

Coronavirus Information and FAQs**Introduction**

This document and the FAQs are intended to provide you with general information about the 2019 Novel Coronavirus disease, also known as COVID-19, including how it is transmitted and how you can prevent infection. It does not constitute legal advice on this topic.

This document is not intended to be exhaustive and we encourage you to supplement your knowledge by visiting the website of the Centers for Disease Control website at www.cdc.gov.

The following information is provided based upon currently known information. The progress of this disease is constantly evolving. The foregoing information is subject to change based upon such evolving information. If you have any questions regarding this matter, please contact your Seyfarth attorney.

TABLE OF CONTENTS

	<u>Page</u>
1. Background Information	1
(a) What is Coronavirus?	1
(b) How does Coronavirus spread?.....	1
(c) How many people survive Coronavirus?.....	1
(d) What are the signs and symptoms of Coronavirus?	1
(e) How infectious is Coronavirus?	1
(f) Has the Coronavirus been declared a worldwide pandemic?.....	2
(g) How long can the Coronavirus live outside of the human body?	2
(h) How can I protect myself?.....	2
(i) What happens if I suspect I or someone I know has Coronavirus?.....	2
(j) Should I consider providing information to my employees about the Coronavirus? ...	3
2. Employee Restrictions	3
(a) Should I consider quarantining employees, or having employees remain off work, who have recently returned from areas heavily affected by Coronavirus?.....	3
(b) Should I consider quarantining employees who have travelled to countries near areas heavily affected by Coronavirus, or who may travelled with individuals from areas heavily affected by Coronavirus on a plane or other carrier?.....	3
(c) Can I restrict employees from traveling to areas heavily affected by Coronavirus as determined by the CDC?	4
(d) Can I prevent an employee from entering the workplace if they refuse to answer our COVID-19 questionnaire?	4
(e) Can a healthy employee in a direct patient-care position (e.g. nurse) who is not in a high risk group refuse to treat COVID-19 patients out of fear of exposure?	4

(f) Some of our clients have asked that our client/customer facing employees sign acknowledgments stating that they have not travelled internationally to the regions where there is widespread coronavirus infections and that, to their knowledge, they have not come into contact with an infected person. Clients are requesting these acknowledgements as a condition of allowing our employees onto the client site to perform our services. Can we ask our employees to sign these acknowledgements without violating the law? 5

3. Labor & Management Rights..... 5

(a) What obligations exist to notify or negotiate with a union regarding Coronavirus policies, including leave due to quarantine?..... 5

(b) If I have union-represented employees, how does COVID-19 impact my duty to bargain with the union before making any changes to terms and conditions of employment? 6

(c) What COVID-19 specific issues might an employer expect a union to raise?..... 7

(d) Should employers prepare for union information requests on this topic?..... 8

(e) Can we rely on a CBA no-strike clause to discipline or discharge union employees if they refuse to work because of COVID-19? 8

(f) Our CBA expires at the end of the month. Can--or should--we insist that the union continue meeting for face-to-face bargaining? What about conducting grievance meetings? 9

(g) What if an employer has to lay employees off?..... 9

(h) What if an employer has to temporarily or permanently close a facility, department, or function, or desires to transfer operations to another location? 9

(i) What are some other rules regarding strikes by union-represented and non-union employees in the healthcare industry?..... 10

(j) What steps can an employer take to maintain the best-possible relationship with a union during this crisis?..... 10

4. Leave & Compensation 10

(a) Does FMLA leave apply for employees, or immediate family members, who may contract Coronavirus? 10

(b) Would I need to pay employees who go on leave during a quarantine period or because they have contracted Coronavirus? 11

(c) Would I need to pay workers' compensation for employees who contract Coronavirus?..... 11

(d) Should I reimburse my employees for the cost of internet or other costs if they work from home?..... 11

5. Disability/Discrimination/Privacy..... 12

(a) Does the ADA restrict how I interact with my employees due to the Coronavirus? 12

(b) Can employers take employee temperatures as they arrive for work and send them home if they have a fever? 14

(c) Is there an obligation to accommodate employees who do not want to work in public facing positions due to risk of infection?..... 14

(d) I am considering going cashless to help prevent the spread of COVID-19 by touching paper money. Is this legal?..... 15

(e) How much information we can give other employees about a documented/confirmed case of COVID-19 at one of our locations? 15

6. Worker Health and Safety (OSHA) 15

(a) Has OSHA provided guidance on how to handle Coronavirus? 15

(b) Can OSHA cite an employer for exposing my workforce to Coronavirus without protective measures? 16

(c) Do I need to record cases of Coronavirus on my OSHA 300 Log or report a diagnosis to OSHA?..... 16

(d) What obligation, if any, do employers have to report confirmed cases of COVID-19 to government authorities? 17

7. International 17

(a) What requirements apply outside of the United States? 18

8. Implications to Benefit Programs 18

(a) Is Coronavirus testing and treatment covered under the employer’s medical plan? 18

(b) What about coverage for medical services under our High Deductible Health Plan? 18

(c) Can we cover telemedicine under our medical plans? 18

(d) If expenses are not covered under the group medical plan, can employees get reimbursed for coronavirus related expenses from their Flexible Spending Account? 19

(e) What about HIPAA - what can I say or disclose?..... 19

(f) Would I need to pay my employee disability benefits if they contract the Coronavirus?..... 20

(g) If an employee’s dependent care needs change as a result of the coronavirus outbreak, can they change their dependent care flexible spending account (DC FSA) election outside of the plan’s open enrollment period?..... 20

(h) Are my employees covered by a severance plan if they are laid off due to economic stress to my business as a result of COVID-19? 20

(i) Do employees laid off due to COVID-19 still need to receive COBRA notices? 20

9. Impact on Retirement Plans 21

(a) What should employees with 401(k) plan balances do in a volatile market due to the Coronavirus? 21

(b) Can employees access their 401(k) balances to help cover expenses as a result of this crisis? 21

(c) Can employers reduce or suspend employer matching contributions under their 401(k) plan as a result of the economic impact of the coronavirus outbreak? 21

(d) How will the crisis impact defined benefit pension plans? 22

(e) How will the crisis impact incentive compensation arrangements?..... 22

(f) What about tax filing and related deadlines - any relief there? 23

(g) What if my plan is currently under audit?..... 24

10. Immigration	24
(a) In light of the COVID-19 pandemic has there been any changes to the Form I-9 and E-Verify related rules?	24
(b) Can you share insight on options other than completing a Form I-9 in person, and how other companies are thinking about the I-9 process, in light of almost overnight remote working and office closures?	24
(c) What should companies be considering if they choose to utilize one of the above alternatives to having HR complete the Form I-9, in person?	24
(d) Is this an area we should anticipate greater flexibility on from the government in the near term?.....	25
(e) Is it true that Immigration and Customs Enforcement issued I-9 Notice of Inspection audit notices this week?	26

1. Background Information

(a) What is Coronavirus?

Coronavirus is a respiratory virus that originated in Wuhan, China. The virus is contagious and potentially fatal. It is suspected that it is transmitted through coughing and sneezing of infected individuals. At the present time, there is no vaccine, cure, or specific treatment.

(b) How does Coronavirus spread?

Health authorities have not confirmed how Coronavirus is transmitted, but suspect it is spread through person-to-person contact or contact with infected bodily fluids. There is also evidence that the virus has been spread by animal sources, including individuals with links to seafood or animal markets. Authorities do not believe you can get it from air, water, or food.

(c) How many people survive Coronavirus?

Coronavirus had a fatality rate of less than 3% in China, with a fatality rate outside of China lower than that. The current fatality rate in the United States is slightly below 2% and decreasing as more cases are diagnosed. As such, the majority of those affected so far have survived the disease.

(d) What are the signs and symptoms of Coronavirus?

Individuals infected with Coronavirus have displayed the following symptoms:

- Mild to severe respiratory illness (including pneumonia and/or bronchitis);
- Fever;
- Cough; and
- Difficulty breathing.

(e) How infectious is Coronavirus?

Virus transmission may happen on a spectrum and authorities are not sure if the virus is highly contagious, or less so. For person-to-person transmission, health authorities suspect the virus is spread through coughing and sneezing, similar to how influenza and other respiratory pathogens are spread. Health authorities do not believe you can get it from air, water, or food.

There is some evidence that the virus can be spread through touching a surface that someone sneezed or coughed on and then touching your face.

Recent guidance from the CDC based upon a study conducted by Johns Hopkins indicates that the average time from infection to first symptoms, also known as the incubation period, is 5.1 days. However, the incubation period may be as little as 2 days or as many as 14. During this period, an individual can be infected and spreading

the disease although they may not be experiencing the signs and symptoms of the virus.

(f) Has the Coronavirus been declared a worldwide pandemic?

On March 11, 2020, the World Health Organization (“WHO”) released a “breaking” tweet quoting Doctor Tedros Adhanom Ghebreyesus, Director-General: “We have therefore made the assessment that COVID-19 can be characterized as a pandemic.”

According to the CDC definition, a “pandemic” refers to a (1) a virus that can cause illness or death with (2) sustained person-to-person transmission of that virus and (3) evidence of spread throughout the world. As the WHO has the reach to demarcate the global spread of the disease, individual countries look to the WHO to confirm a pandemic. The WHO cautioned that “describing the situation as a pandemic does not change WHO’s assessment of the threat posed by this coronavirus. It doesn’t change what WHO is doing, and it doesn’t change what countries should do.” Accordingly, the WHO has not made additional recommendations based on the “pandemic” declaration.

(g) How long can the Coronavirus live outside of the human body?

It can vary. For similar viruses, most exist for a few hours depending on the hardness of the surface it exists on, as well as ambient air conditions. The harder the surface, the longer the virus can survive.

During recent testing, *under ideal laboratory conditions* which cannot be reproduced in the real-world, the virus was able to survive over 24 hours on plastic and metal, less than 24 hours on cardboard, and less than 4 hours on copper. However, CDC indicated a more realistic real-world time frame is minutes-to-an hour on soft surfaces and hours to a day on hard surfaces.

(h) How can I protect myself?

Because there is currently no vaccine to prevent infection, the best way to protect yourself is to avoid being exposed to this virus. The CDC recommends the following additional steps:

- Wash your hands often with soap and water for at least 20 seconds. Use an alcohol-based hand sanitizer that contains at least 60% alcohol if soap and water are not available.
- Avoid touching your eyes, nose, and mouth with unwashed hands.
- Avoid close contact with people who are sick.
- Stay home when you are sick.
- Cover your cough or sneeze with a tissue, then throw the tissue in the trash.
- Clean and disinfect frequently touched objects and surfaces.

(i) What happens if I suspect I or someone I know has Coronavirus?

If you exhibit symptoms of Coronavirus or have had close contact with someone exhibiting Coronavirus symptoms, **DO NOT** report to work. Remain in your home and call, message, or email your healthcare professional. Additionally, if you or someone you have had close contact with exhibit symptoms of Coronavirus following recent travel from areas heavily affected by Coronavirus, you must mention your recent travel when you contact your healthcare professional. There is a growing list of affected areas within the United States, as well as a long list of affected countries that is rapidly changing. Please refer to the CDC website at <https://www.cdc.gov/coronavirus/2019-ncov/locations-confirmed-cases.html> for the current listing. Your healthcare professional will work with your state's public health department and CDC to determine if you need to be tested for Coronavirus.

(j) Should I consider providing information to my employees about the Coronavirus?

Yes. Information is available at no cost on the:

- CDC website -- <https://www.cdc.gov/coronavirus/index.html>
- WHO website -- <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

2. Employee Restrictions

(a) Should I consider quarantining employees, or having employees remain off work, who have recently returned from areas heavily affected by Coronavirus?

You should consider telling any employee returning from areas heavily affected by Coronavirus, that they should remain away from work for fourteen days after their return. Since this list of affected countries is likely to change, please refer to the CDC website at <https://www.cdc.gov/coronavirus/2019-ncov/locations-confirmed-cases.html> for the current listing. You can also consider telling employees to self-monitor for any symptoms of Coronavirus. If any symptoms occur, the employee should consider self-quarantine and being evaluated by a healthcare provider. Further, even if not symptomatic, employees may also want to consult a healthcare provider to confirm that the employee is not infectious before returning to work. For union-represented employees, applicable collective bargaining agreements should be consulted regarding employment terms relevant to such actions.

(b) Should I consider quarantining employees who have travelled to countries near areas heavily affected by Coronavirus, or who may travelled with individuals from areas heavily affected by Coronavirus on a plane or other carrier?

At the time of publication, perhaps. Employers should consult the CDC and World Health Organization for the most up to date information on quarantining employees from countries in close proximity to areas heavily affected by Coronavirus. For individuals who have travelled with individuals with exposure to areas heavily affected by Coronavirus, employers should have such employees screened by a healthcare provider before bringing them back to work.

(c) Can I restrict employees from traveling to areas heavily affected by Coronavirus as determined by the CDC?

Yes. Employers may consider restricting employee travel to the areas affected by the disease for business purposes.

Employers cannot tell employees that they cannot travel to areas heavily affected by Coronavirus for personal purposes. Employers should remain aware of their obligations under leave laws to allow employees leave to travel to affected areas to care for others who are ill, as well as their obligations to avoid national origin discrimination. Moreover, several states have off-duty discrimination laws that provide blanket protections to prohibit discrimination against employees who participate in legal activities outside the workplace, such as personal travel, such as New York, where personal travel would be considered “off-duty conduct.” The employer may however require a note for the employee to return to work, as discussed below.

Employers may also consider requesting that employees inform the employer if they are traveling for personal reasons so the employer is aware of employees who are going to areas and are potentially exposed to the disease.

Employees who travel to areas heavily affected by Coronavirus need to be informed that they may be quarantined upon their return. Employees should also be informed that there may not be adequate medical services available if they travel to areas heavily affected by Coronavirus and become ill.

(d) Can I prevent an employee from entering the workplace if they refuse to answer our COVID-19 questionnaire?

Yes. Employers can make answering a COVID-19 questionnaire related to travel and contact with confirmed or exposed individuals a condition of employment. The employer can also ask an employee if they have any of the COVID-19 symptoms designed by WHO and CDC. Do not ask for any other medical information - the employer just needs to know if the employee currently has any COVID-19 symptom(s). There may be state or local laws that impact asking an employee about COVID-19 symptoms. For example, in California, an employer should ask generally if the employee is experiencing any of the COVID-19 symptoms but not ask the employee to identify which specific symptoms he or she is experiencing.

If an employee refuses to answer, the employer should explain the reason for the requirement. If the employee still refuses to complete the required disclosure form, he/she should be sent home. In such circumstances, the company should check any state/local reporting pay laws that may be in place in that jurisdiction to determine if reporting pay is required.

(e) Can a healthy employee in a direct patient-care position (e.g. nurse) who is not in a high risk group refuse to treat COVID-19 patients out of fear of exposure?

Any employee may refuse to perform a task if all of the following conditions are met:

- Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so; and
- The employee refused to work in "good faith." This means that the employee must genuinely believe that an imminent danger exists; and
- A reasonable person would agree that there is a real danger of death or serious injury; and
- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.

While this employee may believe he/she is in imminent danger, objectively, that probably is not the case so long as the employer is following CDC and the most recent OSHA guidance on protecting healthcare workers from the Coronavirus. Once the employer explains/demonstrates to the employee that its actions comport with those expectations, an ongoing refusal to perform work would be unreasonable and the protected nature of that activity would fall away. In turn, the employer could take an adverse action. Whether the employer should do that in this situation is another question. Each situation should be analyzed on a case-by-case basis.

The employee may refuse to perform work tasks on account of exposure to COVID-19 and articulate unique risk factors due to a disability. This action would require the employer to engage in the interactive process with the employee and determine whether they should consider reasonable accommodations, including not interacting with COVID-19 positive patients, unless that is an essential function of the job.

(f) Some of our clients have asked that our client/customer facing employees sign acknowledgments stating that they have not travelled internationally to the regions where there is widespread coronavirus infections and that, to their knowledge, they have not come into contact with an infected person. Clients are requesting these acknowledgements as a condition of allowing our employees onto the client site the perform our services. Can we ask our employees to sign these acknowledgements without violating the law?

Yes. The information sought by your clients is the same type of information employers are asking their employees to disclose with a view toward preventing spread of the virus. The EEOC has stated in its recently recirculated guidance document that these types of inquiries do not violate the ADA. For union-represented employees, unless the ability to require such acknowledgments is covered/addressed through management rights in the applicable collective bargaining agreement (e.g., through the ability to unilaterally implement employment policies), it may be subject to bargaining, although arguably this may be accomplished on an expedited basis.

3. Labor & Management Rights

(a) What obligations exist to notify or negotiate with a union regarding Coronavirus policies, including leave due to quarantine?

Under the NLRA employers with a union-represented workforce have a duty to bargain with the union regarding wages, benefits, and other terms and conditions of employment. A potential, narrow limitation to this duty to bargain may arise where there are “compelling economic exigencies” requiring prompt action. The NLRA limits compelling economic exigencies to extraordinary, unforeseen events having a major economic impact on the employer that compels the employer to act immediately and unilaterally to change certain employment terms or working conditions. Even in the highly narrow circumstances where economic exigencies arguably exist, an employer typically still must afford as much notice and opportunity to bargain as is practicable under the circumstances. Moreover, such exigencies do not permit an employer to ignore contractual commitments in a collective bargaining agreement, i.e., changing existing terms (as opposed to filling gaps in terms) typically cannot be undertaken unilaterally.

An employer’s duty to bargain otherwise will turn on the specific language of the CBA, including management-rights and force-majeure language. Depending on the CBA’s terms, an employer may have more--or less--latitude to act unilaterally under these circumstances.

(b) If I have union-represented employees, how does COVID-19 impact my duty to bargain with the union before making any changes to terms and conditions of employment?

The COVID-19 pandemic is causing many health care employers to assess whether changes in employment terms and working conditions are necessary or desirable to directly combat the virus or to maintain operations. Examples of such changes include mandatory testing, questionnaires regarding travel, sending employees home, modifying schedules, applying attendance policies, PPE requirements, pay adjustments, and the like.

Under the National Labor Relations Act (NLRA or Act), an employer ordinarily is obligated to provide a union with notice and a reasonably opportunity to bargain over wages, hours, and other material employment terms and working conditions. These are known under the Act as “mandatory subjects of bargaining.” It is possible that an existing collective bargaining agreement (CBA) does not address certain mandatory subjects, and they are open and unresolved. If so, the employer must bargain over them to the point of an agreement or a lawful bargaining impasse (i.e., exhausting all reasonable possibilities of an agreement with negotiations conducted in an atmosphere free of employer unfair labor practices).

However, if there is a CBA in effect, its terms already may “cover” the subject of the change. This most commonly occurs where the CBA contains an expansive management rights article affording the employer discretion to make unilateral changes -- to the extent they do not conflict with other express terms of the CBA. An employer’s management rights will be stronger where the CBA explicitly affords it those rights. There is more likely to be a contract dispute if the employer is relying upon broader and more general (and vaguer) rights.

An employer should recognize that even if it wants to make changes that are improvements to existing terms and conditions, unless the CBA already grants the employer the right to act unilaterally, legally it cannot do so, and still must provide

the union with notice of the proposed changes and a bargaining opportunity. Of course, if the proposed changes indeed are improvements, the union likely will agree to them.

Most CBAs do not contain force majeure provisions which allow an employer to repudiate or modify existing contract terms. Where such force majeure language does not exist, an employer should recognize that it is bound by its contractual commitments unless it can persuade the union that the ultimate alternative to change could be unfavorable. If the union cannot be persuaded, it is not obligated to bargain over modifications to previously agreed-upon terms.

Generally, in first contract situations, or successor CBA bargaining, an employer cannot simply reach a lawful bargaining impasse on discrete subjects apart from the overall deal, and then implement only those changes. Rather, it would have to wait for the final, comprehensive CBA to be agreed upon. However, a narrow and highly limited exception to this principle arises where there are “compelling [economic] exigencies” requiring immediate action. The National Labor Relations Board (NLRB) has limited such exigencies to extraordinary, unforeseen events having a major economic impact on the employer that compels it to act immediately (or with very little lead time) and unilaterally to change certain aspects of employment. The existence of “exigent circumstances” is generally disfavored by the NLRB; however, such circumstances are more likely to be recognized with respect to health-related issues, particularly where an employer is attempting to follow government or established public-health standards, e.g., CDC/OSHA/WHO.

To the extent that an employer is compelled by a government mandate to take certain actions, if there is discretion/are options as to how the mandate can be carried out, the employer is obligated to bargain over the effects of the directive, i.e., the possible compliance approaches.

Similarly, to the extent that the government may enact legislation that provides greater or different benefits than in a CBA (e.g., as may be the case with the Families First Coronavirus Response Act), and there is no carve out to simply maintain the terms or benefits that are in the CBA, then to the extent that the improvements/differences are a clear mandate, there likely is no bargaining obligation. However, to the extent the changes have effects on other terms and conditions, an employer must provide notice to the union and a reasonable opportunity to effects bargain.

(c) What COVID-19 specific issues might an employer expect a union to raise?

The possibilities are numerous, including the following:

- Comprehensive contingency plans to address the crisis
- Unions insisting that employers provide paid sick leave for any reason, including when an employee’s parent must stay home due to cancelled schools. Unions may also ask for an employer to provide for childcare or childcare-assistance under such circumstances.

- Unions urging employers to provide full protective gear to employees, including hazmat suits, N95 respirators, or face masks, or otherwise raising concerns about PPE. This is particularly common among healthcare employers.
- Unions maintaining that employers provide wage increases for employees to facilitate those employees being able to stay home when sick or obtain and pay for emergency childcare
- Modifications to attendance policies
- Protocols for when employees can refuse to work without loss of pay or potential discipline
- Hazardous duty-type pay increases or bonuses
- Subsidized alternatives to public transportation

(d) Should employers prepare for union information requests on this topic?

Yes. As part of bargaining, CBA administration, or adequately representing its members, a union has the right under the NLRA to request information from an employer that is relevant to its performing its responsibilities in those areas. Given the current situation, an increasing number of unions are making wide-ranging information requests so they can understand how the employer is addressing certain situations. You should anticipate receiving such requests, and should consider how you can rapidly respond. An employer's failure to promptly and sufficiently respond to information requests can be an unfair labor practice, and can prevent the employer from reaching a lawful bargaining impasse where one is needed to undertake unilateral changes.

We are aware of an increasing number of unions making such requests. Employers should be prepared to answer questions regarding its contingency plans, safety protocols, safeguards for customer-facing employees, how payment to employees might be handled in the event of a shutdown, and how the employer plans to treat coronavirus-related absences, among others.

(e) Can we rely on a CBA no-strike clause to discipline or discharge union employees if they refuse to work because of COVID-19?

In many circumstances, no. Section 502 of the Taft-Hartley Act provides that it is not a "strike" for employees to refuse to work in "abnormally dangerous conditions." Under NLRB case law, if employees have a reasonable belief they are in danger, and such belief has at least some objective basis, they may refuse to work. An emergency situation such as a confirmed outbreak/global pandemic, and in which the employees objectively could be exposed to COVID-19, may well satisfy Section 502. Accordingly, an employer should take whatever steps it can to educate employees about the extent of any dangers and to ameliorate them. Of course, as with a strike, employees are not required to be compensated if they do not perform work unless there is a contractual basis for doing so, e.g., their absence qualifies for paid leave.

(f) Our CBA expires at the end of the month. Can--or should--we insist that the union continue meeting for face-to-face bargaining? What about conducting grievance meetings?

These are unusual times and all of our clients are concerned about the increased likelihood of contagion associated with travel and large-group meetings. NLRB case law holds that a party may not unilaterally insist on remote bargaining. However, where possible, and with the union's consent, conducting bargaining via phone and over e-mail is advisable. We have also seen clients and unions agree on contract extensions to defer bargaining until a later--and safer--date. Likewise, it may be advisable to try to agree that grievance meetings -- especially involving union business agents or other non-employee personnel -- be conducted remotely.

(g) What if an employer has to lay employees off?

Most CBAs have provisions that allow an employer to lay off (at least under certain conditions) according to particular rules (e.g., seniority), and likewise describe how recalls are to take place. To the extent an employer wants to depart from such provisions where they exist, it will have to convince the union to modify CBA terms, which the union can refuse to do. If an employer is in a first contract situation, ordinarily it cannot lay off -- at least outside the boundaries of an established, status quo practice -- until the overall CBA is reached. An exception may be if exigent circumstances exist. See No. 1 above.

If the CBA does not address whether or not a laid off employee is entitled to benefits, or if this subject was not clearly addressed in CBA bargaining, the employer may have to engage in bargaining over the effects of the layoff (not the decision itself if the decision is covered by the CBA). Effects bargaining also would be required to the extent there is no CBA in place. In such circumstances, the union should be given as much advance notice as possible of the layoffs and an opportunity to effects bargain. As with other forms of bargaining under the NLRA, an employer is not required to agree to all -- or even any -- of the union's proposals. Rather, it just must negotiate in good faith consistent with those standards under the NLRA.

(h) What if an employer has to temporarily or permanently close a facility, department, or function, or desires to transfer operations to another location?

Those decisions are mandatory bargaining subjects unless an employer's CBA covers their ability to undertake those actions unilaterally, or the union otherwise has waived its decision bargaining rights. Many CBA management rights provisions address such restructuring actions and should be consulted.

Even where, e.g., a CBA management rights provision gives an employer the ability to implement such a decision, ordinarily the employer still must engage in timely and adequate bargaining over the effects of the decision upon union-represented employees. In effects bargaining, a union is free to raise virtually subject it chooses, e.g., severance pay, health insurance continuation, transfer rights, to the extent it is not already covered by the CBA. However, as with any effects bargaining, an employer does not have to agree to all or any of the union's proposals, but must bargain in good faith consistent with NLRA standards.

(i) What are some other rules regarding strikes by union-represented and non-union employees in the healthcare industry?

In the healthcare industry, if it has a reasonable belief that a strike will occur, for staffing purposes, it may ask employees whether they intend to work or strike.

If a strike is not prohibited by a CBA no-strike provision (but see No. 6 above), Section 8(g) of the NLRA prohibits a union from engaging in a strike, picketing, or other concerted refusal to work at any health care institution without first giving at least 10 days' notice in writing to the institution and the Federal Mediation and Conciliation Service. Importantly, however, Section 8(g) does not apply to non-union employees, and such employees can engage in a Tact-Hartley Section 502 safety action (see No. 6 above), or other concerted activity protected by the NLRA. Employees cannot be treated adversely for undertaking such actions, but do not need to be compensated for time when they refuse to work unless it is pursuant to some type of contractual guarantee or vested right/

(j) What steps can an employer take to maintain the best-possible relationship with a union during this crisis?

An employer's relationship with the union will continue after the current crisis has passed, so we recommend that employers endeavor to preserve a good faith, open, and constructive bargaining relationship. Along those lines, we recommend that employers:

- Follow standard good faith bargaining principles as much as possible, e.g., meet, listen to the union with an open mind, promptly respond to union information requests, consider whether any compromises make sense, be prepared to explain why you disagree.
- Even where exigent circumstances arguably exist, be prepared to provide as much advance notice of proposed changes as possible. Also try to anticipate and have the resources to rapidly respond to union information requests. To the extent practicable, consider providing certain types of information in advance of negotiations/without being asked that you would want to see if you were on the other side of the table.
- Tell the union that you are willing and able to meet at any time to address questions (and via phone if agreed to by the union).

If there is a genuine impasse that needs a quick resolution, consider whether proposing FMCS or other mediation is desirable.

4. Leave & Compensation

(a) Does FMLA leave apply for employees, or immediate family members, who may contract Coronavirus?

Yes, assuming that the FMLA applies to the employer, Coronavirus would qualify as a "serious health condition" under FMLA, allowing an employee to take FMLA leave if either the employee contracts the disease or an immediate family member contracts the disease. The employee would be entitled to job reinstatement as well. State law

may provide additional leave benefits. For union-represented employees, applicable collective bargaining agreements should be consulted regarding relevant employment terms.

(b) Would I need to pay employees who go on leave during a quarantine period or because they have contracted Coronavirus?

Perhaps. The employee may be required to be paid if the employee is subject to a contract or collective bargaining agreement that requires pay when employees go on work-required leave. In the absence of a contract, hourly employees work at-will and are not guaranteed wages or hours. In other words, these employees do not need to be paid. However, many organizations are looking at supplemental paid sick leave or other paid benefits to assist employees during this time. Employees also may be eligible for full or partial state unemployment benefits or state disability benefits, depending the parameters of the particular state program. For exempt employees, these employees do not have to be paid if they are sent home for an entire workweek. However, if exempt workers work for part of the work week, they would have to be paid for the entire week.

(c) Would I need to pay workers' compensation for employees who contract Coronavirus?

Perhaps, if the employee contracted the disease in the course of their employment. That is, does the employee's work require them to be exposed to persons who are infected, typically healthcare workers. If an employee incidentally contracts the disease from a co-employee, there likely will be no worker's compensation liability. If there is workers' compensation liability, employers are responsible for covering the costs of reasonable and necessary medical care, temporary total disability benefits, and permanent disability (if any). Employers should engage a competent medical professional on infectious diseases for advice to determine whether the disease is work-related.

(d) Should I reimburse my employees for the cost of internet or other costs if they work from home?

A number of states require employers to reimburse expenses incurred by employees for tools, equipment and the like that are "necessary" to the performance of their job duties. Only California has case law interpreting such a law. Under California Labor Code section 2802, employers must reimburse employees for reasonable and necessary expenses incurred related to work. In *Cochran v. Schwan's Home Serv., Inc.*, (228 Cal. App. 4th 1137, 1144 (2014)), the court held that an employer must reimburse an employee for the reasonable expense of mandatory use of a personal cell phone, even where the employee did not incur any additional expense. Thus, if employees are not *required* to work remotely (i.e., they requested the ability to work remotely), it may not be necessary to provide the reimbursement. However, a case could be made that, even if the remote work is not necessary, internet usage is necessary to perform even voluntary remote work. A number of the laws in other states are worded similarly to the California law.

There is also an issue under federal law. The Fair Labor Standards Act (FLSA) does not explicitly require employers to reimburse employees for work-related expenses.

The FLSA only mentions reimbursement in the context of “regular rates.” The Act states that properly reimbursable work-related expenses incurred by employees need not be considered a part of the “regular rate” of payment for the purposes of calculating overtime. Still, when employees are expected to provide tools necessary for job performance, their employers are required to pay them back “to the extent that the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the [FLSA].” 29 C.F.R. 531.35. Thus, an employer will be in violation of federal law if it fails to reimburse an employee for tools necessary for job performance if the amount of the claimed reimbursement causes the employee’s wages to fall below the minimum wage. If a decision is made not to reimburse work-related internet expenses, an employer would need to make sure that each employee’s total wages less the work-related internet expense he or she incurs is higher than the federal (or state) minimum wage.

For union-represented employees, applicable collective bargaining agreements should be consulted regarding relevant employment terms. If not covered, such provisions likely would need to be bargained with the union.

Thus, we typically advise nationwide employers to provide an across-the-board reasonable reimbursement for things like personal cell phones used for work purposes; internet would be treated the same if the employee works from home.

5. Disability/Discrimination/Privacy

(a) Does the ADA restrict how I interact with my employees due to the Coronavirus?

Voluntary medical exams are always permitted, if performed confidentially. The EEOC has suggested materials to distribute to the workforce in the event of global health emergency or pandemic.

The ADA protects qualified employees with disabilities from discrimination. A disability may be a chronic physical condition, such as breathing. Employees may be entitled to an “accommodation” such as leave or be allowed to work remotely for a limited period. Employees who have contracted the virus must be treated the same as non-infected employees, as long as the infected employees can perform their essential job functions. If the employee poses a health or safety threat to the workforce, the employer may place the employee on leave.

Now that a pandemic has been declared, here is some additional EEOC Guidance employers should be mindful of:

May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?

Yes. The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be

permitted under the ADA if the illness were serious enough to pose a direct threat.

During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?

ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

If pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, these inquiries are not disability-related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.

During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal, does not implicate the ADA.

During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear personal protective equipment during a pandemic, but must also be compliant with OSHA regulations regarding respirator use if respirators are provided to employees. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

May an ADA-covered employer require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work?

Yes. Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

As a practical matter, however, 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.”

In these situations, we recommend the employee go to an urgent care facility or other accessible outpatient clinic if one is available to at least be screened to determine if the employee may be infected.

If the employee is asymptomatic and has received a negative COVID-19 test result, some employers may use these factors to allow an employee to return to work without requiring a doctor's note.

EEOC recently confirmed that this guidance remains current and applies to Coronavirus:

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

(b) Can employers take employee temperatures as they arrive for work and send them home if they have a fever?

Taking an employee's temperature is normally a prohibited medical exam under the ADA unless it is considered job-related and consistent with business necessity. This standard may be met, for example, in the healthcare industry.

However, because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature as they arrive for work and send them home if they have a fever. See EEOC's updated guidance at:

https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

It is important to keep in mind, though, that not all individuals infected with COVID-19 have a fever, or even show any symptoms at all. Thus, employers should have a measured approach deciding to take employees' temperatures.

For union-represented employees, unless the ability to require such temperature testing is covered/addressed through management rights in the applicable collective bargaining agreement, it may be subject to bargaining, although arguably this may be accomplished on an expedited basis.

(c) Is there an obligation to accommodate employees who do not want to work in public facing positions due to risk of infection?

This is a combination of a reasonable refusal to work (OSHA) and accommodation (ADA) question.

As to OSHA, if somebody is in a high-risk health group and comes forward to say they need to be separated from others to avoid contracting Coronavirus, the most reasonable course of action would be to approve the request until there is reliable information suggesting that it is unnecessary. If non-high risk employees make a similar request, each request should be considered on a case-by-case basis based upon the reasonableness of the concern. Employees should not be disciplined for refusing to work if they reasonably believe that there is a risk of infection because an employee making such a complaint may be engaging in protected activity. If the employer can establish that a reasonable person, under the circumstances then

confronting the employee, would not conclude that there is a real danger of death or serious injury, the employee does not have to be paid during the time period the employee refuses to work.

On the accommodation issue, the employer could require confirmation of need for the accommodation from the person's healthcare provider, and the employer may ask the employee to stay home provisionally while awaiting the accommodation information from the healthcare provider.

(d) I am considering going cashless to help prevent the spread of COVID-19 by touching paper money. Is this legal?

According to the Federal Reserve, it is not illegal under federal law for private businesses to refuse cash for the payment of goods and services. However, individual state and local laws may vary. For example, San Francisco, Philadelphia, New York City, New Jersey, and Massachusetts (in 1978!), among others, have passed prohibitions on going cashless as being discriminatory.

(e) How much information we can give other employees about a documented/confirmed case of COVID-19 at one of our locations?

Employers must be careful not to divulge the identity of the employee with a COVID-19 diagnosis. Employers should simply say: "an employee in this location who we think may have had contact with you has been diagnosed." Employers should feel free to ask the diagnosed employee the names of other employees with whom they had close contact. The employer should also be careful not to confirm the identity of the diagnosed employee if other employees "guess."

6. Worker Health and Safety (OSHA)

(a) Has OSHA provided guidance on how to handle Coronavirus?

Yes, OSHA has issued guidance regarding protecting workers in the case of a global health emergency and specifically Coronavirus. The guidance puts the burden on employers to identify risks specific to their workplace settings and to determine the appropriate control measures to implement.

OSHA's guidance also identifies jobs that it considers very high or high risk, medium risk and lower risk. Very high or high risk workers include those who interact with potentially infected travelers from abroad, including those involved in healthcare, travel, or waste management.

OSHA provides examples of how to reduce the risk of obtaining the virus, including washing hands with soap and water, avoiding close contact with people who are sick, and avoiding touching your eyes, nose or mouth with unwashed hands. Additionally, the guidance includes discussion on appropriate engineering or administrative controls.

OSHA has also indicated that while no specific standard covers COVID-19 exposure, some OSHA requirements may apply to preventing occupational exposure, including OSHA's personal protective equipment standards and OSHA's general duty clause.

However, the guidance document does not discuss what, if any, enforcement activities OSHA may undertake

OSHA has also issued a fact sheet, indicating that employers should train employees on the following:

- Differences between seasonal epidemics and worldwide pandemic disease outbreaks;
- Which job activities may put them at risk for exposure to sources of infection;
- What options may be available for working remotely, or utilizing an employer's flexible leave policy when they are sick;
- Social distancing strategies, including avoiding close physical contact (e.g., shaking hands) and large gatherings of people;
- Good hygiene and appropriate disinfection procedures;
- What personal protective equipment (PPE) is available, and how to wear, use, clean and store it properly;
- What medical services (e.g., vaccination, post-exposure medication) may be available to them; and
- How supervisors will provide updated pandemic-related communications, and where to direct their questions.

(b) Can OSHA cite an employer for exposing my workforce to Coronavirus without protective measures?

Perhaps. OSHA regulates safety hazards through its “general duty” clause that applies to “recognized hazards” in the workplace. OSHA will look to the CDC as authority when issuing such citations. The agency will determine whether the employer's industry, “recognized” that exposure to infected individuals in the workplace is a hazard. If so, the agency would expect the employer to take feasible measures to protect the employees and, if not does not take such action, the employer could be subject to citation. Employers should conduct a hazard assessment for potential exposures and develop an action plan that includes hazard identification, hazard prevention procedures, employee training, medical monitoring surveillance and recordkeeping.

(c) Do I need to record cases of Coronavirus on my OSHA 300 Log or report a diagnosis to OSHA?

Diagnosed cases of Coronavirus will likely not be “recordable” on the Company's OSHA 300 Log (or state equivalent) or “reportable” to OSHA.

Generally speaking, an illness is not “reportable” in a federal OSHA jurisdiction unless the employer can prove the disease was contracted while at work through an occupational exposure AND results in an inpatient hospitalization for medical treatment within 24 hours of exposure.

However, if an employer has information that the illness was contracted due to an occupational exposure, the employer would be required to record the illness on their OSHA 300 Log if it resulted in days away from work or restricted duty. However, we believe it will be difficult for employers to tie an employee's diagnosis of COVID-19 to a specific occupational exposure.

There are several industries where OSHA may try to claim that an infected employee was exposed while at work. For example, where employees are expected to come into contact with or be in close proximity to a person who has contracted the disease as part of their job duties, such as a hospital, nursing homes, emergency responders, or laboratories that handles the disease. In these cases, employers should likely err on the side of caution and record or report the illness as necessary.

(d) What obligation, if any, do employers have to report confirmed cases of COVID-19 to government authorities?

For purposes of reporting to local health departments, obligations vary on a state, county and city level. Currently, there is no obligation to directly report to the CDC. The majority of states require that healthcare related industries and laboratories have an obligation to report confirmed cases. Many states also require schools, day care facilities, camps and similar institutions to report any confirmed cases. A small number of states require food establishments to report a confirmed case. Finally, a handful of states have statutes written broadly enough that most employers arguably have to report, including:

- Illinois
- Maine
- Minnesota
- Montana
- Nevada
- New Hampshire
- New Mexico
- Tennessee
- Utah
- Wisconsin

Regardless of any requirement to report, we recommend voluntarily reporting to the health department as the health department can help guide in the workplace response, the health department will learn of the infection and engage with the employer regardless of whether the employer notifies the department, and following the health department's guidance on response provides a measure of cover.

7. International

(a) What requirements apply outside of the United States?

The specific requirements for countries outside of the United State vary. If you require advice on matters outside of the U.S., please let us know and we can connect you with members of our International Team within the Seyfarth COVID-19 Task Force.

8. Implications to Benefit Programs

(a) Is Coronavirus testing and treatment covered under the employer's medical plan?

Generally, testing and treatment are considered medical services under IRC Section 213(d) that would be eligible for reimbursement under an employer's medical plan. The extent to which such services would be covered will depend on the terms of the specific medical plan. For example, deductibles, co-insurance and co-payments may apply first. Some employers are considering modifying their medical plans to cover these services without applying any out-of-pocket requirements. This is normally a matter of design for self-funded plans. With respect to insured plans, America's Health Insurance Plans (AHIP), a trade association that includes most major carriers and third-party administrators, announced that they would offer clients the opportunity to modify their plan designs to waive all cost-sharing for services relating to COVID-19 testing and treatment. Many TPAs also offered to waive fees for all telemedicine services (COVID-19 or otherwise), to reduce foot traffic in doctor's offices where a patient is at greater risk of contracting the virus.

(b) What about coverage for medical services under our High Deductible Health Plan?

A covered person under a High Deductible Health Plan (HDHP) cannot get medical services covered under the plan (other than preventive services, like the flu vaccine) before satisfying his/her deductible. If services are covered before the deductible is met, the plan will fail to be a HDHP, rendering the covered person ineligible to make tax-favored contributions to a Health Savings Account (HSA) for that year. In Notice 2020-15, the Internal Revenue Service has issued relief to individuals who have medical coverage under an HDHP. Until further notice, a medical plan intended to be an HDHP will not fail to be an HDHP if it covers medical costs associated with testing and treating COVID-19 without application of the deductible or otherwise-applicable cost-sharing.

(c) Can we cover telemedicine under our medical plans?

Many employers are looking at ways for covered participant to access medical care without having to travel to their doctor's office (and risk infection or spreading infection). Telemedicine may provide answer to this concern, and may generally be covered under a group medical plan. However, where an HDHP is concerned, telemedicine may not qualify as preventive services. Where the services are related to the coronavirus, such services could be covered without endangering the HDHP status of the plan. However, were other medical services are sought via telemedicine, it does not appear that those services could be covered without first satisfying the participant's deductible and other cost-sharing requirements.

(d) If expenses are not covered under the group medical plan, can employees get reimbursed for coronavirus related expenses from their Flexible Spending Account?

Certain supplies, like facemasks and hand-sanitizer, might be covered as an eligible medical expense depending on the circumstances (including whether they're used due to personal illness or the need to treat a family member who has illness). Purchasing surgical masks while healthy and not near people who have contracted the virus (which the CDC has asked the public not to do) would generally not be covered. If in doubt, request a letter of medical necessity

(e) What about HIPAA - what can I say or disclose?

Medical Information. To the extent employers are getting information about employees who may have been exposed to SARs-CoV-2 or tested positive for COVID-19, that information will generally not be protected by HIPAA privacy where it is not accessed through the group health plan. Much of this information may be either self-reported from employees to their managers or Human Resources, which would not implicate the health plan. Other information may be received as a result of medical exams conducted at the work place, such as taking temperatures, which is discussed above.

Medical Inquiries. If workers for your company test positive for COVID-19, your organization may be contacted by public health authorities seeking information about the worker's symptoms, who they may have interacted with in the workforce, and where they may have traveled. Or, companies may seek to obtain verification from a worker returning from an at-risk country that the worker isn't showing any symptoms of coronavirus. It's important to understand that most of these types of inquiries are not governed by HIPAA because the request does not include a request to the health plan (the covered entity) for protected health information (PHI). That said, other employment laws or privacy laws may come into play (e.g., ADA restrictions on medical exams or inquiries, OSHA concerns, etc.), which have been discussed above.

Health Plan Disclosures to Public Health Entities. It is possible that the CDC, HHS or a state agency may directly request information from the group health plan to determine whether other persons have experienced symptoms consistent with COVID-19. HIPAA generally permits a health plan to disclose PHI to a public health authority to prevent or control the spread of an infectious disease. Such a public health authority can also request that the health plan disclose such PHI to a foreign government agency. If a health plan is unsure whether this permitted use exception applies, it could always seek an authorization from the participant to disclose the information. To be clear, even though an exception would permit a health plan sponsor to disclose PHI without the participant's consent in this context, other HIPAA rules continue to apply, including the minimum necessary rule (limiting the scope of the disclosure) and the record-keeping requirements (tracking such disclosures and making them available upon request).

HIPAA Policies – Remote Work Planning. Many health plan HIPAA privacy and security policies limit or prohibit employees within the HIPAA “firewall” from bringing home materials containing PHI or from accessing EPHI or creating paper copies of PHI remotely. Health plan administrators should consider whether to relax

this requirement (and amend their policies accordingly) to facilitate remote-working/quarantine-type situations. To ensure proper safety standards exist (and depending on the nature/scope/sensitivity of PHI workers will be accessing), some health plan administrators might determine that it is appropriate to invest in equipment (software, locking file cabinets, etc.) to facilitate this remote-work shift.

(f) Would I need to pay my employee disability benefits if they contract the Coronavirus?

If an employee contracts COVID-19, that illness would often be covered by an employer's sick/disability benefit program. Many employers have a three-pronged approach of offering sick pay (or PTO), then short-term disability (STD) after so many days of sick leave, followed by long-term disability (LTD) after a several month elimination period. Sick pay and STD are typically self-funded payroll continuation arrangements while LTD is insured. STD and LTD will define when an employee is considered to be disabled, thus allowing him/her to access disability benefits. Given what is currently known of COVID-19, it is not likely that employees will remain disabled long enough to trigger LTD benefits (which often require a 6-month elimination period). However, employers should review the terms of coverage in their disability programs to ensure they understand when such benefits should be paid for periods of absence. Additionally, there are various paid leave laws that may come into effect. You should check the laws in your jurisdiction to ensure you are affording employees all of their paid leave rights.

(g) If an employee's dependent care needs change as a result of the coronavirus outbreak, can they change their dependent care flexible spending account (DC FSA) election outside of the plan's open enrollment period?

The permitted election change rules for DC FSAs are very broad. For example, mid-year DC FSA election changes are generally permitted if there is a change in the dependent care provider or a loss of or gain in access to free dependent care, provided the requested change is consistent with the reason for the change. For example, if a childcare provider is no longer providing the care (e.g., day care is closed or summer day camp is cancelled) and a parent will be watching the child instead, the DC FSA election can be reduced or eliminated. Before allowing employees to change their DC FSA elections mid-year, it's important to confirm that your cafeteria plan document permits DC FSA election changes consistent with the IRS guidance (most do).

(h) Are my employees covered by a severance plan if they are laid off due to economic stress to my business as a result of COVID-19?

Many employers already have a severance plan in place that can include monetary assistance when employees are laid off. Check the terms of eligibility for severance benefits to see if the laid off employees qualify for severance benefits. If they do, follow the terms of the severance plan to award them this income replacement benefit. If no plan is in place, it may be worthwhile to explore establishing a plan to provide for systematic severance payments in the event of layoffs.

(i) Do employees laid off due to COVID-19 still need to receive COBRA notices?

Yes. Employers who provide group health coverage generally are required to provide notice to terminating employees of their right to continue coverage at their own expense. Severance plans may provide healthcare continuation for a month or longer after work ends, especially for people with families. There is no requirement for the amount of benefits under a voluntary severance plan. Employers may provide severance pay of 1-3 months and a lump sum to pay for COBRA coverage for the same period. Regardless of whether an employer is subsidizing its laid off employees for COBRA or not, it is particularly important during this pandemic that employers provide COBRA notices and the ERISA required opportunity to apply for COBRA continuation coverage. If the COBRA subsidy is not already in the severance plan, employers may also consider amending their severance plans to include a lump sum payment for these unanticipated monthly COBRA premiums to ease the health care cost burden to these laid off employees.

9. Impact on Retirement Plans

(a) What should employees with 401(k) plan balances do in a volatile market due to the Coronavirus?

The spread of SARS-CoV-2 has caused the market to lose quite a bit of value in a short time-frame, resulting in corresponding drops in value of retirement accounts. Employers should not be giving investment advice to their 401(k) plan participants, although employers can expect jittery employees looking for reassurance that their retirement plan balances will weather the storm. If employers want to do something, they could remind participants that the 401(k) is a long term savings vehicle and that participants should be investing with a long-term view and not having a knee-jerk reaction to volatile markets. If the 401(k) plan has investment advice or managed accounts available through the plan, plan participants can be reminded of this professional help that is available to them.

(b) Can employees access their 401(k) balances to help cover expenses as a result of this crisis?

While active employees cannot generally take an in-service distribution from a 401(k) plan, there are a few ways that funds could be accessed. Many 401(k) plans offer loans, which are paid back from payroll deductions. Other 401(k) plans allow in-service distributions for those who are over 59 1/2. Finally, many 401(k) plans allow for withdrawals in the case of unreimbursed medical expenses which cause a financial hardship to the participant.

(c) Can employers reduce or suspend employer matching contributions under their 401(k) plan as a result of the economic impact of the coronavirus outbreak?

Employers with 401(k) plans that do not rely on a safe harbor plan design (i.e., to pass nondiscrimination testing) can reduce or suspend matching contributions on a prospective basis at any time, through a corresponding plan amendment.

Employers with 401(k) plans that rely on a safe harbor plan design can reduce or suspend safe harbor matching contributions as of the first day of any plan year (e.g., January 1 for a calendar year plan); however, if the employer wants to reduce or

suspend safe harbor matching contributions *during* a plan year, the employer must satisfy one of the following alternatives:

1. The employer must be “operating at an economic loss” for the plan year; or
2. The employer must have included a statement about the possibility of reducing or suspending safe harbor contributions mid-year in its safe harbor notice (regardless of the employer’s financial condition).

Under either alternative, the employer must also provide a supplemental notice to participants at least 30 days in advance of the effective date of the mid-year reduction/suspension and must give impacted participants a reasonable opportunity to change their deferral elections. A corresponding plan amendment is also required, and must provide that the plan will pass the applicable nondiscrimination tests for the entire plan year, using the current-year testing method. Participants still must receive all safe harbor matching contributions through the effective date of the amendment but the plan will lose its safe harbor status for the entire plan year (thus requiring that it pass the ADP and/or ACP tests for the year) and may also lose any exemption to the top-heavy rules for the plan year.

If an employer has updated its 401(k) plan safe harbor notice (which is required to be provided to participants when they first become eligible for the plan and annually thereafter) to incorporate the statement referenced above, that employer would avoid the issue of having to prove it is “operating at an economic loss” if it wishes to reduce or suspend safe harbor matching contributions mid-year.

(d) How will the crisis impact defined benefit pension plans?

Coronavirus could significantly impact the funding levels of defined benefit pension plans for two reasons. First, broadly put, future benefit liabilities are determined based on mortality and interest rate assumptions. The lower the interest rate assumption, the higher the projected liabilities will be. Because the Federal Reserve continues to lower interest rates in response to the crisis, the projected defined benefit plan liabilities will also increase. Second, for purposes of determining plan funding requirements, projected future liabilities are measured against plan assets. The coronavirus has significantly reduced plan assets as a result of the recent market crash. As a result, the coronavirus crisis is both increasing the projected future liabilities while simultaneously reducing the assets available to pay such liabilities.

(e) How will the crisis impact incentive compensation arrangements?

Most incentive compensation arrangements are tied to the underlying performance of the employer offering the incentive. Most programs were set based on performance metrics that no longer correlate to the current economic environment (e.g., performance stock units will be well below target and threshold measures, stock options will be underwater and restricted stock units will payout a fraction of what they would have two weeks ago). Additionally, and for purposes of new incentive compensation grants, compensation committees are faced with defining performance metrics (often for the next three years) and choosing the grant levels based on short-term devaluation that may be resolved soon or have a lasting impact on the employer’s core business objectives. Employers should consider creating added

