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## Fargo Employment and Benefits Update May 15, 2020

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# Fargo Employment and Benefits Update

Friday, May 15, 2020

## Overview

Employment law and benefits law developments have occurred at an exceptionally rapid pace this year, driven by the coronavirus. Dorsey is pleased to invite you to this webinar to update you on the developments.

### 9:00 am – 9:30 am CT | 8:00 am – 8:30 am MT      **Employment Law Update**

Employment law developments have continued. This session will provide you an update on federal and state case law and regulatory developments in the last year.

*Jack Sullivan, Jillian Kornblatt and Briana Al Taqatqa, Dorsey & Whitney LLP*

### 9:30 am – 10:00 am CT | 8:30 am – 9:00 am MT      **Benefits Update**

Congress has been busy. Since December it has passed the SECURE Act, the Families First Coronavirus Response Act (FFCRA), and the CARES Act. This session will provide an overview of the changes made by this legislation.

*Tim Goodman, Dorsey & Whitney LLP*

### 10:00 am – 10:10 am CT | 9:00 am – 9:10 am MT      **Break**

### 10:10 am – 10:40 am CT | 9:10 am – 9:40 am MT      **FFCRA Emergency Leaves**

The Families First Coronavirus Response Act (FFCRA) provides for emergency leaves for private employers with fewer than 500 employees (possibly including subsidiaries of larger employers). This session will review these emergency leaves, exceptions, and briefly touch on payroll credits.

*Jillian Kornblatt, and Tim Goodman, Dorsey & Whitney LLP*

### 10:40 am – 11:10 am CT | 9:40 am – 10:10 am MT      **Coronavirus: Employment & Benefit Issues**

Employers of all sizes have had to react to the drastic economic changes. This session will discuss reductions in hours and wages, furloughs, terminations, COBRA, employer retirement plan contributions, and more.

*Rebecca Bernhard and Tim Goodman, Dorsey & Whitney LLP*

### 11:10 am – 11:40 am CT | 10:10 am – 10:40 am MT      **Ask the Attorneys**

An overview of current employment law and benefits issues and opportunity to ask questions.

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## FARGO EMPLOYMENT AND BENEFITS UPDATE

### Dorsey Speaker Biographies



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#### **Briana Al Taqatqa**

Associate  
Minneapolis, Minnesota  
(612) 492-6617  
[altaqatqa.briana@dorsey.com](mailto:altaqatqa.briana@dorsey.com)

Briana is an associate in Dorsey's Labor & Employment group, where she represents clients in all areas of employment litigation, including: discrimination, harassment, retaliation, contract matters, and class action wage and hour suits. In addition, Briana advises clients with employment questions related to leave, wage and hour, hiring, performance improvement, termination, and other employment policies. She maintains an active pro bono practice, including representing clients seeking asylum in the United States and participation in a local housing legal clinic.

Before coming to Dorsey, Briana worked for an international education-management company, supporting its efforts both in the United States and in Abu Dhabi, United Arab Emirates to provide high quality, free or low-cost education to children in need.



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**Rebecca Bernhard**

Partner  
Minneapolis, Minnesota  
(612) 492-6186  
bernhard.rebecca@dorsey.com

Rebecca's experience spans traditional labor and employment counsel, immigration, and federal contract compliance and audits, including affirmative action plans and audits. She supports clients with their corporate transactions, advising on labor and employment diligence, negotiating with new unions and conducting effects bargaining, and assisting her clients with post-acquisition or post-divestiture integration. Rebecca has particular experience helping food, beverage, and agribusiness companies as well as cooperatives and financial institutions with their employment problems. Prior to joining the firm, Rebecca served as Senior VP of HR and Associate General Counsel at one of the nation's largest student loan guarantors. Rebecca also has direct experience in labor relations, including serving as the Director of Labor Relations for a telemarketing company before attending law school, making her an excellent advisor to employers in all aspects of managing unionized employees.

In addition, Rebecca assists clients with their business immigration needs, including securing temporary and permanent US visas, Form I-9 compliance training and audit defense, and merger and acquisition-related counseling. She is a frequent author and speaker on labor and employment topics confronting HR professionals, including legal issues related to talent management, succession planning, and compliance. Rebecca is Co-Chair of Firmwide Diversity and Inclusion.



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**Tim Goodman**

Partner  
Minneapolis, Minnesota  
(612) 340-2825  
goodman.timothy@dorsey.com

Tim works with employers on health and retirement plans, and executive compensation. Tim works with employers, with a special focus on assisting cooperatives, agribusiness companies, hospitals and health care entities, and tax-exempt organizations. Tim advises on health benefits including health care reform (the ACA), wellness plans, telemedicine, and employee assistance plans. His ACA experience includes taxes and penalties; including section 4980H and the employer shared responsibility fee, reporting (Form 1095-C), notices and mandates. Tim helps employers with the complex rules governing retirement plans and assists them to review operations, address errors, and maintain the tax-qualified status of their plans. His experience includes qualified and nonqualified retirement plans (including defined benefit, 401(k), 403(b), 457(b), and 457(f) plans, and section 409A). On executive benefits, Tim assists with employment agreements, severance arrangements, deferred compensation, and incentive plans. With health care entities, Tim also assists on sign-on bonuses, reasonable compensation under section 4958, and the excise taxes under section 4960 (added by the Tax Cuts and Jobs Act).



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### **Jillian Kornblatt**

Partner

Minneapolis, Minnesota

(612) 492-6156

kornblatt.jillian@dorsey.com

Jillian is a partner in Dorsey's Labor & Employment group, where she focuses her practice on employment litigation and advice, and independent investigations. Jillian assists employers in investigating and responding to internal complaints, agency charges, and lawsuits based on allegations of discrimination, harassment, retaliation, breach of contract, conversion, wage and leave statute violations, and whistleblower claims. In her advice practice, she helps clients avoid litigation and be in the best position possible if an employee does bring a claim. Jillian also helps employers navigate union grievances and unfair labor practice charges. Jillian has conducted a number of complex and sensitive investigations, using her clinical social work background to reach the heart of the matter in a way that leaves interviewees feeling respected during the process.

Before practicing law, Jillian spent six years in human resources management. In these roles, she advised managers on employee relations, recruiting, compensation, benefits, performance appraisals, and organizational development issues.



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### **Jack Sullivan**

Partner

Minneapolis, Minnesota

(612) 492-6176

sullivan.jack@dorsey.com

Jack is an employment adviser and litigator in Dorsey's Labor & Employment group, where he provides business leaders and human resource professionals with practical guidance through difficult compliance, managerial, and workforce decisions. Jack also advises management on union and labor-law issues. His advice to clients is informed and strengthened by his own professional experience as a manager, as he served as a newsroom leader and editor during his first career as a journalist – and so knows first-hand the challenges and rewards of effectively hiring, training, and managing employees. Jack works to resolve potential problems and disputes on terms that work best for his clients so they can focus on the needs of their business – and when matters can't be resolved, is a creative and effective litigator who has represented clients in state and federal courts and private arbitrations across the country.



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## Employment Law Update

May 15, 2020

**Briana Al Taqatqa, Associate – Labor & Employment**

**Jack Sullivan, Partner – Labor & Employment**

**Jillian Kornblatt, Partner – Labor & Employment**



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## Agenda

- **Employment Statutes and Regulations**
- **Discrimination and Harassment**
- **Wage & Hour**
- **Labor**
- **Predictions**



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## Employment Legislative Update



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## New Legislation

- **Noncompete Expansion (HB 1351)**
  - Sale of business goodwill and partnership dissolution exceptions
  - The restriction may be within a “reasonable geographic area and for a reasonable length of time”
- **Minimum Wage Preemption**
  - Local governments may not require higher wages
- **Enforcement of Wage Claim Investigations (SB 2145)**
  - Department has subpoena power



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## New Legislation Cont.

- **Volunteer Emergency Responder Leave**
  - Now includes volunteer National Guard members of any state
- **Marijuana Decriminalization**
  - Employers do not have to accommodate marijuana use
- **Workers' Compensation**
  - Annual payroll report required; file electronically with WSIO
  - Employees cannot waive coverage or pay premiums

## Failed Bills

- **SB 2303 – proposed amendment to the North Dakota Human Rights Act (NDHRA) to add sexual orientation as a protected class**
  - Law remains: Sexual orientation and gender identity are not statutorily protected classes in North Dakota
- **HB 1509 – a bill to create a paid family medical leave fund**
  - Law remains: Private employers are not required to provide paid family or medical leave
- **HB 1293 – requiring employers to accommodate requests to attend worship services**
  - Law remains: Retail employers grant time off for worship unless undue hardship

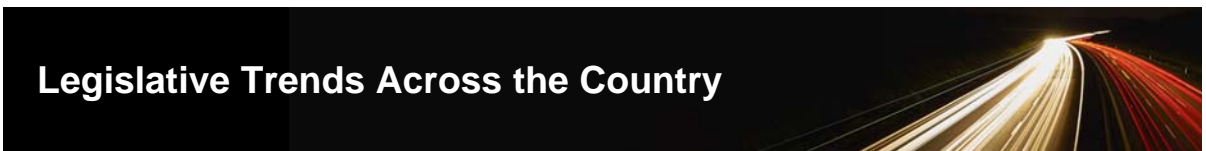


## Discrimination and Harassment



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## Legislative Trends Across the Country

- **#MeToo remains in full force**
- **Federal trend of deregulation continues**
- **Trendsetters: California, Illinois, New York (state), and New York City**
  - Settlement and Employment Agreements: restrictions on confidentiality
  - Mandatory anti-harassment training
  - Revising the “Severe or Pervasive” standard
  - Restrictions on pre-dispute arbitration



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## ***Paskert v. Kemna-Asa Auto Plaza, Inc.*, 950 F.3d 535 (8th Cir. 2020)**

- Plaintiff was a sales associate at a used-car dealership where she was supervised by the manager who was demeaning and sexually suggestive toward women, ridiculed and screamed at employees, and frequently lost his temper including throwing objects in the office.
- Claim: Sex discrimination based on a hostile work environment, and retaliation.
- Eighth Circuit concluded supervisor's behavior did not meet "the severe or pervasive standard" for establishing a Title VII hostile work environment claim.
  - But noted that the behavior was "inappropriate and should never be tolerated in the workplace," and that the employer and manager "should both be embarrassed and ashamed for how they treated her."



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## **Wage & Hour**



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## Federal Wage & Hour Update

- Federal minimum wage remains at \$7.25
- Overtime: Minimum salary threshold for white collar workers is \$35,568
- Regular Rate of Pay: DOL Final Rule effective January 15, 2020
  - Examples of excluded benefits: PTO paid time not worked, gym memberships and “wellness programs,” employer discounts, and tuition benefits
- *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019)
  - Courts may compel class action arbitration only where the parties expressly declare their intention to be bound by such actions in their arbitration agreement
  - “Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.”



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## *In re Minn. Living Assistance, Inc.*, 934 N.W.2d 300 (Minn. 2019)

- “Split-day” pay plans are prohibited under Minnesota law
- Split-day plan: The first 5.5 hours of each 16-hour workday, employees were paid at one rate of pay; the remaining 10.5 scheduled hours, they were paid 1.5 times that rate.
- Baywood used this split-day plan even after an employee had worked 48 hours (the overtime threshold under Minnesota law) in a workweek.
- Minnesota Supreme Court: Employers are required to pay their employees at least 1.5 times wages for all hours worked after the first 48 hours of a workweek, regardless of whether the employee received time-and-a-half compensation during the first 48 hours of that week.



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## Labor

## “Protected Activity” Limited by Trump-era Board

### *Alstate Maintenance, LLC, 367 NLRB No. 68 (2019).*

- Employee, airline skycap (porter), protested about a lack of customer tips in front of co-workers and a supervisor
- Board ruled he was not engaged in protected concerted activity
  - Was said in front of other employees
  - “Mere gripe”
- It was not illegal for the company to fire the worker on account of the protest activity
- \*Overturned Obama-era precedent

## NLRB Rules: No Statutory Right to Company Technology



*Ceasers Entertainment d/b/a Rio All-Suites Hotel and Casino, 368 NLRB No. 143 (2019).*

- Employees do not have a statutory right under the NLRA to use an employer's email system and/or other information technology resources to communicate with each other for non-work-related reasons.
- Employers are permitted to limit the use of its email systems and other information technology systems, provided that they do not do so on a discriminatory basis.
- Exception – if email is “only reasonable means”
- \*Overturned Obama-era precedent.



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## NLRB Rules: Confidentiality During Investigations is Lawful



*Apogee Retail LLC d/b/a Unique Thrift Store, 368 NLRB No. 144 (2019).*

- Employer work rules that require confidentiality during the course of internal workplace investigations are “presumptively” lawful when they are limited to the duration of a given workplace investigation.
- Balancing test: employee rights v. employer's legitimate business justifications
- \*Overturned Obama-era precedent.



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## Predictions



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## 2020-21 Predictions

- Wage and hour misclassification
- COVID-19 litigation



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## Thank You & Contact Information



**Briana Al Taqatqa**  
(612) 492-6617  
altaqatqa.briana@dorsey.com



**Jillian Kornblatt**  
(612) 492-6156  
kornblatt.jillian@dorsey.com



**Jack Sullivan**  
(612) 492-6176  
sullivan.jack@dorsey.com



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## Benefits Update

May 15, 2020

Tim Goodman, Partner – Benefits & Compensation



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## Overview

- **Legislative changes**
  - SECURE Act retirement plan changes
  - CARES Act retirement plan changes
  - SECURE Act health plan changes
  - FFCRA health plan change
  - CARES Act health plan changes
- **Regulatory changes and guidance**
  - DOL-IRS-HHS FAQ 42
  - DOL-IRS final regulations on deadlines
  - DOL benefit plans FAQs
  - IRS Notice 2020-23
  - IRS Notice 2020-29
  - IRS CARES Act FAQs
- **Employer assistance**
  - Disaster leave sharing, medical leave sharing, and section 139



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## Legislation – SECURE Act Retirement Plans

- **Change in required minimum distribution (RMD) age (FCAA, Division O, § 114)**
  - **Previously**
    - Distributions required to start no later than April 1 of calendar year following attainment of age 70½ (for qualified plans, severance from employment by participants who work past age 70½)
  - **SECURE Act**
    - Changes age 70½ to age 72 for plan participants and IRA owners who turn age 70½ after December 31, 2019
    - Law change did not affect actuarial increase requirements applicable to participants in pension plans (DB plans) who continue working past age 70½



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## Legislation – SECURE Act Retirement Plans

- **Post-death distribution period (FCAA, Division O, § 114) – Mandatory**
  - **Previously**
    - Beneficiary who inherited plan or IRA benefit permitted to stretch required minimum distributions over beneficiary's life
  - **SECURE Act**
    - Ten-year rule
      - Now, in most cases, individual beneficiaries must completely withdraw all retirement benefits by end of tenth year following year of plan participant or IRA owner's death
    - Five exceptions
      - Surviving spouse
      - Minor children of participant
      - Disabled individuals
      - Chronically ill individuals
      - Individuals not more than 10 years younger than plan participant



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## Legislation – SECURE Act Retirement Plans

- **New safe harbor rate cap for qualified automatic contribution arrangements (QACAs) (FCAA, Division O, § 102) – Optional**
  - **Previously**
    - Safe harbor arrangements designed to satisfy Code § 401(k)(13) capped automatic contribution rate at 10%
    - Applies to both automatic contribution and auto-escalation limits
  - **SECURE Act**
    - Retains 10% cap for first year of participation, but permits rate to be increased to 15% for subsequent plan years
    - Increases potential retirement savings for participants who have not made elective deferral election
    - Potential issue if plan document references Code § 401(k)(13) but does not include specific percentage – how is change implemented?
      - Does plan sponsor want it to be implemented?
    - Effective for plan years starting after December 31, 2019



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## Legislation – SECURE Act Retirement Plans

- **Notice requirements (FCAA, Division O, § 103) – Optional**
  - **Generally reduces certain administrative costs and burdens for nonelective safe harbor plans**
  - **Previously**
    - Safe harbor matching contribution and nonelective contribution must provide initial and annual safe harbor notices to participants before start of plan year
    - Notice to explain: safe harbor contribution formulas, how to make elective deferrals, vesting and distribution rules, contact information, automatic contributions, and auto-escalation (if applicable)
  - **SECURE Act**
    - Safe harbor notices no longer required for nonelective safe harbor plans where safe harbor is only for elective contributions
    - Safe harbor notices still apply to safe harbor matching contributions
    - Effective for plan years beginning after December 31, 2019



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## Legislation – SECURE Act Retirement Plans

- **Plan adoption (FCAA, Division O, § 103) – Optional**

- **Previously**

- Generally, amendment adopting safe harbor plan must be executed before beginning of plan year in which safe harbor applies
    - Possible to adopt safe harbor nonelective plan at 3% contribution rate no later than 30 days before end of plan year provided several conditions are met

- **SECURE Act**

- Possible to adopt safe harbor nonelective plan at 3% contribution rate no later than 30 days before end of plan year without current conditions
    - Possible to adopt safe harbor nonelective plan at 4% contribution rate through end of following plan year (need to provide 4% nonelective contribution for both years)
    - Note: safe harbor matching contribution plan amendments are still required to be adopted *before* plan year in which safe harbor applies
    - Effective for plan years beginning after December 31, 2019

## Legislation – SECURE Act Retirement Plans

- **Lifetime income disclosure (Division O, Section 203) – Mandatory**

- **Previously**

- No disclosure required

- **SECURE Act**

- Disclosure of lifetime income (DOL to provide guidance)
    - Effective date: Date 12 months after issuance of latest of (i) interim final rules, (ii) model disclosure, or (iii) assumptions for conversion factors

- **Lifetime income fiduciary safe harbor (Division O, Section 204) – Optional**

- **Previously**

- No fiduciary relief

- **SECURE Act**

- Fiduciary protected if fiduciary takes certain steps in selecting insurer providing annuities

- **Lifetime income options (Division O, Section 109) – Optional**

## Legislation – SECURE Act Retirement Plans

- **Loans (FCAA, Division O, § 108) – Mandatory**
  - **Previously**
    - DOL guidance allowed loans through credit card (ERISA Advisory Opinion 1995-17A)
  - **SECURE Act**
    - Prohibits loans through credit cards and similar arrangements
    - Effective December 20, 2019
- **415 compensation definition (FCAA, Division O, § 116) – Mandatory**
  - **Previously**
    - If employer provided difficulty of care payments under Code § 131 for foster care, amount was excluded from income and from compensation for retirement plan purposes
  - **SECURE Act**
    - Inclusion in compensation for retirement plan purposes for difficulty of care payments for foster care
    - Effective for plan years starting after December 31, 2015



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## Legislation – SECURE Act Retirement Plans

- **Distributions to assist parents (FCAA, Division O, § 113) – Optional**
  - **Previously**
    - No specific provision for distribution upon child birth or adoption
    - May qualify for hardship distribution, but such distributions before age 59½ are subject to 10% early distribution penalty
  - **SECURE Act**
    - Plan may offer distribution of up to \$5,000 within one year of birth or adoption
      - Does not cover adoption of spouse's child
      - Limited to children under age 18 or physically or mentally incapable of self-support
    - Limit of \$5,000 is on an individual basis, so each spouse could receive distribution of up to \$5,000
    - If plan offers, plan also needs to offer repayment opportunity
    - Effective for plan years starting after December 31, 2019



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## Legislation – SECURE Act Retirement Plans

- **Part-time employee eligibility (FCAA, Division O, § 112) – Mandatory**
  - **Previously**
    - Defined contribution plans (other than 403(b) plans) may exclude employee who has not completed one year of eligibility service (1,000 hours in 12-month period)
  - **SECURE Act**
    - Dual eligibility:
      - One year of eligibility service (1,000 hours in 12-month period)
      - Three consecutive years in which an employee completes at least 500 hours of service
    - Matching and nonelective contributions not required for these employees
    - Need to treat employees who are eligible solely based on new provision as accruing year of vesting service for each year in which employee completes 500 hours in 12-month period
    - This new requirement does not apply to collectively bargained plans
    - Service before January 1, 2021 does not need to be taken into account
    - Effective for plan years starting after December 31, 2020

## Legislation – SECURE Act Retirement Plans

- **DB plans, money purchase pension plans, and governmental 457(b) plans (FCAA, Division M, § 104) – Optional**
  - **Previously**
    - Age 59½ in-service distribution available under 401(k) plans (and 403(b) plans)
  - **SECURE Act**
    - Provides for age 59½ in-service distribution option for these plans
    - Effective for plan years beginning after December 31, 2019
- **Additional changes under SECURE Act**
  - Provides for closed DB plan testing relief
  - Provides church plan relief
  - Directs IRS to provide 403(b)(7) plan termination guidance
  - Increases certain penalties
  - And more

## Legislation – CARES Act Retirement Plans

- **CARES Act – Participants affected by coronavirus (Section 2202) - Optional**
  - **Participants affected during 2020**
    - Participant, spouse, or dependent diagnosed with COVID-19 or SARS CoV-2
    - Participant experiences adverse financial consequences due to quarantine, furlough, or lay off or reduced hours due to such virus
    - Participant experiences adverse financial consequences due to being unable to work or provide child care due to such virus
    - Participant experiences adverse financial consequences due to factors determined by Secretary of the Treasury
  - **Plan administrator can rely on employee's certification that employee satisfies one condition**
  - **Plan's covered: 401(k) plans, 403(b) plans, and governmental 457(b) plans**

## Legislation – CARES Act Retirement Plans

- **CARES Act – Participants affected by coronavirus (Section 2202) – Optional**
  - **Three forms of assistance available to participants affected**
    - **Distribution of up to \$100,000 – Optional**
      - Not subject to mandatory 20% income tax withholding (participant may request withholding)
      - Not subject to mandatory 10% withholding for early withdrawals prior to age 59½
      - Not treated as eligible rollover distribution (no 402(f) rollover notice)
      - Taxed pro rata over 3-year period (unless participant elects otherwise)
      - Eligible for re-contribution to plan or IRA within 3 years of distribution

## Legislation – CARES Act Retirement Plans

- **CARES Act – Participants affected by coronavirus (Section 2202) – Optional**

- **Three forms of assistance available to participants affected (continued)**

- **Loan amount expansion – Optional**

- Plan loans made from March 27 through September 23, 2020
      - Plan loan dollar limit increased to \$100,000 (from \$50,000)
      - Plan loan account limit increased to 100% of account (from 50%)
      - Note: Employer may want to expand number of loans available under plan for participants who already have maximum number of loans

- **Loan payment suspension – Optional**

- Plan loan payments due between March 27 through December 31, 2020
      - Plan loan payments delayed for one year (5-year repayment period adjusted to accommodate)
      - Plan loan payment adjusted for interest during delay
      - Note: Plan employer should discuss process with plan record-keeper / vendor

- **Plan amendment deadline: For calendar year plans is December 31, 2022**



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## Legislation – CARES Act Retirement Plans

- **CARES Act – RMDs (Section 2203) – Optional**

- **Required minimum distribution (RMD) suspension (Section 2203)**

- **Background on RMDs**

- RMDs are amount of retirement accounts required to be included in income each year
      - If employee has terminated employment, for employee who attained age 70½ on or before December 31, 2019, in general RMD would be required in 2019

- **CARES Act RMD relief appears similar to RMD relief approved for 2009 in light of great recession**

- **Absent contrary IRS guidance, record keepers / vendors will likely offer 2 alternatives:**

- Default to continue RMDs with individual able to elect to not receive such distribution
      - Default to discontinue RMDs unless individual able to elect to receive such distribution



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## Legislation – CARES Act Retirement Plans

- **CARES Act – DB plans (Section 3608) – Optional**

- **DB plans – Funding relief (Section 3608)**

- Provides that single-employer plan contributions that would be due during 2020 are now due on January 1, 2021

– 2020 1 <sup>st</sup> quarterly	Was due April 15, 2020	Now due January 1, 2021
– 2020 2 <sup>nd</sup> quarterly	Was due July 15, 2020	Now due January 1, 2021
– 2019 final contribution	Was due September 15, 2020	Now due January 1, 2021
– 2020 3 <sup>rd</sup> quarterly	Was due October 15, 2020	Now due January 1, 2021

- Interest accrues from original due date until paid

- **DB plans – AFTAP election (Section 3608)**

- Provides that for any plan year that includes any portion of 2020, employer may use plan's adjusted funding target attainment percentage (AFTAP) for last plan year ending before January 1, 2020
    - Allows employers to avoid lump sum and benefit accrual restrictions



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## Legislation – CARES Act Retirement Plans

- **CARES Act – DB plans (Section 3609)**

- **DB plans – CSEC plan relief (Section 3609)**

- Cooperative and Small Employer Charity (CSEC) employer DB plans are subject to funding rules that are similar to those in place before 2006 and enactment of Pension Protection Act (PPA)
    - CSEC plans also have lower PBGC premiums (changed by SECURE Act at end of 2019)
    - CARES Act slightly expands definition of CSEC plans to include certain charitable employers that perform or support certain medical research



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## Legislation – SECURE Act Health Plans

- **Cadillac tax (FCAA, Division N, § 503)**
  - **Previously**
    - Code § 4980I imposed 40% excise tax on high-cost employer-sponsored health coverage exceeding annual limitation
  - **FCAA repealed tax**
- **Health provider tax (FCAA, Division N, § 502)**
  - **Previously**
    - ACA § 9010 imposed fee on each covered entity engaged in business of providing health insurance
  - **FCAA repealed tax**
- **Medical device tax (FCAA, Division N, § 501)**
  - **Previously**
    - Code § 4221(a) imposed 2.3% excise tax on sales of medical devices
  - **FFCRA repealed tax**



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## Legislation – SECURE Act Health Plans

- **Patient centered outcomes research (PCOR) fee (FCAA, Division N, § 104) – Mandatory**
  - **Previously**
    - Code § 4375 and Code § 4376 provided for PCOR fees through calendar year plan years ending on or before September 30, 2019
  - **FCAA changes**
    - PCOR fees extended through plan years ending before October 1, 2029
    - Applies to health insurers and self-insured health plan sponsors
    - Calculated based on average number of lives covered during policy year or plan year multiplied by applicable dollar amount for year
    - Applicable dollar amount for plan years ending on or after October 1, 2018 through September 30, 2019 was \$2.45; IRS to issue applicable dollar amounts for subsequent years



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## Legislation – FFCRA Health Plans

- **COVID-19 testing (Section 6201) – Mandatory**
  - **Families First Coronavirus Response Act (FFCRA) requires group health plans to cover products and services used in testing and diagnosis of COVID-19**
    - On first-dollar basis, without any cost-sharing
    - No medical management requirements, such as preauthorization
    - Retiree-only plans, plans providing only excepted benefits (e.g., limited-scope dental and vision plans), and certain other plans are exempt from FFCRA's COVID-testing mandate

## Legislation – CARES Act Health Plans

- **COVID-19 testing (Section 3201) – Mandatory**
  - **CARES Act expands types of tests covered**
    - Products approved by U.S. Food and Drug Administration (FDA)
    - Products for which developer has requested or intends to request emergency use authorization by FDA
    - Products developed in and authorized by state that has notified U.S. Department of Health and Human Services (HHS) of its intention to review COVID-19 tests
    - Products that HHS approves through published guidance

## Legislation – CARES Act Health Plans

- **COVID-19 test pricing (Section 3202) – Mandatory**

- CARES Act also governs amount that plans must cover for COVID-19 testing
  - Healthcare providers are required to publish their “cash price” for COVID-19 tests on public website
  - Plans may reimburse in-network providers for COVID-19 tests at previously negotiated rates
  - For out-of-network providers, plans must either reimburse published “cash price” for test or negotiate lower price
- IRS issued Notice 2020-15, permitting high-deductible health plans (HDHPs) to cover both COVID-19 testing and treatment on first-dollar basis without making participants ineligible to make health savings account (HSA) contributions

## Legislation – CARES Act Health Plans

- **Privacy changes (Section 3224)**

- CARES Act provides that within 180 days of enactment, Secretary of HHS must issue guidance on 45 C.F.R. § 160.103 regarding sharing of patients’ PHI during public health emergency

- **Privacy change (Section 3221)**

- CARES Act revises privacy rules for Part 2 rules
- Substance use disorder (SUD) information (referred to as “Part 2 rules” because they are found in 42 U.S.C. Part 2) are different than and stricter than HIPAA privacy rules
- Group health plans usually do not receive SUD information, but EAPs or wellness programs may receive this information

## Legislation – CARES Act Health Plans

- **Telehealth (Section 3701) – Optional**
  - CARES Act permits, but does not require, HDHPs to waive cost-sharing or provide coverage prior to satisfaction of deductible for general telehealth services without affecting participants' eligibility to make or receive HSA contributions
  - Effective on March 27, 2020 and applies to plan years beginning on or before December 31, 2021
- **Over-the-counter (OTC) medicines (Section 3702) – Optional**
  - HSAs, health FSAs, and HRAs can now reimburse participants for costs of menstrual care products and over-the-counter medicines
  - Effective for expenses incurred after December 31, 2019

## Legislation – CARES Act Fringe Benefits

- **Student loan assistance under section 127 (Section 2206) – Optional**
  - **Background**
    - Under section 127 of Internal Revenue Code, employers may provide employees with up to \$5,250 in tax-free education assistance benefits
    - Benefits must be paid pursuant to written plan and may be used only for expenses permitted under Code
  - CARES Act expands expenses permitted to include student loan repayments made by employer in 2020 to or for benefit of employee
    - CARES Act did not expand \$5,250 limit, so loan repayments count against \$5,250 limit

## CLE Code – For Attendees Requesting Credit



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## Regulatory Guidance – DOL-IRS-HHS – FAQ 42

- **FFCRA and CARES Act guidance on health plans**
  - <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-42.pdf>
    - FFCRA mandates coverage of coronavirus testing with no cost-sharing imposed on participants
    - CARES Act expands covered types of coronavirus testing
- **FAQ 42 explains covered coronavirus testing in depth**
- **FAQ 42 also provides an EAP may offer coronavirus testing and it will not be considered a significant benefit**
- **FAQ 42 allows plans to add telehealth benefits without notice and restrictions on mid-year changes to health plans**



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## Regulatory Guidance – DOL-IRS – Final Regs Suspending Deadlines

- **DOL and IRS deadline extension**

- <https://www.govinfo.gov/content/pkg/FR-2020-05-04/pdf/2020-09399.pdf>

- DOL and IRS final regulations suspend several employee benefit plan deadlines for period from March 1, 2020 until 60 days after announced end of National Emergency (“Outbreak Period”)
- Deadlines then commence (or resume) to run as of that date
- Section 518 of ERISA (as amended by section 3607 of CARES Act) provides in event of Presidentially declared disaster or public health emergency, Secretary of Labor (DOL) may issue guidance suspending deadlines for affected plan administrators, participants, and beneficiaries for period of up to 1 year
- Section 7508A of Code provides in event of Presidentially declared disaster Secretary of the Treasury may issue guidance suspending deadlines for affected plan administrators, participants, and beneficiaries for period of up to 1 year

## Regulatory Guidance – DOL-IRS – Final Regs Suspending Deadlines

- **DOL and IRS deadline extension (continued)**

- **Affected plans and affected deadlines:**

- Health plans: HIPAA 30- or 60-day special enrollment period
- Health plans: COBRA election 60-day election period
- Health plans: COBRA 45-day initial premium payment period
- Health plans: COBRA 30-day grace period for subsequent premiums
- Health plans: COBRA notification date for qualifying event or disability determination
- Health plans – external review: Request for external review date by which claimant may file request for external review after adverse determination
- Health plans – external review: Date within which claimant may file information to perfect request for external review upon finding that request was not complete
- Health and retirement plans: ERISA claims
- Health and retirement plans: ERISA claim appeals

## Regulatory Guidance – DOL – COVID-19 FAQs

- **COVID-19 FAQs for participants and beneficiaries**
  - <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/covid-19.pdf> Provides questions and answers on CARES Act Section 2202
  - **Provides participants and beneficiaries with assistance on**
    - Health coverage
    - COBRA
    - Obtaining retirement benefits
    - Where to obtain information

## Regulatory Guidance – DOL – EBSA Disaster Relief Notice 2020-01

- **Guidance and Relief for Employee Benefit Plans Due to COVID-19 (Novel Coronavirus) Outbreak**
  - <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01.pdf>
  - **Relief for delays due to coronavirus**
    - Timing of elective contributions and loan repayments
    - Blackout notices

## Regulatory Guidance – DOL – Updated Model COBRA Notices & FAQs

- **DOL has updated two model COBRA notices**
  - <https://www.dol.gov/newsroom/releases/ebsa/ebsa20200501>
  - <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/cobra-model-notices.pdf>
    - **Model general notice**
    - **Model election notice**
- **DOL indicates it has updated model notices, “to ensure that qualified beneficiaries better understand interactions between Medicare and COBRA”**
- **Note: Use of model notices does not prevent litigation regarding COBRA notices**

## Regulatory Guidance – IRS – Notice 2020-15

- **IRS Notice 2020-15, 2020-14 IRB 559 (March 30, 2020)**
  - <https://www.irs.gov/pub/irs-irbs/irb20-14.pdf>
- **Provides high deductible health plan (HDHP) that covers coronavirus testing at no charge (no cost-sharing or deductible) will not fail to be HDHP**
  - **Allows HSA contributions**
- **Plan amendment: Employer may need to amend health plan to provide for coverage of testing**

## Regulatory Guidance – IRS – Notice 2020-23

- **IRS Notice 2020-23, 2020-18 IRB 742 (April 27, 2020)**
  - <https://www.irs.gov/pub/irs-irbs/irb20-18.pdf>
- **Extends deadlines for certain retirement plan payment and filing obligations that have deadlines on or after April 1, 2020 and before July 15, 2020**
  - Plan loan repayments due (can be delayed; for employer is optional)
  - Window for eligible rollover distribution (extended to later of (i) 60 days after receipt of distribution, or (ii) July 15, 2020)
  - Deadline for plan to distribute employee deferrals in excess of 402(g) limit (plus associated earnings) for 2019 calendar year (April 15, 2020 to July 15, 2020)
  - Additional extensions for non-calendar year plans

## Regulatory Guidance – IRS – Notice 2020-29

- **IRS Notice 2020-29, 2020-22 IRB \_\_ (May 26, 2020)**
  - Draft at: <https://www.irs.gov/pub/irs-drop/n-20-29.pdf>
- **Permits mid-year changes to group health plans, health FSA, and dependent care FSA**
  - **Group health plans (medical, dental, and vision) – Optional**
    - Allow employees to elect coverage prospectively
    - Allow employees to change level of coverage prospectively
    - Allow employees to drop coverage prospectively if employee attests in writing employee is enrolled or immediately will enroll in other health coverage not sponsored by employer
  - **Health FSA – Optional**
    - Allow employees to prospectively change (elect, revoke, increase, or decrease election)
  - **Dependent care FSA – Optional**
    - Allow employees to prospectively change (elect, revoke, increase, or decrease election)
- **Plan amendment due December 31, 2020**

## Regulatory Guidance – IRS – Notice 2020-33

- **IRS Notice 2020-33, 2020-22 IRB \_\_ (May 26, 2020)**
  - Draft at: <https://www.irs.gov/pub/irs-drop/n-20-33.pdf>
- **Increases limit for unused health FSA carryover amounts from fixed amount of \$500 to 20% of health FSA contribution limit for year**
  - For 2020, health FSA contribution limit is \$2,750
  - For 2020, health FSA carryover amount into 2021 is thus \$550
  - In future, amounts adjusted annually for inflation
- **Plan amendment for carryover to 2021 due December 31, 2021**

## Regulatory Guidance – IRS – COVID-19 FAQs

- **Coronavirus-related relief for retirement plans and IRAs questions and answers**
  - <https://www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers>
- **Provides questions and answers on CARES Act Section 2202**
  - **Relief for participants affected by coronavirus**
    - Distribution of up to \$100,000 – Optional
    - Loan amount expansion – Optional
    - Loan payment suspension – Optional
  - Indicates IRS will issue guidance and will use IRS Notice 2005-92 as basis (provided guidance on tax-favored distributions and plan loans under sections 101 and 103 of Katrina Emergency Tax Relief Act of 2005 (KETRA))

## Benefit Plans – Fringe Benefits

- **Benefit plan impacts – Fringe benefits**

- **Disaster leave banks**

- Allow employees to donate leave to disaster leave bank (cannot designate recipient)
    - Affected employees can receive paid leave in reasonable amount determined by employer
    - Donor employee not subject to federal income or employment taxes
    - Plan document required
    - Notice 2006-59, 2006-28 I.R.B. 60 (July 10, 2006)

- **Medical leave banks**

- Allow employees to donate leave to medical leave bank (can designate recipient)
    - Employees who are ill or have ill family member can receive paid leave
    - Donor employee not subject to federal income or employment taxes
    - Plan document required
    - Rev. Rul. 90-29, 1990-1 C.B. 11



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## Benefit Plans – Fringe Benefits

- **Benefit plan impacts – Fringe benefits**

- **Qualified disaster relief payments**

- Affected employees can receive cash amount (“reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster”) determined by employer
    - Not subject to federal income or employment taxes
    - Plan document not required, but helpful to explain to employees
    - Employers should keep documentation of amounts paid to claim deduction
    - 26 U.S.C. § 139



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## Conclusion & Contact Information



**Tim Goodman**  
(612) 340-2825  
goodman.timothy@dorsey.com



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Workplace law trends for today and beyond.  
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## FFCRA Emergency Leaves

May 15, 2020

**Briana Al Taqatqa, Associate – Labor & Employment**

**Tim Goodman, Partner – Benefits & Compensation**

**Jillian Kornblatt, Partner – Labor & Employment**



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## Dorsey's Coronavirus Resource Center



The screenshot shows the Dorsey & Whitney website's Coronavirus Resource Center. At the top is a navigation bar with links: CAREERS, ABOUT US, COMMUNITY, LOCATIONS, PEOPLE, INDUSTRIES & PRACTICES, NEWS & RESOURCES, and CLIENT ACHIEVEMENTS. Below the navigation bar, there's a 'PUBLICATIONS' section featuring a large image of coronavirus particles. To the right of the image is a 'RELATED INDUSTRIES & PRACTICES' list with links to: China, Class Action Litigation, Commercial Litigation, Construction & Design, Construction Litigation, Development & Infrastructure, Energy & Natural Resources, Europe, Food, Beverage & Agribusiness, Government Contracts Counseling & Litigation, Government Enforcement & Corporate Investigations, and Healthcare. Below the image, the text reads: 'Coronavirus Resource Center', 'March 2020', and a paragraph stating: 'As the 2019 Novel Coronavirus (COVID-19) outbreak continues to unfold governments, economies, businesses, and societies are being adversely affected. Many companies are therefore also facing significant and urgent business and legal challenges so we have created a resource center to provide information that may be helpful in decision making.'



[www.Dorsey.com/Coronavirus](http://www.Dorsey.com/Coronavirus)

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## Agenda

- **New Federal Employment-Related Legislation**
- **FFCRA Leaves**
  - **Eligibility and Statutory Requirements**
  - **Health Care Exclusion**
  - **Legal Landmines**
- **Payroll Tax Credits**
- **Additional COVID-19 Considerations for Employers**



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## Unprecedented Federal Legislation

- **Families First Coronavirus Response Act (“FFCRA”)**
  - Enacted March 18, 2020
  - Effective April 1, 2020
  - Creates two new types of paid-leave benefits:
    - Emergency Paid Sick Leave Act (“EPSLA”)
    - Emergency Family and Medical Leave Expansion Act (“EFMLEA”)
- **Coronavirus Aid, Relief, and Economic Security (“CARES”) Act**
  - Enacted March 27, 2020
  - Covers broad range of topics including federal PPP loans, pandemic unemployment insurance, and limited amendments to FFCRA



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## FFCRA Leaves: Eligibility and Requirements



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## Overview of FFCRA Paid-Leave Requirements

- Apply only to smaller employers (**1-499 employees**)
- Require employer to provide **paid leave**
- Employer eligible for up to 100% **reimbursement** via payroll tax credits
- Paid leave only available if employee **cannot work or telework** due to a need for leave for a qualified reason



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## Emergency Paid Sick Leave Act (“EPSLA”)

- Applies to **all** employees, immediately (no waiting period)
- Up to two weeks (80 hours) of paid sick leave
- Employee cannot work (or telework) due to a need for leave for **six possible reasons**:
  1. Subject to a Federal, State, or local **quarantine or isolation order** related to COVID-19;
  2. Advised by a health care provider to **self-quarantine** due to concerns related to COVID-19; or
  3. Experiencing **symptoms** of COVID-19 and seeking medical diagnosis
  4. **Caring for an individual** who is subject to a quarantine or isolation order, or who was advised by health care provider to self-quarantine due to COVID-19-related concerns;
  5. **Caring for son or daughter** due to school or child care closures or unavailability; **or**
  6. Experiencing a “**substantially similar condition**” as specified by the Secretary of Health and Human Services
- Reasons 1-3: 100% of regular rate of pay, **capped at \$511/day (\$5,110 aggregate)**
- Reasons 4-6: 2/3 of regular rate of pay, **capped at \$200/day (\$2,000 aggregate)**



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## Emergency Family Medical Leave Expansion Act (“EFMLEA”)

- Employee must be employed for 30 calendar days
- Adds **one new reason for FMLA leave**: Caring for son/daughter whose school / care is closed, or child care provider unavailable, due to COVID-19 related reasons
- Two weeks of unpaid family leave; ten weeks paid (12 weeks total)
  - Can use two weeks of emergency paid sick leave (or other accrued paid leave) in place of unpaid leave
- 2/3 of employee’s regular rate of pay, **capped at \$200 per day** (\$10,000 aggregate)



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## FFCRA Leaves: Health Care Exclusion



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## Employers May Exclude Employees Who are “Health Care Providers”

- Employers may exclude “health care providers” (and emergency responders) from BOTH types of paid leave
- Includes anyone employed at any
  - Doctor’s office, hospital, health care center, clinic
  - Nursing facility, retirement facility, nursing home, **home health care provider**
  - Any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.
  - Any individual that the highest official of a State or territory, determines is a health care provider necessary for that State’s or territory’s response to COVID-19
- Notice of exemption to employees



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## FFCRA Leaves: Four Legal Landmines



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## Miscounting “Employees”

- FFCRA only applies to employers with fewer than 500 employees...**but who are “employees”?**
- **Guidance on counting from the DOL**
  - **COUNT:** Employees in the United States, full-time and part-time employees, employees on leave, temporary employees (even those jointly employed by another employer), and day laborers
  - **DO NOT COUNT:** Employees outside of the United States, independent contractors, employees who have been furloughed or laid off
- **Even more complicated for employers with complex management structures**
  - **Fact-specific application of multiple tests; consult counsel**



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## Small Employers Are Not Completely Exempt

- There is an exemption in the FFCRA for employers with fewer than 50 employees
- **BUT IT APPLIES ONLY TO PAID-LEAVE BENEFITS UNDER EFMLEA AND § 5102(a)(5) of the EPSLA**
  - Only applicable to paid-leave benefits for an employee to care for son or daughter due to school or child care closure or unavailability
- No exemption for any other qualified reason for leave



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## Documentation and Privacy Concerns

- **Documentation for EPSLA Leave**
  - Employee name
  - Date(s) of leave
  - Qualifying reason for leave
  - Statement that employee cannot work or telework due to qualifying reasons
- **Documentation for EFMLEA Leave**
  - Employee name
  - Name of child cared for
  - Name of school/place of care/child care provider
  - Statement that no other suitable person is available to care for the child
  - Statement that employee cannot work or telework due to qualifying reasons
- **Potential Landmine**
  - Be wary of federal and state medical privacy laws



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## Performance Issues in a Remote Work Environment

- “Unable to work or telework” is highly case specific
- Documentation is key
- Consider formal Work From Home policy that requires employees to perform in substantially the same manner as if performing work at a worksite
- Be mindful of potential disparate impact (e.g. women, working parents)



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## Payroll Tax Credits

## Payroll Tax Credits

- **Payroll tax credits (Sections 7701, 7703, and 7705)**
  - **FFCRA provides refundable employment tax credits equal to:**
    - Amount of FFCRA emergency sick leave (EPSLA) wages
    - Amount of FFCRA emergency family leave (EFMLEA) wages
    - Amount of employer portion of Medicare taxes on these FFCRA emergency leave ages
    - Amount of qualified health plan expenses employer pays during emergency leaves
  - Tax credits apply against 6.2% Social Security tax to be paid by employer
  - If tax credit exceeds liability under Social Security tax, excess is refundable
  - IRS has issued FAQs
    - <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

## Payroll Tax Credits

- **Payroll tax credits (continued)**

- **Qualified health plan expenses**

- Generally includes both employer and pre-tax employee health plan premium amounts (does not include after-tax employee premium payments)
    - Plans covered : Includes health, dental vision, health FSA, and (if sponsored) health reimbursement arrangements(HRA) (and EAP if it is a group health plan)
    - Plans not covered: HSAs, Archer MSAs, and QSEHRAs
    - Note: FAQs provided detailed methods for calculating amounts

- **Claiming payroll tax credits**

- Can reduce payroll tax deposits (Form 941 Instructions to be revised to include guidance)
    - Can request advance tax credit using Form 7200
    - No failure to deposit penalties imposed if:
      - Amounts not deposited are less than or equal to amount of payroll tax credits, and
      - Employer did not seek payment of advance credit by filing Form 7200



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## Payroll Tax Credits

- **CARES Act added several additional tax credit / tax deferral options**

- **Retention credits (CARES Act Section 2301)**

- **Tax deferral (CARES Act Section 2302)**

- Substantially delays required dates for deposit of employer portion of Social Security taxes, imposed at 6.2% of employee wages up to \$137,700 per employee
      - Applies to taxes due from March 27, 2020 through December 31, 2020
      - 50% due by December 31, 2021; 50% due by December 31, 2022
      - Employers who receive PPP loan forgiveness are not eligible

- **Paycheck protection program (PPP) (CARES Act Section 1102)**

- **Detailed rules on how these interact**

- Cannot claim FFCRA payroll tax credit on same wages as retention credit
  - FFCRA payroll tax credits are not payroll costs for purposes of PPP



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## Additional COVID-19 Considerations for Employers



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### Keep Your Employees Safe



- The CDC and local health recommendations are a minimum, not an aspirational goal
- Figure out what and who you need in the office and then determine what are the maximum practicable safety measures you can take.
  - CDC says 6 feet distance, but can you do 15?
  - Can you limit each worker to his or her own space with no overlap?
  - Can you disinfect all touched surfaces daily? Twice a day?
  - Can you do more but thinner staggered shifts?
- Communicate in detail the steps you are taking



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## What rights do employers have regarding suspected cases of COVID-19?

- You can require employees who exhibit COVID-19 symptoms to go home
- You can require employees with symptoms to be tested or wait 14 days before returning to work
- Employees generally cannot refuse to come to work
  - However, they may be able to refuse to travel to affected areas such as China, or to work with or near people who are or are likely to be infected (such as patients) without personal protective gear
  - Fear of getting sick from public transportation is insufficient
- CDC has recommended wearing simple face masks
  - Some states have issued orders requiring employees to wear face masks



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## Employees Who Don't Want to Return to Work

- OSHA: Employees have a right to refuse to engage in unsafe work
- The National Labor Relations Act, protects employees' ability to discuss issues of mutual concern in the workplace, like safety or pay (even non-union employees)
- Anyone who complains about safety in the workplace or about some form of disparate treatment has engaged in "protected activity"
- Do not retaliate



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## Wage and Hour Issues: Overtime-Eligible (Hourly) Workers

- Paid for all actions primarily for benefit of employer
- Employees must be paid for new safety procedures
  - Temperature checks
  - Donning and doffing PPE
  - Remote work training
  - Training on new safety procedures
- Closely monitor non-exempt employees working from home



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## Wage and Hour Issues: Overtime Exempt Workers

- Employees must be paid at least \$684 per week to maintain exemption
  - Threshold salary not pro-rated for reduced hours
- Exempt employees must be paid if they work any part of a week
  - Unless the absence is FMLA covered
- First and last weeks of furlough should be in full workweeks for exempt employees
- Beware the “just a quick email” issue



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## Race and National Origin Discrimination

- **Beware of harassment or discrimination on protected classes**
  - Race
  - National origin
    - CDC warning: “Do not show prejudice to people of Asian descent, because of fear of this new virus. Do not assume that someone of Asian descent is more likely to have COVID-19”
- **Foreign nationals (IRCA)**
  - IRCA protects individuals from employment discrimination based on immigration or citizenship status
- **To prevent discrimination, do not make determinations of risks of infections based on race or national origin and maintain confidentiality of those with confirmed infection**
  - Response programs should apply equally to all employees



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## Disability Discrimination

- **Employees disabled or “perceived as” disabled (ADA)**
  - ADA prohibits employers from requiring medical examinations unless employee poses “direct threat”
  - During the H1N1 flu pandemic, EEOC released guidance clarifying that workplace discrimination can violate the ADA, even if based on an honest fear of H1N1
- **Can you ask about symptoms and take temperatures?**
  - Yes
- **Can you mandate that employees be tested for COVID-19?**
  - Yes, the EEOC granted permission to employers to test employees for COVID-19 before they enter a work site without running afoul of the ADA



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## Conclusion & Contact Information



**Briana Al Taqatqa**  
**(612) 492-6617**  
altaqatqa.briana@dorsey.com



**Tim Goodman**  
**(612) 340-2825**  
goodman.timothy@dorsey.com



**Jillian Kornblatt**  
**(612) 492-6156**  
Kornblatt.jillian@dorsey.com



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# ahead of the curve

Workplace law trends for today and beyond.  
Come up to speed to stay ahead.

## Coronavirus: Employment & Benefit Impacts

May 15, 2020

Rebecca Bernhard, Partner – Labor & Employment

Tim Goodman, Partner – Benefits & Compensation



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### Overview

- Reductions in force
- Furloughs
- Bringing employees back
- Reductions in compensation
- Benefit impacts



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## Reductions in Force

- **Reductions in force**

- **Employment**

- Compliance with anti-discrimination law
      - ADEA – disclosure obligations
      - Selection for termination
      - Release of claims?
      - Severance obligations
    - Final payment obligations
      - Payout of accrued paid time off
      - Commissions or other bonuses
    - WARN Act notices
      - Counting affected employees
      - Single site or multiple locations?



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## Reductions in Force

- **Reductions in force**

- **Benefits**

- Retirement plans
      - Loan repayments
        - » IRS suspension guidance
        - » CARES Act optional suspension of repayment
        - » For deemed distribution, potential treatment as CARES Act distribution
      - Distributions
        - » Termination is permitted distribution event
    - Health plans
      - COBRA (termination causing loss of coverage)
      - State continuation coverage
    - Life insurance
      - Conversion rights
      - Minnesota: state continuation coverage



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## Furloughs

- **Furloughs**

- What are differences between furlough and lay off?
- **Employment**
  - Terms of furlough
    - Complete cessation of work?
    - Reduction in hours?
  - Anti-discrimination obligations
  - Wage and hour concerns
    - Reduction of exempt employee hours?
    - Remote or telework for non-exempt employees?
  - Immigration concerns
    - Are selected employees on H-1B visa?

## Furloughs

- **Furloughs**

- **Benefits**
  - Retirement plans
    - Loan repayments
      - » IRS suspension guidance
      - » CARES Act optional suspension of repayment
      - » For deemed distribution, potential treatment as CARES Act distribution
    - Distributions (no termination event; possible hardship event)
  - Health plans
    - COBRA (reduction in hours causing loss of coverage)
    - State continuation coverage
    - ACA small penalty concern (if coverage not subsidized)
  - Life insurance
    - Conversion rights
    - Minnesota: state continuation coverage
  - Life and LTD: Discussions with insurers on continued coverage

## Bringing Employees Back

- **Return to work**

- **Employment: Return from furlough and rehire**

- **Safety concerns: Social distancing and additional measures**
      - Staggered shifts?
      - Temperature checks?
      - Training on new safety procedures and practices?

- **Employment: Rehire**

- **Documents for personnel files**
      - » Even if employer has retained documents, may need rehire to complete new documents
    - **Form I-9**
      - » If completed within last three years, employee does not need to complete on rehire
      - » Otherwise, employee needs to complete new Form I-9
    - **Form W-4**
      - » New Form W-4 for 2020
      - » Unless employee completed 2020 Form W-4 prior to termination, need to complete on rehire



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## Bringing Employees Back

- **Return to work**

- **Benefits: Return from furlough and rehire**

- **Health and welfare plan premiums**
      - How to catch up unpaid employee premiums?

- **Benefits: Rehire**

- **Benefit elections**
      - **Health and welfare pre-tax elections**
        - » In general, cafeteria plan elections are to be irrevocable for plan year (often calendar year)
        - » Regulations indicate that if employee is terminated and rehired within 30 days, elections are to be restored (this is a safe harbor, based on preamble to regulations)
        - » Regulations indicate after 30 days plan may allow new election, reinstate prior election, or keep participant out of plan until next plan
        - » 26 C.F.R. § 1.125-4(c)(4), Example 5
      - **401(k) plan elections**
        - » Need to review plan provisions
          - » Does plan provide for automatic enrollment?
          - » Is plan safe harbor QACA?
          - » Amend plan to provide for restoration of prior election?



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## CLE Code – For Attendees Requesting Credit



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## Reductions in Compensation

- **Reductions in compensation**

- **Employment**

- Employment agreements and offer letters
    - Compliance with wage and hour laws

- **Tax issues**

- Deferring or delaying payments
      - Payments delayed but paid in same year
      - Payments delayed to subsequent year
        - » Section 409A (deferred compensation)
    - Constructive receipt (employee given choice on time of payment)
      - Payments delayed but paid in same year
      - Payments delayed to subsequent year
        - » Section 451



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## Benefit Impacts – Retirement Plans

- **DC plans**

- **Potential partial termination**

- If more than 20% of employees over period are involuntarily terminated, then employer likely has had partial plan termination
    - If there is partial plan termination, employer needs to vest any terminated employees who had unvested amount when terminated
    - Causes reduction in forfeitures
      - 26 U.S.C. § 411(d)(3); Rev. Rul. 2007-43, 2007-28 I.R.B. 45 (July 9, 2007)

- **Employer contribution reduction**

- Many employers have implemented or are considering reducing employer contributions
    - Timing and ability to do so depends on several factors
      - Safe harbor plans: Employer must provide 30-day notice
      - Money purchase pension plans: Employer must provide 45-day notice (204(h) notice)
      - Employer has to adopt plan amendment



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## Benefit Impacts – Retirement Plans

- **DC plans (continued)**

- **ADP and ACP nondiscrimination testing**

- Employers, especially those who suspend safe harbor contributions, likely to have more difficulty passing ADP and ACP testing for 2020 (HCEs may see refunds and forfeitures)

- **Investments and fiduciary duties**

- Review of plan investments
      - Fiduciaries should review performance of funds and measure against benchmarks
    - Employer stock
      - If independent fiduciary does not supervise employer stock, fiduciaries should be monitoring employer stock relative to peers and market in general



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## Benefit Impacts – Retirement Plans

- **DB plans**

- **Potential plan termination**
  - Similar concern as discussed under DC plans
- **Plan liabilities**
  - Low interest rates tend to increase plan liabilities
- **Plan assets**
  - Depending upon plan investment strategy, plan investments may have lost value
    - Impact on financial statements
    - Impact on future funding contributions

## Benefit Impacts – Retirement Plans

- **DB plans**

- **Potential plan termination**
  - Similar concern as discussed under DC plans
- **Plan liabilities**
  - Low interest rates tend to increase plan liabilities
- **Plan assets**
  - Depending upon plan investment strategy, plan investments may have lost value
    - Impact on financial statements
    - Impact on future funding contributions

## Benefit Impacts – Health Plans

- **Health plans: Potential impacts**

- **Predicted: Annual increase of 5.4% through 2028**

- » Health Affairs, <https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2020.00094>

- **Now: Likely cost decrease for 2020; unknown longer term impact**

- **Cost decrease due to decline in elective treatments**

- » U.S. Bureau of Economic Analysis, [https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=3&isuri=1&nipa\\_table\\_list=31&categories=survey](https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=3&isuri=1&nipa_table_list=31&categories=survey) (18% decline in health spending in first quarter of 2020)
      - » Washington Post, <https://www.washingtonpost.com/business/2020/05/04/financial-distress-among-doctors-hospitals-despite-covid-19-weighs-heavily-economy/>
      - » Federation of American Hospitals, [https://www.fah.org/fah-ee2-uploads/website/documents/COVID-19\\_Alert-Dramatic\\_GDP\\_Reduction.pdf](https://www.fah.org/fah-ee2-uploads/website/documents/COVID-19_Alert-Dramatic_GDP_Reduction.pdf) (component of GDP related to hospitals experienced 12.1% decline in first quarter of 2020)

- **Some increase due to coronavirus, but offset by decline in elective treatments**

- » Health Affairs, <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00426> (projecting costs based on coronavirus infections)

- **Plan amendments (coronavirus coverage, telehealth changes (if any), OTC changes)**



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## Conclusion & Contact Information



**Rebecca Bernhard**

**(612) 492-6186**

[bernhard.rebecca@dorsey.com](mailto:bernhard.rebecca@dorsey.com)



**Tim Goodman**

**(612) 340-2825**

[goodman.timothy@dorsey.com](mailto:goodman.timothy@dorsey.com)



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## Hot Topics & Ask the Attorneys

May 15, 2020

**Briana Al Taqatqa, Associate – Labor & Employment**

**Rebecca Bernhard, Partner – Labor & Employment**

**Jillian Kornblatt, Partner – Labor & Employment**

**Jack Sullivan, Partner – Labor & Employment**

**Tim Goodman, Partner – Benefits & Compensation**



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## Hot Topics & Ask the Attorneys

- **Employment law**
  - Coordination of FFCRA leaves and other leaves
  - Changes in workforce (reductions and hiring)
  - Protecting workforce
- **Benefits law**
  - Privacy and workforce
  - 401(k) plan contributions
  - 401(k) plan amendments
  - Health plan continuation of coverage
  - Health plan amendments
  - Health plan costs



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## Questions

- Questions on employment and benefits topics



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## Conclusion & Contact Information



**Briana Al Taqatqa**  
(612) 492-6617  
altaqatqa.briana@dorsey.com



**Rebecca Bernhard**  
(612) 492-6186  
bernhard.rebecca@dorsey.com



**Jack Sullivan**  
(612) 492-6176  
sullivan.jack@dorsey.com



**Jillian Kornblatt**  
(612) 492-6156  
kornblatt.jillian@dorsey.com



**Tim Goodman**  
(612) 340-2825  
goodman.timothy@dorsey.com



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