Covid-19 Overload
A Potpourri of Issues

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Presented For:
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No statements made in this seminar or in the written materials/PowerPoint should be construed as legal advice pertaining to specific factual situations.
Workplace Policies
What should we tell our employees?

More is better. We recommend an open and honest communication policy that provides employees with factual information from health officials.

We further recommend assuring employees that their health and safety is of paramount importance. It is important to communicate with and prepare employees so as not to cause a panic.
Can I tell employees if a co-worker has tested positive for the coronavirus or other communicable disease?

No. The Americans with Disabilities Act (ADA) and HIPAA privacy rules restrict employers from sharing personal health information of an employee. Employers should inform employees that possible exposure has occurred in the workplace without disclosing any identifying information about the individual who tested positive.
Can I ask an employee if he or she has the coronavirus?

- No. Employers can ask an employee how he or she is feeling in general but should not inquire about a specific illness as that could rise to the level of a disability related inquiry under the ADA.

- However, if an employee appears sick during a pandemic, that employee may be sent home.
How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

According to the Equal Employment Opportunity Commission (EEOC), during a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.
What should we do if an employee discloses that they have been in close contact with a person who tested positive for COVID-19?

- Individuals who have been in close contact with a person diagnosed with COVID-19 should self-quarantine according to CDC guidance. [CDC Guidance](https://www.cdc.gov/coronavirus/2019-ncov/index.html). Employers can require an employee who has been exposed to the virus to stay at home.
Can an employee refuse to undertake an assigned task based on fear of exposure to COVID-19?

Maybe. Employers should consider whether a reasonable person in the job position would find the assigned task to be a hazard. Employers should undertake a case-by-case analysis to determine whether a reasonably perceived hazard is present. If there is not a reasonable hazard, then the employer may discipline or terminate the employee. An employee cannot refuse to work based on speculation or fear. Indeed, discipline may be necessary under some circumstances to keep the business operating. The employer should be cautious, however, employees may be protected under the National Labor Relations Act (NLRA) or the Pennsylvania Labor Relations Act (PLRA) when employees are engaged in “protected concerted activity for mutual aid and protection.”
Can I require an employee to go home (or stay home) if he or she is sick?

- Yes. An employer may ask employees that show signs of respiratory illness to leave the workplace, seek medical attentions, and stay home until they are symptom free.
What if an employee was exposed to COVID-19 in the workplace, can I send them home?

- Yes. You should send home employees who worked closely with an employee that tested positive for COVID-19 for 14 days. You **must** preserve the confidentiality of the diagnosed employee and exposed employees to the extent possible and provide increased cleaning to the affected work spaces.
What if an employee has a suspected but unconfirmed case of COVID-19?

- The employer should treat the suspected case as a confirmed case for purposes of sending home potentially infected employees. The employer should also treat an employee that self-reports close contact with someone who had a presumptive positive case of COVID-19 as a confirmed case.
Can an employee refuse to report to work due to fear of contracting the coronavirus?

• Maybe. Where OSHA applies (it does not in the public sector), employees may be entitled to refuse to work if they believe they are in imminent danger under the Occupational Safety and Health Administration Act (OSHA). Employees, however are not entitled to pay for refusing to come to work except to the extent there are applicable sick leave or other time off policies that are applicable. Be cautious because employees may be protected under the National Labor Relations Act (NLRA) when employees are engaged in “protected concerted activity for mutual aid and protection.”
Can we require a doctor’s note before allowing a sick employee to return to work?

- It depends. When an employer engages in this practice consistently, the employer may require clearance from a health care provider before permitting employees to return to work. The Centers for Disease Control and Prevention (CDC), however, recommends employers remove such requirements during a health crisis because access to health care providers may be limited. The EEOC advises that such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees. Like the CDC, the EEOC cautions that, as a practical matter, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation.
- We advise that employers should ask for a note. However, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus.
If an employee returned from business or personal travel, can the employer require the employee to stay away from the office for 14 days?

- It depends. If the employee is returning from a country with a Level 3 Travel Health Notice from the CDC, then yes, that employee should automatically stay home for a period of 14 days after returning to the United States. Travelers from Countries with Widespread Sustained (Ongoing) Transmission Arriving in the United States | CDC An employer may choose to exclude an employee who passed through an area with a substantial outbreak.
Can an employee object to business travel?

• Yes. Employees can refuse to travel when a realistic threat is present. Also, be cautious because employees who object to business travel may be protected by the National Labor Relations Act (NLRA) or Pennsylvania Labor Relations Act (PLRA).
If a nonexempt employee is sent home from work because they are sick, does the employer have to pay the employee?

• **No** - unless there is a collective bargaining agreement indicating otherwise, nonexempt employees – subject to any new federal/state mandates – who do not have paid leave available are not required to be paid for such absences. Most employers, however, do provide employees with paid time off for illnesses and to the extent leave time is available, nonexempt employees may use their accumulated sick leave.

• **However**, with the passage of the Families First Coronavirus Response Act, which was enacted into law on March 18, 2020 to respond to the coronavirus pandemic, public sector employers and private sector employers with less than 500 employees are required to provide paid sick time to their employees if the illness is COVID-19 related. Full-time employees are eligible for 80 hours of paid sick leave. Part-time employees are eligible for paid sick leave based on the number of hours that the employee would normally work in a two-week period. **More on that later.**
If an exempt employee is sent home from work because they are sick, does the employer have to pay the employee?

- Generally, yes. An exempt employee must be paid their full salary for any week they perform work with very limited exceptions, including pay for partial-day absences. An employer may reduce salary for full-day absences due to illness if the employer offers a paid sick leave benefit and the employee has exhausted that leave or is not yet eligible for the leave. This must be done in accordance with a bona fide sick leave policy. **FLSA Salary Basis Regulation - What is a "Bona Fide" Sick Leave Plan?** Finally, if no work is performed by an exempt employee for an entire week, then no salary is due.

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Does the Family and Medical Leave Act (FMLA) cover absences due to COVID-19?

- Yes. Under regular FMLA provisions, eligible employees of covered employers are entitled to up to 12 weeks of job protected leave in a designated 12 month period. Qualifying conditions include:
  - Caring for an immediate family member with a serious health condition
  - Taking medical leave when the employee is unable to work because of a serious health condition.
  - A positive test result for coronavirus *may* qualify as a “serious health condition” under the FMLA, thereby allowing eligible employees to take FMLA protected leave.
What happens to an employee’s FMLA leave when an employee is out with an illness related to COVID-19?

• Assuming that the employer is a public employer or a private-sector employer with less than 500 employees, the employee would be entitled to 80 hours of paid leave under the Paid Emergency Paid Sick Leave Act at 100% of the employee’s pay (due to his/her own illness) subject to certain caps.

• After the 80 hours of paid leave, if the employer is covered under the FMLA and the employee otherwise qualifies for leave because of his/her own serious health condition or to care for a family member with a serious health condition, the normal provisions of the FMLA would apply such that the employee would be eligible for up to ten (10) additional weeks of FMLA, for a total of twelve weeks of leave. If, however, the employee had already exhausted all FMLA leave prior to the COVID-19 related illness, he/she would not be entitled to additional FMLA leave.
Do we have to allow employees to work from home?

- No. You are not required – subject to federal/state mandates – to allow employees to work from home. Telecommuting, however, may be a reasonable measure to reduce exposure to the virus in some work environments. Under the Americans with Disabilities Act (ADA), employees with disabilities that put them at high risk for complications may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic, however, telecommuting may not be reasonable in all circumstances. [Pandemic Preparedness in the Workplace and the ADA](#).

- Notwithstanding the forgoing, allowing an employee to work from home may limit an employer’s obligations to provide paid emergency leave under the Families First Coronavirus Response Act, which was enacted into law on March 18, 2020. Specifically, the Act provides that an employee will be eligible for paid leave if the employee is unable to work or telework due to a need for leave because of: a COVID-19 related illness, suspected illness, quarantine or isolation order; the need to care for a family member with an illness or subject to such order; or, because the employee is caring for a child if the child’s school or place of care has been closed due to COVID-19 precautions. Making telework an option for an employee may, therefore, limit the employer’s obligations under the Act.
Can I take employees’ temperatures to ensure they do not have a fever when reporting to work?

- Yes. Generally, measuring an employee’s body temperature is a medical examination. Under normal circumstances due to concerns under the ADA, employers are generally advised not to take temperatures and rather require employees with visible signs of respiratory illness to stay home.

- However, because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees’ body temperature. In doing so, employers should be aware that some people with COVID-19 do not have a fever. In addition, taking temperatures must be done with consistency and in a manner that protects privacy of employees.
• Do I have to allow an employee to wear a face mask at work?
  No. The CDC advises against wearing a face mask unless an individual is sick with symptoms of the virus or is taking care of someone with the virus at home or in a health care setting.

• Are employers at risk of violating discrimination laws based on actions taken and/or commentary about COVID-19?
  Yes. Title VII and the Pennsylvania Human Relations Act (PHRA) prohibit discrimination based on race, color, national origin and other protected categories. According to the CDC, employers should not make determinations of risk based on race or country of origin. The CDC further recommends reducing stigma based on certain criteria such as persons of Asian decent, people who have traveled, and related to emergency responders or healthcare professional.
Hiring

- If an employer is hiring, may it screen applicants for symptoms of COVID-19?
  Yes. An employer may screen job applicants for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job. This ADA rule applies whether or not the applicant has a disability.

- May an employer take an applicant's temperature as part of a post-offer, pre-employment medical exam?
  Yes. Any medical exams are permitted after an employer has made a conditional offer of employment. However, employers should be aware that some people with COVID-19 do not have a fever.
May an employer delay the start date of an applicant who has COVID-19 or symptoms associated with it?
Yes. According to current CDC guidance, an individual who has COVID-19 or symptoms associated with it should not be in the workplace.

May an employer withdraw a job offer when it needs the applicant to start immediately but the individual has COVID-19 or symptoms of it?
Yes. Based on current CDC guidance, this individual cannot safely enter the workplace, and therefore the employer may withdraw the job offer.
New Issues:
Families First Coronavirus Response Act (FFCRA)
On Wednesday, March 18, 2020, lawmakers in the United States Senate passed the Families First Coronavirus Response Act ("Act") by a 90-8 vote.

The Act, among other things, creates the: (1) Emergency Family and Medical Leave Expansion Act ("Emergency FMLA"); and (2) Emergency Paid Sick Leave Act ("Paid Sick Leave").

The Act permits the exclusion of "emergency responders."
• The DOL announced that both the paid sick leave and FMLA expansion take effect April 1, not the April 2 date suggested by the statute and opined by law firms nationwide.

• The FFCRA states it is effective “not later than 15 days after” its enactment. The President signed the law on March 18, and the fifteenth day after is April 2.

• The law will remain in effect between April 1 and December 31 of this year, and it is not retroactive.

• The DOL will not bring an enforcement action against an employer for violating the FFCRA until after April 17, 2020, provided the employer made reasonable, good faith efforts to comply with the law.
Who Is An Emergency Responder?

• An employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, firefighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state’s or territory’s or the District of Columbia’s response to COVID-19.

• Thus, for purposes of public sector employers, the most common exemptions will include police, firefighters, as well as (potentially) public works employees. For County employers, this would also include corrections personnel and 911 operators.
EFMLA

- Emergency FMLA expands the leave available to employees during the coronavirus health crisis.
  - It applies to all employers with less than 500 employees
  - An employee will be eligible for leave after 30 days of employment
EFMLA

- If eligible for Emergency FMLA, an employee may take leave for only one reason:

- The employee has a qualifying need related to a public health emergency (COVID-19), such that the employee is not able to work, or telework, due to a need to care for a son or daughter under the age of 18, if the child’s school or paid child care provider is closed due to the public health emergency ("qualifying need").

- Of course regular FMLA—under the regular FMLA conditions—is available to public sector employees who qualify.

- Note: “child care provider” covers only an individual who “receives compensation” for doing so “on a regular basis.” Schools included are only elementary and secondary schools.
EFMLA

- If an eligible employee meets the qualifying need, then Emergency FMLA provides up to 12 weeks of job-protected leave:
  - The first 10 days of which may consist of unpaid leave in which the employee can elect to use accrued vacation, personal or sick leave for unpaid leave.
  - After the 10 days, the employer is required to provide paid leave based on an amount that is not less than 2/3rd of an employee’s regular rate of pay or the number of hours the employee would otherwise be normally scheduled to work.
  - The amount of paid leave may not exceed $200 per day or $10,000 in the aggregate.
EFMLA

• Employees who have already exhausted FMLA leave entitlement in the calendar year, even if for unpaid leave, would not be entitled to any additional leave under this new law, including the paid leave.

• In turn, employees who have used a portion of their calendar year entitlement would only get a correspondingly shorter period of leave under the new law.
Employers may elect to exclude emergency responders from coverage under this Act.

Job-protection during Emergency FMLA leave does not apply to employers with fewer than 25 employees, provided that the following conditions are met:

- The position held by the employee when leave commenced no longer exists due to economic conditions or changes in operating conditions of the employer that affect employment, which were caused by the public health crisis;
- The employer makes reasonable efforts to restore the employee to an equivalent position the employee held when the leave commenced;
- And, if the aforementioned efforts fail, the employer makes reasonable efforts, for a period of one year, to contact the employee if an equivalent position becomes available.
EFMLA

• *Can the employer seek reimbursement?*
  • There are payroll credits available to private sector employers, equal to 100% of the costs paid to employees utilizing Emergency FMLA leave, subject to the $200 per day/$10,000 aggregate limits. This credit does not apply to public employers.

• *Other employer considerations.*
  • Employers with less than 50 employees will not be subject to private causes of action for a violation of the Emergency FMLA provisions.

• Emergency FMLA will expire on December 31, 2020.
Emergency Paid Sick Leave ("EPSLA")

- **Who is covered?**
  It covers private entities and individuals that employ fewer than 500 employees. It also covers all public employers that employ 1 or more employees.

- **What does the Act provide?**
  Paid sick time as follows:

  - Full-time employees = 80 hours of paid leave
  - Part-time employees = a number of hours equal to the number of hours that such employees work, on average, over a 2-week period.

  In all cases, paid sick time shall **not** carry over from year to year.

  The Act permits employees to use sick time immediately, regardless of how long the employee has been employed. However, paid sick time provided under the Act will cease beginning with the employees next scheduled work shift immediately following the conclusion of the employee’s need for paid sick time.
**EPSLA**

- *How does it work?*

- An employer is prohibited from requiring an employee to use accrued paid sick time or other paid leave prior to the employee’s use of additional paid sick time. An employer is also prohibited from requiring an employee to find a replacement to cover the hours during which the employee is using paid sick time.
For what purposes is an employee eligible for paid sick leave?

To the extent that an employee is unable to work or telework, the employee may use paid sick time for any of the following reasons:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.

- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
For what purposes is an employee eligible for paid sick leave?

The employee is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order or has been advised by a healthcare provider to self-quarantine.

The employee 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.

The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
What is the required compensation for employees?

If an employee is taking leave for reasons (1), (2), or (3) above, then employees are required to be compensated for paid sick time in an amount not less than the greater of the employee’s regular rate of pay or the minimum wage rate in effect under applicable federal or state law. Paid sick time is capped at $511 per day and $5,110 in the aggregate.

If the employee is taking leave for reasons (4), (5), or (6), that employee’s compensation shall be \( \frac{2}{3} \)rd of the amount the employee would otherwise receive if the employee was sick or ordered to stay home. Paid sick time is capped at $200 per day and $2,000 in the aggregate.
Are there any exclusions?
The Act permits an employer of an employee who is a health care provider or an emergency responder to exclude such employee from application of the uses of paid sick leave.

Can the employer seek reimbursement?
The Act permits private employers to take tax credits for all or a portion of qualified sick leave wages paid to employees, subject to certain limitations, based on the type of employer. This credit does not apply to public employers.

Other employer considerations.
The Act further provides, among other things, a notice requirement to all employees, nondiscrimination obligations for employers, and penalties for employers who fail to provide paid sick leave under the Act or unlawfully terminate an employee for taking such paid sick leave.

Paid Sick Leave will take effect within 15 days after enacted into law and will expire on December 31, 2020.
Reading these two acts together it appears that full time employees will be permitted to use two weeks of Paid Sick Leave before being transitioned to the wage benefit provided for under the Emergency FMLA leave if an employee it taking leave as the result of not being able to work, or telework, due to a need to care for a son or daughter under the age of 18, if the child’s school or paid child care provider is closed due to COVID-19.

*If One of Our Employees Already Utilized All of Their Pre-FFCRA FMLA Time, do They Still Get the FFCRA Time?* No, if an employee used all of their Pre-FFCRA FMLA Time, the employee would not receive more. If the employee used part of the time, the employee might be entitled to a portion of the FFCRA time.
New Issues:
Covid 19 Furloughs
Layoff or Furlough—what’s the difference?

Generally speaking, none. Both describe a (hopefully) temporary exclusion from work which differs from a termination or a permanent exclusion.

It may make a difference in the language of your collective bargaining agreement.

A full or partial layoff or furlough may make someone eligible for full or partial UC benefits.

Question: does an employee on furlough or layoff remain eligible for health care benefits?
• Can an employer layoff, furlough, reduce hours or terminate employees?

Non-union employees, yes.

Union employees, yes but check your collective bargaining agreement for rules regarding seniority, order, skill, job classification/unit or other considerations.
Do furloughed, laid off or reduced hours employees get paid?

Exempt (salaried) employees: Paid for week unless no work performed during the week.

Non-exempt (hourly) employees: paid for time worked unless leave time counted as compensated time, etc.

Reduced hour employees—Exempt paid for week regardless; non-exempt paid for time worked.

May reduce an exempt employee to an hourly employee temporarily.
If there are mandatory or voluntary office closures, the next question for employers is, “do I have an obligation to pay employees and what wage replacement options are available for workers?”

Placing aside the FFCRA, there is no federal requirement to provide wage continuation. Collective bargaining agreements, individual employment agreements and state or local laws might require pay continuation in some circumstances, so be sure to review the specifics of your situation.
The U.S. Department of Labor ("DOL") issued Guidance on the payment of wages under the Fair Labor Standards Act ("FLSA") with respect to absences related to COVID-19, use of paid time off ("PTO"), and the differences on handling exempt and non-exempt employees.

The Guidance reminds employers that exempt employees must be paid their salary if they work a portion of any workweek, but that employers can require exempt employees to utilize available PTO time for days not worked. Non-exempt employees must be paid for the hours that they work.

Absent restrictions on the use of PTO under a union contract, employers can require non-exempt employees to use available PTO for days not worked, unless there are state or local requirements to the contrary.
• The Guidance addresses alternative work arrangements (e.g., telecommuting). It states that employers “may encourage or require employees to telework as an infection-control or prevention strategy.”

• Employers, however, cannot make their employees pay for additional costs incurred in connection with working from home if they are business expenses and their payment would reduce the employees’ earnings below the minimum wage or overtime compensation.

• It is also not permissible to make employees pay for these additional costs if telecommuting is a reasonable accommodation for a qualified disability.

• Employers must evaluate if a reimbursement is necessary on a case-by-case basis and should consult with counsel first.
The CDC and many local health officials are recommending social distancing to limit exposure and

1. Limitations on employees allowed to travel together.
2. Limits on number of participants in live meetings.
3. Staggering of employee schedules on both a shift and work week basis.
4. Limits on interactions between facilities, departments, or subdivisions of an organization or relocation of employees to less populated worksites.
5. Working from home, tele-work, etc.
6. Staggering of employee breaks to minimize social interaction.
7. Tightening of restrictions on visitors or off-duty employees in workplace.
• Can an employer change the schedule to protect employees or put them on a rotational shift?

• Must the employer bargain about that decision? Decision bargain or impact bargain?

• Under the Pennsylvania Labor Relations Act (“PLRA”), employers have a duty to bargain with a union over certain mandatory subjects, such as wages, hours, benefits, and certain other terms and conditions of employment. The last category includes furloughs, leaves of absence, payment for leaves, etc. If employers unilaterally make decisions regarding those matters or fail to bargain over them, they can face an unfair labor charge.
Employers must review applicable collective bargaining agreements to determine their rights and if they need to bargain with their unions, focusing on management rights, leaves of absence, paid time off, and health and safety sections of their collective bargaining agreements, which may empower them to make decisions about assigning work, layoffs, and scheduling without first negotiating with the union.

Where employers have time to negotiate, they must do so before implementing a policy that relates to a subject of mandatory bargaining. Emergencies, such as a pandemic, might permit employers to argue that they do not need to negotiate with a union before implementation of a policy, but they would need to negotiate afterwards. The strength of this argument will depend on the individual circumstances.

The PLRB has recognized emergency situations may require employers to unilaterally implement what would otherwise be bargainable in order to address an isolated and imminent exigent circumstance. See e.g., Mifflin County Educational Support Personnel Association ESPA/PSEA/NEA v. Mifflin County School District, 38 PPER 37 (Final Order, 2007). Based on the current pandemic and rapidly changing landscape, it is believed that the Board would find that the present circumstance creates an exigent or emergency circumstance justifying the failure of the employer to satisfy its bargaining obligations in some respects.
If a public employer enacts layoffs before or after April 1, 2020, what is the impact of such action on expanded FMLA or emergency sick leave entitlement?

- Employees who are laid off or furloughed prior to the commencement of the above provisions are not entitled to any of the benefits. If the employee is laid off or furloughed after April 1, 2020, the employee can receive FFCRA benefits for the period from April 1, 2020, until the date of layoff/furlough. However, as of the date of the layoff/furlough, the benefits would end unless the employee is subsequently recalled during a period in which the FFCRA remains applicable. The same analysis applies if the employer is ordered to close by the federal or state government.

- As an extension of this issue, the fact that an employer has one or more employees receiving FFCRA benefits does not preclude the employer from implementing a layoff/furlough, so long as such action would have been taken regardless of the FFCRA usage.
• **If an employee is receiving benefits under the FFCRA, can they also claim unemployment?** No, employees receiving FFCRA benefits are considered to be employed and, therefore, are ineligible for unemployment compensation benefits.

• **Can an employee use both FFCRA benefits and paid leave concurrently?** To the extent that doing so would allow the employee to receive more than his/her full normal compensation, no. However, an employer *may* allow employees to use part of their leave time to supplement FFCRA benefits to obtain full salary, but no more.
Can FMLA expanded leave and emergency sick leave be used intermittently?

- It depends. If the employer and employee agree, then possibly, but the DOL has limited the instances in which such agreement can occur. For instance, in the following circumstances, such an agreement **is not** permissible by the DOL:
  - the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
  - the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  - the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
  - the employee is caring for an individual who either is subject to a 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; or
  - the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

- The DOL further indicated that other instances, such as where the employee has access to childcare for two days out of the week, but not for the other three, are instances where the employer and employee may agree on intermittent leave.
New Issues: Unemployment Compensation
The Governor just signed H.B. 68 on Friday, March 27, 2020. In H.B. 68, the General Assembly created significant relief for Pennsylvania employers by amending the Pennsylvania Unemployment Compensation Act in the following ways:

- Extends the time period for an employer to request relief from UC charges from 15 to 21 days after the earliest notice issued to the employer by the Department of Labor and Industry

- Provides relief from charges for contributory employers and reimbursable employers who elected to pay a solvency fee to the UC Trust Fund

- Requires that relief for benefit charges for weeks of unemployment during the duration of the disaster emergency that are COVID-19-related will be provided automatically
Unemployment Compensation

• What does that mean for employers?

• Relief from charges means that the employer’s share of UC benefits will be assumed by the Commonwealth presuming that the employer: 1) timely applies for relief from charges; 2) provides the required notice to employees regarding the availability of UC benefits; and 3) is a qualifying employer—e.g., that the employer is either a contributory employers or a reimbursable employers who elected to pay a solvency fee to the UC Trust Fund.
Unemployment Compensation

Things for which employers must prepare.

Employers must provide appropriate notice of the availability of UC benefits upon separation or furlough. That means that standard separation paperwork must now also include:

UC benefits are available to workers who are unemployed and meet UC law requirements.

An employee may file a claim in the first week that employment stops, or hours are reduced.

Information and assistance on a claim is available on the department’s website and toll-free number, which an employer shall provide.

Information the employee needs in order to file: Full legal name; Social security number; and, If not a citizen or resident, authorization to work in the United States.
While the window for employers to request full relief from benefit charges will be extended from 15 days (after the earliest notice issued to the employer by the Department of Labor and Industry) to 21 days, employers must be prepared to file for relief from charges within the time frame or lose the opportunity to obtain that relief.
The CARES Act boosts benefits for workers who are unemployed, partly unemployed, or cannot work for a variety of COVID-19-related reasons. Qualifying reasons include having a COVID-19 diagnosis, caring for a family member due to certain COVID-19-related reasons, being unable to work because your workplace is closed due to COVID-19, and resigning as a direct result of COVID-19. Benefits available under the CARES Act are fully funded by the federal government, but are administered by states.

- **$600 Weekly Supplement.** The CARES Act provides temporary Federal Pandemic Unemployment Compensation (FPUC) of $600 per week to all workers eligible for unemployment benefits through July 31, 2020. This straight-across-the-board supplement is in addition to the weekly benefit workers otherwise would receive under state law. It will be paid at the same time workers receive their benefits from the state. This supplement does not affect eligibility for Medicaid or the Children’s Health Insurance Program (CHIP). For some workers, receipt of this supplement may put their weekly unemployment benefit amount at or over 100% of their regular earnings.

- **Additional 13 Weeks.** Under state law, claimants receive their benefits for a specific period, which is usually 26 weeks. The CARES Act gives claimants an additional 13 weeks of benefits until December 31, 2020.

- **More Availability.** The CARES Act makes benefits available to independent contractors, self-employed workers, part-time workers, and those with limited work history. However, it does not include workers who telework or have paid leave.
New Issues:
Public Meetings
Section 1001 of the Borough Code

• (c) Telecommunication.—Council may provide for the participation of council members in council meetings by means of telecommunication devices, such as telephones or computer terminals, which permit, at a minimum, audio communication between locations, if the following apply:

  – (1) A majority of the membership of council then in office is physically present at the advertised meeting place within the borough and a quorum is established at the convening or reconvening of the meeting. If, after the convening or reconvening of a meeting, a member has been disqualified from voting as a matter of law, but is still physically present, council members participating by telecommunication device in accordance with this section shall be counted to maintain a quorum.
Section 1001 of the Borough Code

• (2) The telecommunication device used permits the member or members of council not physically present at the meeting to:
  – (i) speak to and hear the comments and votes, if any, of the members of council who are physically present, as well as other members of council who may not be physically present and are also using a telecommunication device to participate in the meeting; and
  – (ii) speak to and hear the comments of the public who are physically present at the meeting.

• (3) The telecommunication device used permits the members of council and the members of the public who are physically present at the meeting to speak to and hear the comments and the vote, if any, of the member or members of council who are not physically present at the meeting.

• (4) Physical absence of a council member. Council may only authorize participation by telecommunication device for one or more of the following reasons:
  – (i) illness or disability of the member of council;
  – (ii) care for the ill or newborn in the member's immediate family;
  – (iii) emergency; and
  – (iv) family or business travel
35 Pa.C.S. § 7501(d)

- **Temporary suspension of formal requirements.**--Each political subdivision included in a declaration of disaster emergency declared by either the Governor or the governing body of the political subdivision affected by the disaster emergency is authorized to exercise the powers vested under this section in the light of the exigencies of the emergency situation without regard to time-consuming procedures and formalities prescribed by law (excepting mandatory constitutional requirements) pertaining to the performance of public work, entering into contracts, the incurring of obligations, the employment of temporary workers, the rental of equipment, the purchase of supplies and materials, the levying of taxes and the appropriation and expenditure of public funds.
The Sunshine Act is clear that public meetings should be held at public buildings with open public participation whenever possible. If an official emergency declaration prevents that from happening, a meeting via teleconference, webinar, or other electronic method that allows for two-way communication is generally permissible.

Any agency taking that step must provide a reasonably accessible method for the public to participate and comment pursuant to Section 710.1 of the Sunshine Act. That method should be clearly explained to the public in advance of and during the meeting.
Further, the Office of Open Records strongly recommends that any agency holding such a meeting record the meeting and proactively make the recording available (preferably online) so that a full and complete record of the meeting is available to the public.

Some agencies are governed by laws which add requirements beyond those included in the Sunshine Act. For example, both the Borough Code and the Third Class City Code explicitly require that a majority of members be physically present for purposes of determining a quorum. In such cases, the provisions of 35 Pa.C.S. § 7501(d) can come into play. The OOR encourages agencies to consult with their solicitors on such issues.
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- We would recommend that when officials are not able to comply with the Act, they seek other ways of complying with the spirit of the law, which is to ensure that the public at large has an opportunity to view their government in action. This may be accomplished through conference calls, video chats, transcription of meetings or otherwise recording the meeting and making the recording publicly available or otherwise accessible.

- Public participation pursuant to Section 710.1 is a necessity. Common-sense should also prevail here. There may be no singular way to meet this statutory requirement, but no doubt government officials working together can identify ways to permit their constituents to have a voice in a manner that is achievable given whatever technology and other methods of communication are available in their communities.
Last, one should ensure that any action that deviates from any applicable statutory provision is necessitated because of the emergency. What can happen in the ordinary course of business should happen in the ordinary course of business with full and complete transparency after the emergency has ended. But that which must be done immediately (even if not related to the pandemic, but nonetheless still needs to be done), or that which must be done in order to respond to the emergency, would seem to constitute situations where appropriate deviation would comport with the spirit of the law and its exceptions.
House Bill 1564

HB 1564 received third consideration and final passage (on a unanimous vote) by the House of Representatives on March 25, 2020. The bill has not yet been acted on by the Senate. Includes the following requirements:

• Would permit completely remote meetings during an emergency.

• All members of the municipal governing body must be able to speak to and hear the comments and votes.

• To the extent possible, the municipality must allow for public participation.

• The municipality must post notice of the meeting on its publicly accessible Internet website and, except where emergency circumstances dictate otherwise, via a newspaper of general circulation.

• The meeting must be livestreamed, recorded, or at a minimum, the draft minutes be made available within 48 hours of the meeting’s conclusion.