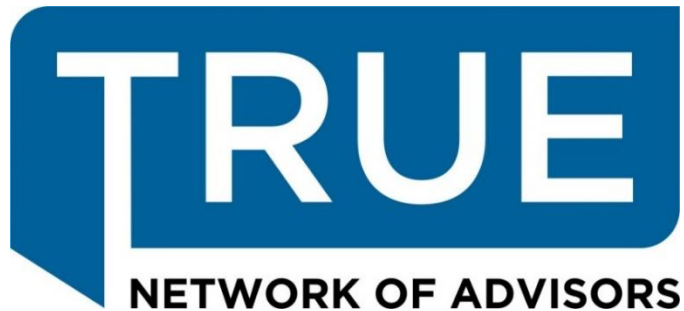


# COVID-19 Resources Webinar Series: Labor & Employment and Benefits

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Presented By  
Matt Stiles and Matthew Cannova  
Maynard, Cooper & Gale, P.C.  
July 2020



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

## CORONAVIRUS CONSIDERATIONS FOR EMPLOYERS



***If an employee gets COVID-19 from work, is the employer liable? Can the employer be sued?***

# Grief Results In A Call to Action ...

“It started out as a way for grief-struck families to mourn their coronavirus dead online: a Facebook group... But this spontaneous virtual forum ... has now turned into an influential activist group that is providing a steady stream of testimony and evidence to prosecutors investigating whether any crimes contributed to Italy’s COVID-19 toll.”

## Families of Italy’s virus dead seek answers, solace, justice

By NICOLE WINFIELD today



**Source: Associated Press, 07/13/20**

# And now...



HEALTH NEWS

✓ Fact Checked

## Lifelong Lung Damage: The Serious COVID-19 Complication That Can Hit People in Their 20s

Written by Meagan Drilling on June 22, 2020 —  
[Fact checked](#) by Jennifer Chesak



Even young people can have serious complications from COVID-19. Getty Images



HEALTH

## Scans Reveal Heart Damage in Over Half of COVID-19 Patients in Study

BY **KASHMIRA GANDER** ON 7/13/20 AT 5:39 AM EDT

# Historical Reference Points (Legal Precedent?):



**S F D C T**

**SETTLEMENT FACILITY**  
DOW CORNING TRUST  
**DOW CORNING BREAST IMPLANT CLAIMS**



# Assessing Return to Work Risks

## ▼ Legal Standards for Unprecedented Claims:

- ▼ **Negligence:** What would a reasonably prudent employer in the same position as you do to ensure the safety/health of employees (customers) in the workplace?
- ▼ **Prudent Employers:**
  - ▼ Follow the law
  - ▼ Follow public health authority guidelines and recommendations
  - ▼ Have leadership that sets a good example
  - ▼ Avoid politicizing the health issue
  - ▼ Collaborate with other leaders in the industry to ensure consistent practices
  - ▼ Build consensus with trusted advisors: insurance/risk, health/medical, finance/accounting, and legal

# Assessing Return to Work Risks

## ▼ Legal Standards for **Precedented** Claims:

- ▼ **Workers Comp:** Did an employee injury arise out of and occur in the course of employment? **Strict Liability**
  - ▼ **States have taken action to extend workers' compensation coverage to include COVID-19 as a work-related illness or create a presumption of coverage for various categories of workers (all workers, essential workers, first responders)**

### ▼ **Special Action in:**

Alaska

Arkansas

California

Colorado

Florida

Illinois

Kentucky

Massachusetts

Michigan

Minnesota

New Hampshire

New Jersey

New Mexico

New York

North Carolina

North Dakota

Ohio

Pennsylvania

South Carolina

Utah

Vermont

Washington

Wisconsin

Wyoming



# Assessing Return to Work Risks

## ▼ Legal Standards for **Precedented Claims** (cont'd):

- ▼ May 26, 2020, **OSHA obligates all employers subject to maintaining OSHA 300 logs** that they must conduct an **investigation** to determine whether contraction of COVID-19 is **work related and comply with recordkeeping**
- ▼ Employers with ten or fewer employees at all times during the previous calendar year and employers that operate in a **low-hazard industry** are **not** subject to these requirements
- ▼ Low hazard industries:  
**<https://www.osha.gov/recordkeeping/ppt1/RK1exempttable.html>**

\*CAL-OSHA adopted new rule May 27, 2020

# Assessing Return to Work Risks

## ▼ Legal Standards for **Precedented Claims** (cont'd)

- ▼ Employee's COVID-19 positive diagnosis is **recordable IF the case:**
- ▼ is a **confirmed case (not necessarily positive test result)** of COVID-19;
- ▼ is **“work-related”**; **and**
- ▼ involves one or more of the general recording criteria in OSHA regulations (for example, if it results in **days away from work or medical treatment beyond first aid**). Note: days spent in quarantine are not considered “days away from work” for OSHA purposes.
- ▼ **Reportable if results in serious illness, serious injury, or death**

# 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

# Evolving CDC Guidelines for Employers

- ▼ 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

# Proposed Grandfathered Health Plans Guidance

## ▼ Quick Review: Six changes that cause a plan to lose grandfathered status:

- ▼ Elimination of all or substantially all benefits to diagnose or treat a particular condition
- ▼ Increase in a percentage cost-sharing requirement (e.g., raising an individual's coinsurance requirement from 20% to 25%)
- ▼ Increase in a deductible or out-of-pocket maximum by an amount that exceeds medical inflation plus 15 percentage points
- ▼ Increase in a copayment by an amount that exceeds medical inflation plus 15 percentage points (or, if greater, \$5 plus medical inflation)
- ▼ Decrease in an employer's contribution rate towards the cost of coverage by more than 5 percentage points
- ▼ Imposition of annual limits on the dollar value of all benefits below specified amounts

# Proposed Grandfathered Health Plans Guidance

- ▼ **Proposed Rules provide flexibility for GHPs to make certain changes without losing GF status**
- ▼ **HDHPs may make increases to fixed-amount cost-sharing requirements (such as deductibles) that would otherwise cause a loss of grandfather status without losing grandfather status, but only to the extent those changes are necessary to comply with the requirements to maintain their status as an HDHP**

# Proposed Grandfathered Health Plans Guidance

- ▼ *Alternative inflation adjustment for fixed-amount cost-sharing increases:*
  - ▼ The 2015 regulations permit increases in fixed-amount cost-sharing requirements (such as copayments, deductibles, and out-of-pocket maximums) that do not exceed certain thresholds, determined by reference to a Consumer Price Index measure of medical inflation
  - ▼ Under the proposed rule, permitted increases would be determined, in part, by reference to this same measure or by reference to the most recently published “premium adjustment percentage,” whichever is greater
  - ▼ The premium adjustment percentage is published annually by HHS and reflects the cumulative, historic growth from 2013 through the preceding calendar year in premiums for private health insurance (excluding Medigap and property and casualty insurance)
  - ▼ This alternate inflation measure would better account for changes in the costs of health coverage over time



# IRS Guidance regarding FFCRA Tax Credits

- ▼ **Quick Review: Qualifying Reasons for FFCRA Paid Sick Leave and **EFMLA** include when an individual:**
- (1) **is subject to a Federal, State or local quarantine or isolation order related to COVID19;**
  - (2) **has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;**
  - (3) **is experiencing symptoms of COVID-19 and seeking a medical diagnosis;**
  - (4) **is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;**
  - (5) **is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or**
  - (6) **is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of the Treasury and Labor**

# IRS Guidance regarding FFCRA Tax Credits

- ▼ **IRS Notice 2020-54** provides guidance for required reporting by employers related to qualified sick leave wages and qualified family leave wages under the FFCRA
- ▼ **Two Purposes:**
  - ▼ Employer tax credits and
  - ▼ Aimed at providing **employees** who are also self-employed with information necessary for properly claiming qualified sick leave equivalent or qualified family leave equivalent credits
- ▼ Employers are required to report the qualified wages in the amount of wages paid to the employee reported in Boxes 1, 3 (up to the social security wage base), and 5 of Form W-2

# IRS Guidance regarding FFCRA Tax Credits

- ▼ Additionally, employers are required to report the qualified wages in Box 14 of Form W-2 or on a *separate statement*
- ▼ Employers must separately state the total amounts paid for
  - ▼ Qualified sick leave wages paid pursuant to reasons (1), (2), or (3)
    - ▼ Labeled as “**sick leave wages subject to the \$511 per day limit**” (or similar)
  - ▼ Qualified sick leave wages paid pursuant to reasons (4), (5), and (6)
    - ▼ Labeled as “**sick leave wages subject to the \$200 per day limit**” (or similar)
  - ▼ Qualified family leave wages paid pursuant to the EFMLA provisions (reason number 5)
    - ▼ Labeled as “**emergency family leave wages**” (or similar)
- ▼ If a separate statement is provided and the employee receives a paper Form W-2, then the statement must be included with the Form W-2 provided to the employee, and if the employee receives an electronic Form W-2, then the statement shall be provided in the same manner and at the same time as the Form W-2.

# IRS Guidance regarding FFCRA Tax Credits

- ▼ As part of the Box 14 instructions or the separate statement to employees, employers may provide additional information about qualified sick leave wages and qualified family leave wages and explain that these wages may limit the amount of the qualified sick leave equivalent or qualified family leave equivalent credits to which the employee may be entitled with respect to any self-employment income
- ▼ IRS provided Model Language for Employee Instructions
- ▼ **Best Practices:**
  - ▼ Use the model language
  - ▼ Inform employees that this language was provided by the IRS
  - ▼ Include disclaimer that employer does not provide legal or tax advice and employees should consult their own tax professional

# **Model Language for Employee Instructions**

*Included in Box 14, if applicable, are amounts paid to you as qualified sick leave wages or qualified family leave wages under the Families First Coronavirus Response Act. Specifically, up to three types of paid qualified sick leave wages or qualified family leave wages are reported in Box 14:*

- Sick leave wages subject to the \$511 per day limit because of care you required;*
- Sick leave wages subject to the \$200 per day limit because of care you provided to another; and*
- Emergency family leave wages.*

*If you have self-employment income in addition to wages paid by your employer, and you intend to claim any qualified sick leave or qualified family leave equivalent credits, you must report the qualified sick leave or qualified family leave wages on Form 7202, Credits for Sick Leave and Family Leave for Certain Self-Employed Individuals, included with your income tax return and reduce (but not below zero) any qualified sick leave or qualified family leave equivalent credits by the amount of these qualified leave wages. If you have self-employment income, you should refer to the instructions for your individual income tax return for more information.*

# Updated FFCRA FAQs – Health Plans Guidance

- ▼ **FAQS ABOUT FAMILIES FIRST CORONAVIRUS RESPONSE ACT AND CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT IMPLEMENTATION PART 43**
- ▼ Provides relief from otherwise limiting rules for grandfathered GHPs, for wellness programs, and under MHPAEA
- ▼ In light of the COVID-19 pandemic, may a large employer offer coverage only for telehealth and other remote care services to employees who are not eligible for any other group health plan offered by the employer? Yes.
  - ▼ *In general, a plan, fund, or program established or maintained by an employer (or employee organization) that provides medical care (including telehealth or other remote care services) to employees or their dependents is a group health plan subject to federal requirements applicable to group health plans.*

# Updated FFCRA FAQs – Health Plans Guidance

- ▼ **Is COVID-19 testing for surveillance or employment purposes required to be covered under section 6001 of the FFCRA? No.**
  - ▼ *Testing for any other purpose not primarily intended for individualized diagnosis or treatment of COVID-19 or another health condition is beyond the scope of section 6001 of the FFCRA*
- ▼ **If an individual receives multiple diagnostic tests for COVID-19, are plans and issuers required to cover each test, as well as other applicable items and services? Generally, yes.**
  - ▼ *Provided that the tests are diagnostic and medically appropriate for the individual, as determined by an attending health care provider in accordance with current accepted standards of medical practice*

# Updated FFCRA FAQs – Health Plans Guidance

- ▼ **May a plan or issuer also revoke these changes upon the expiration of the public health emergency related to COVID-19 without satisfying advance notice requirements? Generally, yes.**
  - ▼ *Prior guidance announced relief regarding advanced notice requirements to add certain benefits*
  - ▼ *Relief now also applies to revocation of such benefits*
    - ▼ *If the plan or issuer had previously notified the participant, beneficiary, or enrollee of the general duration of the additional benefits coverage or reduced cost sharing (such as, that the increased coverage applies only during the COVID-19 public health emergency) or notifies the participant, beneficiary, or enrollee of the general duration of the additional benefits coverage or reduced cost sharing within a reasonable timeframe in advance of the reversal of the changes*





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