

COVID-19 Update

Presented by
The Franklin Partnership, LLC
Policy Resolution Group at Bracewell
September 25, 2020



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Nothing contained in here shall be deemed legal advice.

More Resources: www.onevoiceinfo.org

ONE VOICE COVID-19 RAPID RESPONSE WEBSITE

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Agenda

- CDC Guidance on Testing, Holidays
- CDC Social Media Tool Kit
- Court Invalidated FFCRA Provisions, DoL Response
- Alternate School Days Is Not Intermittent Leave
- Employee Unemployment, Workshare Taxable Compensation
- Hazard Pay Counts Towards Overtime Regular Rate
- Main Street Lending Facility Changes
- COVID-19 Legislation Update
- Questions

All information presented as of September 24, 2020

CDC Revision: Should Test Asymptomatics

Summary of Changes

Clarifications made on September 18, 2020

- Due to the significance of asymptomatic and pre-symptomatic transmission, this guidance further reinforces the need to test asymptomatic persons, including close contacts of a person with documented SARS-CoV-2 infection.

Revisions made on August 24, 2020

- Diagnostic testing categories have been edited to focus on testing considerations and actions to be taken by individuals undergoing testing

Revisions made on July 17, 2020

- Except for rare situations, a test-based strategy is no longer recommended to determine when an individual with a SARS-CoV-2 infection is no longer infectious (i.e., to discontinue Transmission-Based Precautions or home isolation)

Revisions made on July 2, 2020

- Added screening to possible testing types
- Removed examples – please refer to setting specific guidance

September 18, 2020

<https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html>

CDC for Fall Holiday Celebrations Released

Virus spread risk at holiday celebrations

Celebrating virtually or with members of your own household pose low risk for spread. In-person gatherings pose varying levels of risk. Event organizers and attendees should consider the risk of virus spread based on event size and use of mitigation strategies, as outlined in the [Considerations for Events and Gatherings](#). There are several factors that contribute to the risk of getting infected or infecting others with the virus that causes COVID-19 at a holiday celebration. In combination, these factors will create various amounts of risk, so it is important to consider them individually and together:

During the celebration

After the celebration

Fall holiday celebrations

- **Community levels of COVID-19** – Higher levels of COVID-19 cases and community spread in the gathering location, as well as where attendees are coming from, increase the risk of infection and spread among attendees. Family and friends should consider the number and rate of COVID-19 cases in their community and in the community where they plan to celebrate when considering whether to host or attend a holiday celebration. Information on the number of cases in an area can be found on the area's [health department](#) website.
- **The location of the gathering** – Indoor gatherings generally pose more risk than outdoor gatherings. Indoor gatherings with poor ventilation pose more risk than those with good ventilation, such as those with open windows or doors.
- **The duration of the gathering** – Gatherings that last longer pose more risk than shorter gatherings.
- **The number of people at the gathering** – Gatherings with more people pose more risk than gatherings with fewer people. CDC does not have a limit or recommend a specific number of attendees for gatherings. The size of a holiday gathering should be determined based on the ability to reduce or limit contact between attendees, the risk of spread between attendees, and [state, local, territorial, or tribal](#) health and safety laws, rules, and regulations.
- **The locations attendees are traveling from** – Gatherings with attendees who are traveling from different places pose a higher risk than gatherings with attendees who live in the same area. Higher levels of COVID-19 cases and community spread in the gathering location, or where attendees are coming from, increase the risk of infection and spread among attendees.
- **The behaviors of attendees prior to the gathering** – Gatherings with attendees who are not adhering to social distancing (staying at least 6 feet apart), mask wearing, hand washing, and other prevention behaviors pose more risk than gatherings with attendees who are engaging in these preventative behaviors.
- **The behaviors of attendees during the gathering** – Gatherings with more preventive measures, such as mask wearing, social distancing, and hand washing, in place pose less risk than gatherings where fewer or no preventive measures are being implemented.



[Halloween](#)



[Thanksgiving](#)

September 21, 2020

<https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/holidays.html>

CDC Social Media Tool Kit

Masks

Facebook Sample Message

Wear a mask when you're in public to help slow the spread of COVID-19. When selecting a mask, you have many choices. Avoid masks that are made of materials that make it too hard to breathe. Also avoid masks with valves or vents that allow virus particles to escape and masks that should be saved for healthcare workers. Wear cloth masks with two or more layers to help protect yourself and others from COVID-19.

Learn more about the do's and don'ts of masking: <https://bit.ly/3i9Sy2k> [🔗](#) #WearAMask

Use caution when relying on gaiters and face shields to help protect yourself and others from COVID-19. Researchers are currently investigating their effectiveness. <https://bit.ly/3i9Sy2k> [🔗](#)

Masks are most likely to slow the spread of COVID-19 when they are widely used in public. Wear a mask when you are around people not living in your household, especially when social distancing (staying at least 6 feet apart) is difficult to maintain. Learn more about the importance of wearing a mask in public settings: <https://bit.ly/3ee8iP4> [🔗](#)

Wondering when to use a mask? Wear a mask when you are in a public setting, especially when it is difficult to stay 6 feet away from others not living in your household. You should even wear a mask in a restaurant or rideshare.

However, if everyone in your household is healthy, you do not need to wear a mask at home or in your personal vehicle. For more information on COVID-19 and masks, visit: <https://bit.ly/HowToWearCFC> [🔗](#)



[Download the video](#) [🔗](#) [MP4 - 6 MB]



[Download the video](#) [🔗](#) [MP4 - 2 MB]

Handwashing

Facebook Sample Message

Wash hands often to help slow the spread of COVID-19. Keep these key times in mind for when to wash your hands and remember to practice other protective actions like staying 6 feet from others and wearing a mask. <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

Twitter Sample Message

Wash hands often to help #SlowTheSpread of #COVID19. Keep key times in mind for when to wash your hands & remember to practice other protective measures like social distancing and wearing a mask: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

Social Distancing

Facebook Sample Message

Practice social distancing by putting space between yourself and others. Continue to practice healthy habits to help slow the spread of COVID-19.

- Wash your hands for at least 20 seconds
- Clean and then disinfect frequently used surfaces
- Stay home if you're sick
- Avoid touching your face

Learn more about staying safe and healthy at cdc.gov/covid19

Twitter Sample Message

Practice social distancing by putting space between yourself and others. Continue to practice healthy habits, like washing your hands for at least 20 seconds and staying home if you're sick, to help slow the spread of #COVID19.

Learn more: cdc.gov/covid19

September 18, 2020

<https://www.cdc.gov/coronavirus/2019-ncov/communication/social-media-toolkit.html>

Court Invalidated Several FFCRA Regulations

101. When were the invalidated provisions of the Department's FFCRA paid leave regulations vacated? (added 09/11/2020)

August 3, 2020. The Department first issued its FFCRA paid leave regulations on April 1, 2020. Only certain provisions of those regulations were at issue in the lawsuit *New York v. Scalia*, Civ. No. 20-3020-JPO (S.D.N.Y.). The challenged provisions were vacated when the District Court issued its opinion and order on August 3, 2020. As of August 3, 2020, the work availability requirement provisions, the provision requiring an employee to obtain his or her employer's approval before taking FFCRA leave intermittently, the provision defining "health care provider" for purposes of employees whose employer may exclude them from FFCRA leave, and the provision requiring documentation of a need for leave prior to taking leave were vacated. The remainder of the FFCRA paid leave regulations were unaffected.

102. Where did the District Court's order vacating certain provisions of the FFCRA paid leave regulations apply?(added 09/11/2020)

Nationwide. Based on the specific circumstances in the case and language of the District Court's order, the Department considers the invalidated provisions of the FFCRA paid leave regulations vacated nationwide, not just as to the parties in the case.

103. When do the revisions to the Department's FFCRA paid leave regulations become effective? (added 09/11/2020)

September 16, 2020. The revised explanations and regulatory text become effective immediately upon publication in the Federal Register on September 16, 2020. This means they are effective from September 16, 2020 through the expiration of the FFCRA's paid leave provisions on December 31, 2020.

September 11, 2020

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Department of Labor Issues Conforming Regulation

WASHINGTON, DC – The U.S. Department of Labor’s Wage and Hour Division (WHD) today posted revisions to regulations that implemented the paid sick leave and expanded family and medical leave provisions of the Families First Coronavirus Response Act (FFCRA).

The revisions made by the new rule clarify workers’ rights and employers’ responsibilities under the FFCRA’s paid leave provisions, in light of the U.S. District Court for the Southern District of New York in an Aug. 3, 2020, decision that found portions of the regulations invalid. The revisions do the following:

- Reaffirm and provide additional explanation for the requirement that employees may take FFCRA leave only if work would otherwise be available to them.
- Reaffirm and provide additional explanation for the requirement that an employee have employer approval to take FFCRA leave intermittently.
- Revise the definition of “healthcare provider” to include only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.
- Clarify that employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable.
- Correct an inconsistency regarding when employees may be required to provide notice of a need to take expanded family and medical leave to their employers.

September 11, 2020

https://www.osha.gov/enforcement/covid-19-data#complaints_referrals

Alternate Remote School Days Not Intermittent Leave

The employer-approval condition would not apply to employees who take FFCRA leave in full-day increments to care for their children whose schools are operating on an alternate day (or other hybrid-attendance) basis because such leave would not be intermittent under § 826.50. In an alternate day or other hybrid-attendance schedule implemented due to COVID-19, the school is physically closed with respect to certain students on particular days as determined and directed by the school, not the employee. The employee might be required to take FFCRA leave on Monday, Wednesday, and Friday of one week and Tuesday and Thursday of the next, provided that leave is needed to actually care for the child during that time and no other suitable person is available to do so. For the purposes of the FFCRA, each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day.

The employee may take leave due to a school closure until that qualifying reason ends (*i.e.*, the school opened the next day), and then take leave again when a new qualifying reason arises (*i.e.*, school closes again the day after that). Under the FFCRA, intermittent leave is not needed because the school literally closes (as that term is used in the FFCRA and [29 CFR 826.20](#)) and opens repeatedly. The same reasoning applies to longer and shorter alternating schedules, such as where the employee's child attends in-person classes for half of each school day or where the employee's child attends in-person classes every other week and the employee takes FFCRA leave to care for the child during the half-days or weeks in which the child does not attend classes in person. This is distinguished from the scenario where the school is closed for some period, and the employee wishes to take leave only for certain portions of that period for reasons other than the school's in-person instruction schedule. Under these circumstances, the employee's FFCRA leave is intermittent and would require his or her employer's agreement.

September 16, 2020

<https://www.federalregister.gov/documents/2020/09/16/2020-20351/paid-leave-under-the-families-first-coronavirus-response-act>

Make Sure Employees on Workshare Know the Rules

Reporting unemployment compensation

In January 2021, unemployment benefit recipients should receive a [Form 1099-G, Certain Government Payments](#), from the agency paying their benefits. This form will show the amount of unemployment compensation received during 2020 and any federal income tax withheld. Taxpayers should report this information, along with other income, on their 2020 federal tax return.

Here are other types of payments taxpayers should check for withholding

- Benefits paid by a state or the District of Columbia from the Federal Unemployment Trust Fund
- Railroad unemployment compensation benefits
- Disability benefits paid as a substitute for unemployment compensation
- Trade readjustment allowances under the Trade Act of 1974
- Unemployment assistance under the Disaster Relief and Emergency Assistance Act of 1974
- Unemployment assistance under the Airline Deregulation Act of 1978 Program

Recipients who return to work before the end of the year can use the [IRS Tax Withholding Estimator](#) to make sure the right amount of tax is taken out of their pay. This online tool is available only on IRS.gov, and it can help workers or pension recipients avoid or lessen year-end tax bills or can estimate a refund.

Withholding is voluntary

Federal law allows recipients to choose a flat 10% withholding from these benefits to cover part or all their tax liability. To do this, recipients should complete [Form W-4V, Voluntary Withholding Request](#), and give it to the agency paying their benefits. Don't send the form to the IRS. If the paying agency has its own withholding request form, use it instead.

Recipients who don't choose voluntary withholding, or if the withholding isn't enough, can make quarterly [estimated tax payments](#). The payment for the first two quarters of 2020 was due on July 15. Third quarter is due September 15, 2020 and fourth quarter on January 15, 2021. Taxpayers can visit IRS.gov to view [all payment options](#).

September 10, 2020

<https://www.irs.gov/newsroom/people-should-have-tax-withheld-from-unemployment-now-to-avoid-a-tax-time-surprise>

Hazard Pay Included in Regular Overtime Rate

25. I am an employee of a private employer that began paying me incentive payments, such as hazard pay, for working during the COVID-19 emergency. Do those incentive payments have to be included in the regular rate that is used to compute my overtime pay?

Yes. Payments your employer provides you to perform work constitutes compensation for employment that must be included in the regular rate, subject to eight exclusions described in section 7(e) of the FLSA. None of those exclusions apply to the incentive payments described above.

27. I am a private employer. My state or local government has a program that allows my employees to apply for and receive incentive payments, such as hazard pay, for working during the COVID-19 emergency. I am not involved in developing the program or in disbursing the government-provided incentive payments. Do I need to include such incentive payments in the regular rate that is used to compute employees' overtime pay?

No. Under the FLSA, only compensation for employment must be included in the regular rate used to compute overtime pay. Hazard pay and other incentive payments for working during the COVID-19 emergency that the government provides directly to your employees, i.e., without your involvement, are not compensation for employment that must be included in the regular rate.

September 21, 2020

<https://www.dol.gov/agencies/whd/flsa/pandemic#q25>

Treatment of State Incentives to Work Payments

28. I am a private employer. My state or local government indirectly provides incentive payments, such as hazard pay, to my employees for working during the COVID-19 emergency by using me as an intermediary. The government provides me with the payments, which I disburse to my employees. Do I need to include such pay in the regular rate that is used to compute overtime pay for my employees?

No, unless there is an agreement between you and your employees to treat the government-provided incentive payments for working during the COVID-19 emergency as compensation for employment.

Under the FLSA, only compensation for employment is required to be included in the regular rate used to compute overtime pay. By acting as an intermediary that facilitates these payments, without more, you do not turn government-provided incentive payments for working during the COVID-19 emergency, such as hazard pay, into compensation for employment. However, if you and your employees expressly or implicitly agree to treat the government-provided payments as compensation for employment, then such payments must generally be included in the regular rate.

29. As a private employer, how do I know if my employees and I have implicitly agreed to treat government-provided incentive payments for working during the COVID-19 emergency as compensation for employment?

It's not enough that your employees merely expect the payments. And you certainly don't have an implicit agreement if you're acting only as a pass-through by, for instance, processing checks or withholding taxes. Instead, you must be doing significantly more to initiate, design, and manage the program. The government programs of which WHD is aware do not, generally speaking, suggest employer involvement to that level, though each situation needs to be determined on its own facts. Of course, if you use the payments to offset your minimum-wage or overtime obligations, then you're definitely treating them as compensation.

September 21, 2020

<https://www.dol.gov/agencies/whd/flsa/pandemic#q28>

Fed Trying to Fix MSLF, Provide Lenders Assurance

On September 18, 2020, the Federal Reserve Board updated program FAQs to clarify the Board and Department of Treasury's expectations regarding lender underwriting for the Main Street Lending Program. The revised FAQs emphasize that lender underwriting should look back to the borrower's pre-pandemic condition and forward to their post-pandemic prospects. The FAQs also clarify supervisory expectations for lenders originating Main Street loans. Specifically, the **MSNLF, MSPLF and MSELF (for-profit facilities) Frequently Asked Questions (FAQs)** (see [comparison](#)), **NONLF and NOELF (nonprofit facilities) FAQs** (see [comparison](#)), and **Instructions for Lender Required Documentation** (see [comparison](#)) were amended to provide clarity on a number of issues, including:

- emphasizing that lender underwriting should look back to the borrower's pre-pandemic condition and forward to the borrower's post-pandemic prospects and clarifying supervisory expectations for lenders originating Main Street loans (FAQs F.3, I.2, and K.4);
- providing guidance on completing and submitting Main Street legal documents, and entering data into the Portal, for multi-borrower loans (FAQs H.24, H.25, L.8, L.9, L.12, and M.5); and
- clarifying the application of the direct loan restrictions on loans between Main Street borrowers and their owners, employees, and officers (FAQs H.20, H.21, H.22, and H.23).

The Main Street SPV expects to begin to accepting loans made to multiple co-borrowers when that functionality is deployed next week. In anticipation of that added functionality, the Main Street FAQs updated today also include details regarding co-borrower loans.

COVID Relief Bill Prior to Election Highly Unlikely

- The money divide:
 - Senate GOP: \$650 billion
 - White House: \$1.5 trillion
 - Democrats: \$2.2 trillion
- Divide remains over state, local government and school funding
- Democrats still not there on liability protection for employers
- Largely agree upon:
 - PPP changes and Second Round of PPP loans
 - Tax corrections and changes to make more businesses eligible
 - Additional federal unemployment insurance support of ~\$400
 - Supporting employers PPE expenses

Impact of Supreme Court Vacancy

- A tense Washington just became explosive
- Makes compromise on any COVID-19 legislation more difficult
- Nominee will likely be seated in 2020, possibly confirmed week of October 29
- Nominee can afford to lose 3 GOP Senate votes as VP Pence breaks a 50-50 tie
 - Senate Democrats have virtually no options to block nominee

What Happens Next? The Scenarios

- Pelosi putting together \$2.4 trillion package for House floor vote Sept. 30
- Has stimulus payments to divide Trump from Senate GOP
- Suburban “Front Line” Democrats who won for the first time in 2018 want action
- Does Pelosi really want to hand Trump a victory weeks out of the election?
- Does Schumer really want to hand a victory to vulnerable Senate Republicans?
- Few scenarios in which a deal comes together unless politics for both parties align

The Next Steps

- Most likely scenario is a COVID bill is attached to year end spending bill in December
- However, tying COVID to a contentious government shutdown is a risky strategy
- What if government remains shutdown and no bill passes through holidays (again)

MEDIA



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<https://www.pma.org/advocacy/donate-today.asp>

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