prevent them from spreading the virus;
- Provide a place to wash hands and provide alcohol-based hand rubs containing at least 60 percent alcohol; and
- Encourage workers to report any safety and health concerns.

Read the alert

COVID-19 Temporary Policy for List B Identity Documents

On May 1, 2020, the U.S. Citizenship and Immigration Services (USCIS) announced that Form I-9, *Employment Eligibility Verification*, List B identity documents that are set to expire on or after March 1, 2020 (and are not extended) may temporarily be treated by employers as valid for Form I-9 purposes. This temporary policy was enacted because of the many areas that are under stay-at-home orders due to COVID-19 and some online renewal services have restrictions. Subsequently, employees may experience challenges when trying to renew their driver's license, a state ID card, or other acceptable List B identity documents.

When an employee provides an acceptable expired List B document, not extended by the issuing authority, employers must:

- Record the document information in Section 2 under List B, as applicable; and,
- Enter the word "COVID-19" in the Additional Information Field.

When the employee later presents an unexpired document, employers should, in the Section 2 Additional Information field:

- Record the number and other required document information from the actual document presented; and
- Initial and date the change.

If the employee's List B identity document expired on or after March 1, 2020, and the issuing authority extended the document expiration date due to COVID-19, the document is acceptable as a List B document for Form I-9 (not as a receipt) during the extension timeframe specified by the issuing authority.

When an employee provides an acceptable expired List B document, extended by the issuing authority, employers should:

- Enter the document's expiration date in Section 2; and,
- Enter "COVID-19 EXT" in the Additional Information Field.

Employers may also attach a copy of a webpage or other notice indicating that the issuing authority has extended the documents. Employers can confirm that their state has auto-extended the expiration date of state IDs and driver's licenses by checking the state Motor Vehicle Administration or Department of Motor Vehicles' website. For extended documents, the employee is not required to later present a valid unexpired List B document.

E-Verify participating employers should use the employee's expired List B document number from Section 2 of the Form I-9 to create an E-Verify case as usual within three days of the date of hire. Within 90 days after termination of this temporary policy, employees must present their employer with a valid unexpired document to replace the expired document presented when they were initially hired.

Of note, it is best if the employee can present the replacement of the actual document that was expired, but if necessary, the employee may choose to present a different List A or List B document or documents and record the new document information in the Additional Information Field.

The temporary policy took effect May 1, 2020 and the date of its termination has not been released.

Read about the temporary policy and List B identity documents

Updated COBRA Notices

On May 1, 2020, the U.S. Department of Labor released updated Consolidated Omnibus Budget Reconciliation Act (COBRA) continuation coverage notices (model general notice and the model election notice) to clarify the interaction between Medicare and COBRA for qualified beneficiaries. Plan administrators may use these model notices to notify plan participants and beneficiaries of their rights under COBRA and qualified beneficiaries of their rights to elect COBRA. The revised model notices provide additional information to address COBRA's interaction with Medicare. The model notices explain that there may be advantages to enrolling in Medicare before, or instead of, electing COBRA. The revisions also highlight that if an individual is eligible for both COBRA and Medicare, electing COBRA coverage may impact enrollment in Medicare as well as certain out-of-pocket costs.

COBRA allows employees (and their families) who would otherwise lose their group health coverage due to certain life events to continue their same group health coverage.

These events include termination or reduction in hours, death of a covered employee, divorce or legal separation, Medicare entitlement and loss of dependent status. COBRA generally lasts for 18 months, but, in some cases, can last up to 36 months.

Get the updated model notices, read the press release, and review FAQs.

COVID-19 and Federal WARN Act

In May 2020, the U.S. Department of Labor released Worker Adjustment and Retraining Notification (WARN) Act COVID-19 frequently asked questions to answer employer and employee questions regarding WARN Act responsibilities and protections during the COVID-19 pandemic. The WARN Act requires employers with 100 or more full-time employees (excluding those on the job for fewer than six months) to provide at least 60 calendar days' advance written notice of a worksite closing affecting 50 or more employees, or a mass layoff affecting at least 50 employees and one-third of the worksite's total workforce, or 500 or more employees at a single site of employment during any 90-day period.

However, not all workforce dislocations require a 60-day notice. The act makes certain exceptions to the requirements when employers can show that layoffs or worksite closings occur due to faltering companies, unforeseen business circumstances, and natural disasters. In such instances, the WARN Act requires employers to provide as much notice to their employees as possible.

Read the FAQs and about the act