

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

---



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



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

## CORONAVIRUS CONSIDERATIONS FOR EMPLOYERS



# Assessing Return to Work Risks

▼ If an employee gets COVID-19 from work, can I get sued?

## ▼ 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?
- ▼ **Workers Comp:** Did an employee injury arise out of and occur in the course of employment? **Strict Liability**
  - ▼ **Some States Acting:** California State Comp Ins Fund will accept claims from employees who contract COVID-19 and are classified as “**essential workers**” under the Governor’s shelter in place order. Claimants must have a confirmed positive test result.
- ▼ **OSHA:** Duty to provide a safe workplace consistent with OSHA regulations
- ▼ **Other?**

# 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>

# Evolving CDC 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**

- ▼ For example, for **Critical Infrastructure Workers**, CDC advises:

- ▼ Take **pre-shift temperature checks**

- ▼ Require employees to **self-monitor for symptoms and report any occurrence** to a designated company contact

- ▼ Requiring **wearing of mask** (may be company provided or employee's own (in the event of shortages)

- ▼ 6-foot **social distancing**

- ▼ Regularly **Clean and disinfect** all common places

# Evolving CDC Guidelines for Employers

- ▼ What do I do if an **Employee is Suspected or Confirmed** to have COVID-19:
  - ▼ “**Close off** any areas used for prolonged periods of time by the sick person”
    - ▼ “**Wait 24 hours before cleaning** and disinfecting to minimize potential for other employees being exposed to respiratory droplets. If waiting 24 hours is not feasible, wait as long as possible... **open outside doors and windows** to increase air circulation in these areas”
  - ▼ “**Follow CDC Cleaning & Disinfection Recommendations**”
    - ▼ <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/cleaning-disinfection.html>

# Evolving CDC Guidelines for Employers

- ▼ What do I do if an **Employee is suspected or confirmed** to have COVID-19 **cont'd**:
  - ▼ “Determine **which employees may have been exposed** to the virus and need to take additional precautions”
    - ▼ Follow **CDC Public Health Recommendations for Community-Related Exposure**: <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>
  - ▼ “Follow **CDC Recommended Steps**” regarding staying at home, monitoring symptoms, self-isolation:
    - ▼ <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html>

# Evolving CDC Guidelines for Employers

## ▼ What do I do if an **Employee is suspected or confirmed** to have COVID-19 **cont'd 2**:

### ▼ Employees should not be allowed to discontinue home isolation until CDC guidelines are satisfied:

▼ <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html>

### ▼ **Symptom Based Strategy**

▼ At least 72 hours have passed without symptoms AND 10 days since symptoms first appeared

### ▼ **Test-Based Strategy**

▼ Resolution of fever without medication, discontinuation of respiratory symptoms, and employee has had two negative test results at least 24 hours apart

# PPP and FFCRA

▼ How do we **compliantly spend PPP funds on compensation where a high volume of the employees recalled to work need FFCRA leave** due to child care (or other) issues. Employers may have tough choices:

- ▼ Administer FFCRA consistent with its rules and risk you don't have enough PPP dollars going toward wages to get full forgiveness of your PPP loan;
- ▼ Tell them not to take leave, you're going to pay full wages anyway so you can discharge your PPP funds in order to get maximum forgiveness;
- ▼ Administer the FFCRA leave but pay employees regular wages with PPP funds even though that is more than FFCRA requires AND the employer cannot get a tax credit for fulfilling the FFCRA benefit; or
- ▼ Administer the FFCRA leave consistent with its rules, and use your PPP dollars to hire replacement employees while regular employees are on FFCRA leave.
- ▼ Note: May 3 FAQs from SBA: FAQ 40 says that if employees recalled refuse to return to work, SBA won't let that count against borrower for PPP forgiveness. No such guidance (yet) on FFCRA.

# Policy Considerations

- ▼ Should I have a **written policy**? How dynamic can it be?
- ▼ How **accommodative** should I be without establishing **precedent**?
- ▼ What options do I have when **recalled employees won't return** from unemployment?

# Policy Considerations

- ▼ Employees who **refuse to return** because they are **fearful**?
- ▼ Should we **take temperatures** pre-shift?
- ▼ Do we have to **provide employees with masks**?
- ▼ How do I **enforce mask-wearing** or **social distancing** in our workplace?
- ▼ What if an **employee** refuses to come to work because not all employees follow mask-wearing or social distancing requirements?

# 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

# ***Outbreak Period*** Extensions for Welfare Benefits

- ▼ New rules extend the deadlines/timeframes by disregarding the ***“Outbreak Period”***
  - ▼ The period from March 1, 2020 until **60 days after** the announced end of the National Emergency period (or a later date announced in subsequent guidance)
  - ▼ Applies retroactively to March 1, 2020
- ▼ Examples use April 30, 2020 as the assumed end-date of the National Emergency
  - ▼ The assumed April 30 end-date results in an Outbreak Period running from March 1, 2020 through June 29, 2020 (the 60th day after the assumed end of the National Emergency)
- ▼ Departments intend to issue additional guidance if there are different Outbreak Periods for different parts of the country

# **Outbreak Period Extensions for Welfare Benefits**

## ▼ **Relief for Notices and Disclosures**

▼ *An employee benefit plan and the responsible plan fiduciary will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or document that must be furnished between March 1, 2020, and 60 days after the announced end of the COVID-19 National Emergency **if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances***

▼ *Good faith acts include use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites*

▼ *The guiding principle for plans must be to act reasonably, prudently, and in the interest of the covered workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic wellbeing*

▼ *Departments' approach to enforcement will emphasize compliance assistance and include grace periods and other relief where appropriate*

# *Outbreak Period Extensions* for **Participants (and Dependents)**

- ▼ **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**
- ▼ **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**

# Outbreak Period Extensions for Participants (and Dependents)

- ▼ Example: COBRA Election Period
- ▼ Normal Rule: Qualified beneficiaries must make election within 60 days after receiving COBRA election notice
- ▼ **Outbreak Period Extension:** Extends the 60-day COBRA election period by disregarding the Outbreak Period
- ▼ *Facts: Employee's hours are reduced causing the employee to lose active coverage under the health plan, which is a COBRA qualifying event. Employee receives the COBRA election notice on April 1, 2020*
  - ▼ *Assume the National Emergency ends April 30, 2020—Outbreak Period ends June 29, 2020*
- ▼ *Result: The normal 60-day COBRA election period is extended by disregarding the Outbreak Period*
  - ▼ *Employee would have until 60 days after the end of the Outbreak Period (until August 28, 2020) to elect COBRA*

# *Outbreak Period Extensions* for **Participants (and Dependents)**

- ▼ Example: COBRA Premium Payment Period
- ▼ Normal Rule:
  - ▼ Initial payment 45 days
  - ▼ 30-day grace period for subsequent payments
- ▼ **Outbreak Period Extension:** Extends the 45-day initial premium payment and 30-day grace period for subsequent premium payment timeframes by disregarding the Outbreak Period
- ▼ *Facts: Employee is a COBRA qualified beneficiary who fails to make timely COBRA premium payments by the end of the 30-day grace period for March, April, May, and June*

# *Outbreak Period Extensions for* **Participants (and Dependents)**

- ▼ *Result: The standard 30-day COBRA premium payment grace period is extended by disregarding the Outbreak Period (assume the National Emergency ends April 30, 2020—Outbreak Period ends June 29, 2020)*
- ▼ *Employee would have until 30 days after the end of the Outbreak Period (until July 29, 2020) to make the COBRA premium payment for the months of March, April, May, and June*
- ▼ ***Employee is eligible to receive coverage under the plan during this interim period, even though some or all premium payments may not be received until July 29, 2020***
- ▼ *If the employee makes a premium payment for only two months of coverage by July 29, 2020, those premiums would apply to the first two months that remained unpaid (March and April)—but there would be no COBRA coverage for any month after April 2020*

# Outbreak Period Extensions for Plan Sponsors

- ▼ **COBRA Election Notice Deadline** – Employers generally must provide notice to individuals who experience a qualifying event within 44 days from the loss of coverage
- ▼ **Outbreak Period Extension:** Extends the 44-day period to provide the employee with the COBRA election notice by disregarding the Outbreak Period
- ▼ *Example Facts: Employee loses coverage under the group health plan as a result of termination of employment as April 1, 2020 (assume the National Emergency ends April 30, 2020—Outbreak Period ends June 29, 2020)*
- ▼ *Result: The plan will have until 44 days after the end of the Outbreak Period (by August 12, 2020) to provide the COBRA election notice*

# *Outbreak*      *Period*      **Extensions:** **Considerations and Issues Raised**

- ▼ Plan Amendments / SMM / Employee Communications / Plan Forms
- ▼ COBRA Model Notices
- ▼ Retroactive Application
- ▼ Cash flow difficulties for plan sponsors and insurers
- ▼ Stop-loss Considerations
- ▼ **FAQ Guidance..?**



**Matt Stiles**

**205.254.1071**

**mstiles@maynardcooper.com**



**Matthew Cannova**

**205.254.1193**

**mcannova@maynardcooper.com**

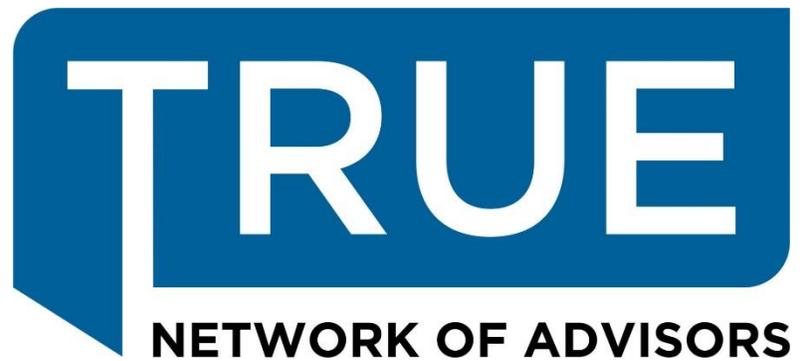


**David Kinman**

**205.254.1092**

**dkinman@maynardcooper.com**

**MAYNARD**  
COOPER GALE



**MAYNARD**  
COOPER GALE

ALABAMA | CALIFORNIA | FLORIDA | NEW YORK | TENNESSEE | TEXAS | WASHINGTON DC

[MAYNARDCOOPER.COM](http://MAYNARDCOOPER.COM)