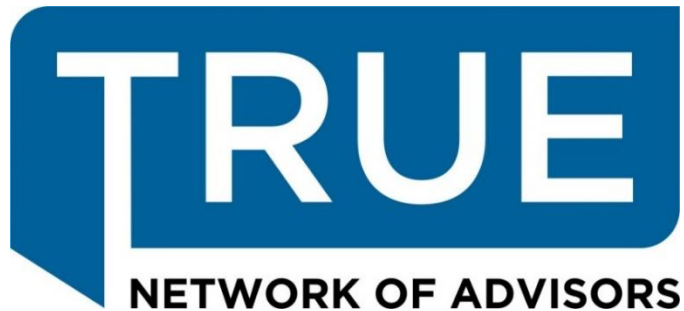


COVID-19 Resources Webinar Series: Return to Work Considerations & Updated Benefits Guidance



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May 2020



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

CORONAVIRUS CONSIDERATIONS FOR EMPLOYERS



Reminder: “Old News” COVID-19 Guidance

- ▼ FFCRA Paid Leave, tax credits, COVID-19 testing coverage mandates
- ▼ CARES Act PPP, loan forgiveness, FSA/ACA coverage changes, COVID-19 testing coverage mandates, employee retention tax credits
- ▼ Guidance from nearly all federal agencies (and most states), including DOL, IRS, EEOC, OSHA, CDC, SBA
- ▼ Outbreak Period Extensions and Relief for Notices and Disclosures
- ▼ **Section 125 Permissible Midyear Election Changes**

NEW **125 Cafeteria Plan Guidance**

▼ **IRS Notice 2020-29**

- ▼ Allows special midyear election changes during 2020
- ▼ Provides ability to use remaining funds from 2019 plan year for all of 2020
- ▼ Clarifies recent HDHP and Telemedicine guidance

▼ **IRS Notice 2020-33**

- ▼ Increases amount available for FSA carryover
- ▼ Clarifications regarding Individual Coverage HRAs
- ▼ These rules are permanent

▼ All are **optional**

▼ Implementation of changes in **IRS Notice 2020-29** requires amendment to cafeteria plan **by December 31, 2021**

Special Midyear Election Change Guidance

- ▼ **Health Plan Elections:** For midyear elections made during calendar year 2020, a cafeteria plan may permit eligible employees to:
 - ▼ (1) make a new, prospective election for coverage if they initially declined employer-sponsored health coverage
 - ▼ (2) revoke an existing election and make a new, prospective election to enroll in different employer-sponsored health coverage
 - ▼ (3) revoke an existing election on a prospective basis, provided that the employee attests in writing they are or will be enrolled in other health coverage not sponsored by the employer
 - ▼ Model attestation provided in [IRS Notice 2020-29](#)
 - ▼ Employer may rely on the written attestation provided by the employee, unless the employer has actual knowledge that the employee's attestation is inaccurate
- ▼ Relief applies for self-funded plans and fully-insured plans
- ▼ Unclear if **health plans** include plans like dental, vision, etc.

Special Midyear Election Change Guidance

- ▼ **FSA & DCAP Elections:** Cafeteria plan may permit eligible employees to revoke an election, make a new election, or increase or decrease an election
- ▼ Applies to all health FSAs, including limited purpose health FSAs compatible with HSAs
- ▼ **Protections from loss for employers** – employers are permitted to limit midyear elections to amounts no less than amounts already reimbursed

Special Midyear Election Change Guidance

- ▼ **Timeline for New Special Midyear Election Change Guidance:**
 - ▼ Only applies for midyear elections made during calendar year 2020
 - ▼ Prospective changes only
- ▼ Employers are not required to provide unlimited election changes, but may, in its discretion, determine the extent to which such election changes are permitted
 - ▼ Be mindful of 125 nondiscrimination rules
- ▼ **Considerations: Adverse Selection**
 - ▼ To prevent adverse selection of health coverage, an employer may wish to limit elections to circumstances in which an employee's coverage will be increased or improved as a result of the election (for example, by electing to switch from self-only coverage to family coverage, or from a low option plan covering in-network expenses only to a high option plan covering expenses in or out of network)

Special Extended Use of Grace Period Funds

- ▼ For unused amounts remaining in a health FSA or a DCAP as of the end of a **grace period or plan year ending in 2020**, a cafeteria plan may permit employees to apply those unused amounts to pay or reimburse medical care expenses or dependent care expenses, respectively, incurred through December 31, 2020
- ▼ **Timeline:**
 - ▼ Only applies to funds remaining at the end of a **grace period or plan year ending in 2020**
 - ▼ May also apply to plans with carryovers, as long as the plan year ends in 2020 (so, not for calendar year plans with carryovers)

NEW **125 Cafeteria Plan Guidance**

- ▼ All are **optional**
- ▼ Implementation requires amendment to cafeteria plan by December 31, 2021
- ▼ Changes to the plan may also implicate other applicable laws, such as notice requirements under ERISA
- ▼ Don't forget...
 - ▼ FSAs may (once again) cover **OTC Medications and Menstrual Products**
 - ▼ For most plans, implementation will require plan amendment

Increased Maximum Amount for Health FSA Carryover

- ▼ Health FSA carryover limit previously set at \$500 (in 2013)
- ▼ **IRS Notice 2020-33** increases the amount that may be carried over from one plan year to the next to reflect indexing for inflation—designed to parallel the indexing applicable to the limit on salary reduction contributions (\$2,750 for 2020)
- ▼ **New Rule:** carryover amount will be equal to 20 percent of the maximum salary reduction contribution for the applicable plan year.
 - ▼ For 2020, the maximum amount that may be carried over to the immediately following plan year beginning in 2021 is **\$550**
- ▼ Implementation of changes **for 2020** requires amendment to cafeteria plan by **December 31, 2021**
 - ▼ Normal amendment rules apply for subsequent years
 - ▼ **Recommendation:** Amend plan to permit maximum amount allowed/as indexed for inflation

Retroactive Application of Recent HDHP and Telemedicine Guidance

- ▼ Recent COVID-19 guidance may be applied **retroactively to January 1, 2020**
- ▼ Applies to
 - ▼ Relief provided in **IRS Notice 2020-15** allowing HDHPs to cover COVID-19 testing and treatment expenses prior to the deductible
 - ▼ Temporary rule change under CARES Act that allows HDHPs to cover telehealth services prior to the deductible
- ▼ Reminder: CARES Act and FFCRA ***require first dollar coverage for COVID testing and related services***

ICHRA Clarifications

- ▼ Normal rule: a health plan, including an individual coverage HRA (ICHRA), may not reimburse medical care expenses incurred before the beginning of the plan year and qualify for exclusion from income and wages under Code §§ 105 and 106
 - ▼ But...medical care expenses are treated as incurred when the covered individual is provided the medical care that gives rise to the expense, and not when the amount is billed or paid
- ▼ **Clarification:** ICHRA may reimburse individual insurance policy premium expenses incurred **prior to** the beginning of the plan year for coverage provided during the plan year
 - ▼ A plan may treat an expense for a premium for health insurance coverage as incurred on (1) the first day of each month of coverage on a pro rata basis, (2) the first day of the period of coverage, or (3) the date the premium is paid
 - ▼ Thus, for example, an ICHRA with a calendar year plan year may immediately reimburse a substantiated premium for health insurance coverage that begins on January 1 of that plan year, even if the covered individual paid the premium for the coverage prior to the first day of the plan year

What's up with COBRA?

▼ **COBRA Model Notices**

- ▼ DOL issued updated versions of the model general notice and the model election notice to ensure that qualified beneficiaries better understand the interactions between Medicare and COBRA
- ▼ Required? No
 - ▼ But DOL will consider use of the (appropriately completed) model notices to constitute compliance with the notice content requirements of COBRA
- ▼ Not related to the **Outbreak Period Extensions**

What's up with COBRA?

Outbreak Period Extensions

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

Assessing Return to Work Risks

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

Critical CDC & OSHA Guidelines for Employers

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

- ▼ Follow **state and local** orders

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

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

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

▼ Or OSHA's guidance for employers:

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

How to Assess Leave or Accommodation Requests in Return to Work

- ▼ Start with **FFCRA** and **special state/local ordinances** mandating COVID-19-related leave
- ▼ Then **FMLA**
- ▼ Then **ADA**
- ▼ Then **other benefit plans** and policies
- ▼ Refer to **EEOC Guidance on ADA:**

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

EEOC Updates ADA Guidance

- ▼ “As government stay-at-home orders and other restrictions are modified or lifted in your area, how will employers know what steps they can take consistent with the ADA to screen employees for COVID-19 when entering the workplace?”
 - ▼ Disability-related inquiries and medical exams ok if **job-related and consistent with business necessity**
 - ▼ Employees that pose a **direct threat to health or safety** maybe prohibited from working
 - ▼ Must follow “**guidance from CDC or other public health authorities**” to determine what is a direct threat

EEOC Updates ADA Guidance

▼ “An employer requires returning workers to **wear personal protective gear and engage in infection control practices.** Some employees ask for accommodations due to a need for modified protective gear. Must an employer grant these requests?”

- ▼ Ok to require **protective gear (masks and gloves)** and require employees to follow CDC guidelines
- ▼ Employers should be prepared to consider **reasonable accommodations** when requested, such as:
 - ▼ “non-latex **gloves**, modified face **masks** for interpreters or others who communicate with an employee who uses lip reading, or **gowns** designed for individuals who use wheelchairs), or a **religious** accommodation under Title VII (such as modified equipment due to religious garb)

EEOC Updates ADA Guidance

▼ “What does an employee need to do in order to **request reasonable accommodation** from her employer because she has one of the **medical conditions that CDC says may put her at higher risk** for severe illness from COVID-19?”

▼ **Employee or employee’s doctor must let employer know** of need or request an accommodation

▼ **Do not act without the employee’s request:**

“If the employer is concerned about the employee’s health being jeopardized ... the ADA does not allow the employer to exclude the employee – or take any other adverse action – solely because the employee [is] at ‘higher risk for severe illness’ if he gets COVID-19.”

▼ Employers can **ask questions or seek medical opinion** to understand issue and decide on the right accommodation

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EEOC Updates ADA Guidance

▼ “What does an employee need to do in order to **request reasonable accommodation** from her employer because she has one of the **medical conditions that CDC says may put her at higher risk** for severe illness from COVID-19?” (CONT'D)

*“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).**”*

▼ **Potential accommodations include:** additional **PPE** (gowns, masks, gloves, other) beyond what typical employee gets; protective measures like erecting a barrier that provides separation between employee and coworkers/the public or increasing the space between employee and others; change to “marginal” job functions (less critical or incidental job duties); changed schedules/locations

DOL Updates FFCRA Guidance

▼ “My employees have been **successfully teleworking from home for weeks now**. All of a sudden, many of them want FFCRA leave due to childcare issues. Can I ask them **why they are now unable to work** for this reason that previously was not an impediment? Can I ask them if they have **pursued alternative childcare arrangements?**”

▼ You should **not require more of them than you require to certify qualified leave under FFCRA**

▼ **DOL Says:** “The fact that your employee has been teleworking despite having his or her children at home does not mean that the employee cannot now take leave to care for his or her children whose schools are closed for a COVID-19 related reason.”

DOL Updates FFCRA Guidance

▼ “My employee claims to have tiredness or other symptoms of COVID-19 and is taking leave to seek a medical diagnosis. What documentation may I require from the employee to document efforts to obtain a diagnosis? When can it be required?”

- ▼ **DOL Says:** “**You may require** the employee to **identify his or her symptoms** and a date for a test or doctor’s appointment”
- ▼ **DOL Says:** “**You may not... require the employee to provide further documentation** or similar certification that he or she sought a diagnosis or treatment from a health care provider in order for the employee to use paid sick leave for COVID-19 related symptoms
- ▼ **Traditional FMLA:** may still use certification forms/process

DOL Updates FFCRA Guidance

▼ “I took EPSL and am now taking EFMLA to care for my children whose school is closed for a COVID-19 reason. After completing distance learning, the children’s school closed for summer vacation. May I take EPSL or EFMLA to care for my children because their school is closed for summer vacation?”

- ▼ **DOL Says: “No.”** Neither EPSL nor EFMLA are available for school closures unrelated to COVID-19
- ▼ **“However,** the employee may be able to take leave if his or her child’s care provider during the **summer—a camp or other programs in which the employee’s child is enrolled**—is closed or unavailable for a COVID-19 related reason”



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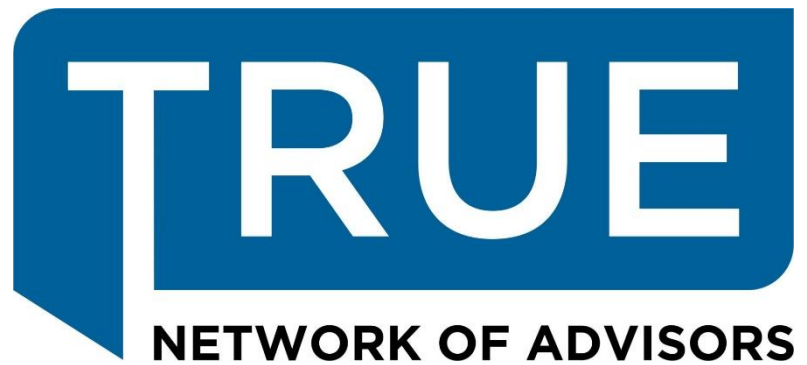


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