

A Coronavirus Update for Employers

Trying to Remain Calm in Troubled Times

“If you can keep your head when all about you are losing theirs...”

Rudyard Kipling, “If” –

Remaining calm is easier said than done given the relentless stream of news about the spread of novel coronavirus (“COVID-19”) across the globe. This article summarizes recent actions taken by both the federal and state governments affecting employer-provided health benefits as well as certain other related issues.

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Families First Coronavirus Response Act

The U.S. House of Representatives passed the [Families First Coronavirus Response Act](#)¹ (FFCRA) Saturday morning, March 14, 2020. We expect the FFCRA will pass the Senate and be signed by the President into law later this week. The FFCRA includes the following provisions:

Mandate to Cover COVID-19 Testing

All fully insured and self-insured group health plans, as well as individual health insurance policies, must provide coverage for COVID-19 testing performed by a health care provider without cost sharing.² This provision includes grandfathered plans under the Affordable Care Act (ACA).

This mandate does not require plans to cover the actual treatment for COVID-19 without cost sharing. However, please see [States are Addressing Coverage for COVID-19](#) later in this article for information about states that are requiring this coverage.

Emergency Paid Sick Leave

| Item | Guidance |
|--------------------------|---|
| Purpose | Requires covered employers to provide “emergency paid sick leave” for the express purpose of permitting an employee to take paid time off due to COVID-19 for a quarantine period, to seek diagnosis or care, or due to illness for the employee or an immediate family member Illness must be COVID-19 for paid sick leave to apply |
| Covered Employers | Private employers with fewer than 500 employees ³ and federal, state, and local governmental employers of any size |
| When Effective | Within 15 days after the FFCRA’s effective date and currently set to expire December 31, 2020 Presumably, emergency paid sick leave beginning before December 31, 2020 may continue until completed |
| Benefit | Covered employers must provide full-time employees with 80 hours of paid sick leave and part-time employees with paid sick leave equal to their average number of hours worked in a two-week period Emergency paid sick leave must be paid at a rate equal to the greater of: (i) the employee’s regular rate of pay; or (ii) the applicable minimum wage rate |

¹ This is the actual version of the bill passed by the House. As of this article’s publication date, the [Families First Coronavirus Response Act Bill Page](#) still reflected an earlier draft of the bill.

² Other FFCRA provisions extend this requirement to Medicare, Medicaid, and other government programs.

³ The FFCRA does not indicate when the 500-employee determination occurs. We expect the final law will address this.

| Item | Guidance |
|-------------------------------|--|
| Eligibility | <p>All employees are eligible</p> <p>Employers cannot require employees to meet any service time or other eligibility requirements prior to taking emergency paid sick leave</p> |
| Other Notes | <p>An employer must provide this sick leave in addition to existing sick leave or other paid time off</p> <p>Employers cannot reduce existing sick leave or paid time off policies to offset or account for emergency paid sick leave</p> <p>Unused emergency paid sick leave does not carry over to the next year</p> |
| Employer Reimbursement | <p>Emergency paid sick leave is reimbursable to employers in the form of a refundable employment tax credit</p> <p>This credit might not reimburse employers for their total costs</p> <p>In general, the credit is up to \$511/day for the employee's own quarantine, diagnosis, or illness and up to \$200/day if the paid leave is to assist a family member</p> <p>The credits are also subject to quarterly aggregate caps based on a formula⁴</p> |

Emergency Expansion to the Family and Medical Leave Act (FMLA)

| Item | Guidance |
|--------------------------|---|
| Purpose | <p>Temporarily expands the FMLA to include paid "public health emergency leave" for the express purpose of permitting an employee to take paid time off due to COVID-19 for a quarantine period, to seek diagnosis or care, due to illness for the employee or an immediate family member or to care for a child whose school has been closed or whose childcare provider is unavailable due to a public health emergency</p> |
| Covered Employers | <p>Employers with fewer than 500 employees⁵</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: This includes employers who are not traditionally subject to the FMLA due to their small size. The FMLA already applies to federal, state, and local government employers of any size, and the FFCRA does not restate this.</p> </div> |

⁴ We omitted the quarterly caps because we expect they will change in the final law. The daily limits may also change.

⁵ The FFCRA does not indicate when the 500-employee determination occurs. We expect the final law will address this.

| Item | Guidance |
|-------------------------------|--|
| When Effective | <p>Within 15 days after the FFCRA's effective date and currently set to expire December 31, 2020</p> <p>Presumably, public health emergency leave beginning before December 31, 2020 may continue until completed</p> |
| Benefit | <p>12 weeks of leave. After a 14-day elimination period, the remaining 10 weeks of public health emergency leave is paid leave⁶</p> <p>Covered employers must pay employees at least two-thirds of their regular rate of pay for the remainder of their FMLA leave period⁷</p> <p>This is a calculated average rate of pay for employees with variable work schedules</p> |
| Eligibility | <p>The FMLA's employee eligibility requirement for public health emergency leave is 30 days with no minimum number of service hours⁸</p> <p>Eligibility is determined without regard to whether the covered employer has 50 employees within a 75 mile radius</p> |
| Other Notes | <p>Public health emergency leave is job-protected leave under the FMLA</p> <p>As with other FMLA leave, employees may use accrued paid leave or Emergency Paid Sick Leave during the unpaid leave period</p> <p>The U.S. Department of Labor (DOL) has the authority to exclude certain health care providers and first responders from this expansion out of necessity. Employers with fewer than 50 employees may apply to the DOL for hardship relief if this expansion will put the employer at risk of going out of business.</p> |
| Employer Reimbursement | <p>The paid portion of public health emergency leave is reimbursable to employers in the form of a refundable employment tax credit</p> <p>This credit might not reimburse employers for their total costs</p> <p>In general, the credit is up to \$200/day</p> <p>The credits are subject to an aggregate maximum of \$10,000⁹</p> |

Other FFCRA Notes

Employers will want to communicate these requirements in conjunction with their existing leave policies. The 500-employee limitation for the paid leaves feels arbitrary. Presumably, Congress believes larger

⁶ It is no coincidence that emergency paid sick leave provides approximately two weeks of paid sick time.

⁷ At the moment, this is uncapped. The prior version of the FFCRA capped this at \$4,000/month.

⁸ This is reduced from the FMLA's usual 12 months/1,250 hours of service eligibility requirement.

⁹ We omitted the quarterly caps because we expect they will change in the final law. The daily limits may also change.

employers are more likely to have paid leave programs in place to assist their workers in situation like this or can afford to implement them.

The FFCRA includes other provisions outside the scope of this article addressing unemployment insurance, food assistance, safety protocols for health care providers and first responders, and other welfare-related matters.

Note: We will provide an update as needed if there are any changes to these provisions or if any new related or similar provisions appear in the final law.

States are Addressing Coverage for COVID-19

A number of states have enacted mandates requiring insurance coverage for COVID-19 and testing without cost sharing for covered participants. As of this article's publication date, [California](#), [Georgia](#), [Maryland](#), [Massachusetts](#), [New York](#), [Oregon](#), [Texas](#), [Vermont](#), and [Washington](#) all require or have requested insurance carriers cover testing at no cost to participants with Massachusetts also requiring coverage for treatment received in medical facilities without cost sharing. These state mandates apply to fully insured coverage and self-insured, non-ERISA coverage¹⁰ issued in the respective states. Situs rules may apply depending upon the state, and employers should check with their insurance carriers to determine if these mandates will apply to a policy situated in another state. We anticipate one or more states may exercise emergency powers to override any situs rules and apply COVID-19 mandates to policies situated in other states. Please also see the note about FFCRA below.

Several major insurance carriers, including Aetna, Anthem, Cigna, United Healthcare, and Humana, have announced that they will include COVID-19 testing as a no-cost preventive service for their fully insured policies, even in states that have not taken regulatory action to require it. A number of insurance carriers are also offering expanded services, such as waiving cost sharing for doctor's office, emergency room and urgent care visits for those diagnosed with the virus. We expect this will become very commonplace by the end of March. A few carriers are providing no-cost telemedicine visits at this time even if unrelated to COVID-19 diagnosis or treatment as a way of mitigating the number of people in health care providers' offices.

Note: The FFCRA will make the state mandates for no-cost COVID-19 testing moot. It will not affect state mandates requiring coverage for treatment without cost sharing.

Self-Insured Group Health Plans, ERISA Preemption, and Reality

The FFCRA mandates coverage for COVID-19 testing without cost sharing. Although self-insured group health plans subject to ERISA are not required to follow the state COVID-19 mandates, many employers and other plan sponsors may wish to provide similar and/or additional COVID-19 benefits for obvious reasons.

¹⁰ This includes state and local governmental plans and church plans.

Employers should pay close attention to communications from their third party administrators (TPAs) to determine whether they are required to opt-out of any proposed plan changes they do not wish to implement or if the employer will need to take affirmative action in order to make any modifications to the plan's normal benefits.

Warning! If you maintain stop-loss coverage, we recommend you confirm any plan design changes with your stop-loss carrier before implementation. This may be a non-issue for COVID-19 testing, but coverage for treatment is another matter.

Plan Design Amendments and Communication

Summary plan descriptions (SPDs) and related plan materials will need to be updated to reflect any plan design changes including changes to eligibility. Adding or increasing COVID-19 benefits or expanding eligibility are enhancements to the existing plan (please see [Other Coverage Options for Employees](#) and [Certain Labor & Employment Issues](#) later in this article for discussion). Fortunately, ERISA provides a very generous amount of time to communicate these summary plan description changes to participants.

Under ERISA, plan administrators have up to 210 days from the end of the plan year in which the change(s) took place to issue a summary of material modification or updated summary plan description.¹¹ Employers will obviously want to communicate enhanced COVID-19 benefits and/or expanded eligibility much faster than this for practical reasons.

The amendment rules for the Summary of Benefits and Coverage (SBC) operate a little differently. The rules generally indicate that a mid-year plan design change materially affecting an SBC's contents must be communicated at least 60 days *before* the effective date without regard to whether the change is an enhancement. Although this seems problematic, we have two thoughts about this:

- The additional COVID-19 benefits may not actually affect the corresponding SBC.

Example: The existing SBC may state preventive services are covered at 100% before the deductible is met. Coverage for COVID-19 testing without cost sharing should already fit within that description.

- Under the circumstances, we expect the DOL will ignore this issue and/or ultimately provide transition relief.

High Deductible Health Plans

The IRS issued [IRS Notice 2020-15](#), which permits qualified high deductible health plans (HDHPs) to provide coverage for COVID-19 testing and treatment before a participant satisfies the minimum statutory HDHP deductible for the plan year without affecting the participant's ability to make or receive health savings account (HSA) contributions.

¹¹ This is roughly July 31st of the following year for a calendar year plan and often enables plan administrators to simply wait to issue the updated summary plan description for the next plan year rather than issuing a separate summary of material modification. It is also common for employers to use a portion of the open enrollment materials as a summary of material modification to communicate changes for the next plan year.

This relief includes COVID-19 testing and treatment received through telemedicine, although we understand it may be administratively difficult to identify telemedicine visits for COVID-19 care separately. As written, IRS Notice 2020-15 does not permit an employer to cover all telemedicine visits at no cost or below fair market value cost before a participant has met the applicable minimum statutory HDHP deductible without jeopardizing the participant's ability to make or receive HSA contributions.

An employer could choose to address this by providing additional employer HSA contributions equal to the cost of a limited number of telemedicine visits. These contributions would count against the employee's annual HSA contribution limit, but the employee will still be economically better. It's possible that some employees have already reached their annual HSA contribution limits. The IRS might revisit its relief to provide some sort of specific exception for telemedicine given the recommendations federal and state agencies are making to encourage the use of telemedicine.¹²

Other Coverage Options for Employees

This section summarizes other coverage options that may be available for employers to provide COVID-19 coverage for employees, spouses, and dependents who are not enrolled in an employer's medical plan due to previously declining coverage or ineligibility for benefits. There is not a perfect solution...

Qualifying Life Events

Note: This section assumes the employer's Internal Revenue Code Section 125 cafeteria plan document permits mid-year, pre-tax election changes for the qualifying life events described below. As a practical matter, nearly all do. The underlying benefit coverage also needs to permit the election change.

- **Medical coverage** – Adding coverage for COVID-19 testing at no cost by itself probably does not qualify as a significant improvement of a benefit option permitting a mid-year election change to enroll in the plan, but adding coverage for COVID-19 treatment at no cost likely does. An employer has some discretion to determine what is significant, and the rules merely indicate a change is significant if the average participant would consider it significant. If medical coverage is fully insured, the employer should confirm the election changes will be permitted by the insurance carrier.
- **Dependent care flexible spending account (DCFSA) coverage** –
 - Decrease election – The closure of a day care provider due to COVID-19 concerns or a reduction in available day care provider hours should qualify as a significant reduction of coverage permitting an employee to decrease an existing DCFSA election and/or stop future contributions. This would also apply if a child is required to stay home and supervised by a parent or relative.

¹² We wonder if telemedicine services will be able to support a surge in demand without service delays or interruption.

- Increase election – Although this seems much less likely, if day care needs increase (and are available) due to school closure, an employee could start contributing to a DCFSA or increase an existing election.

The maximum annual DCFSA reimbursement is \$5,000, which barely makes a dent in the childcare needs for most employees. It is probably premature to be concerned about potential DCFSA forfeitures due to temporary closings of day care providers, schools, and related activities, but we do understand employees feeling comfortable with the additional money in their paychecks right now.¹³

Expanded Eligibility for Medical Coverage

An employer could revise its eligibility rules to cover currently ineligible employees. The communication rules described above in [Plan Design Amendments and Communication](#) apply. This may include offering telemedicine to employees who are not eligible for or enrolled in medical coverage. There are potential compliance risks to offering telemedicine as a stand-alone benefit, but that is outside the scope of this article.

Individual Coverage HRAs (ICHRAs)

An employer could choose to offer [ICHRAs](#) to certain classes of employees who are currently ineligible to elect the employer's medical coverage. The ICHRAs can pay for individual insurance coverage in the public health insurance marketplace as well as pay for COVID-19 related services. This is not an immediate solution, as ICHRAs take a little bit of time to implement before employees are able to use them to purchase coverage or pay for out-of-pocket expenses.

Onsite/Near-site COVID-19 Testing

An employer should be able to pay for its employees (and any spouses and dependents) to receive COVID-19 testing onsite or at a near-site location on a tax-free basis without creating an ERISA plan or group health plan so long as the testing occurs within a very short timeframe. This is subject to legal interpretation, but the rationale is that the program requires no ongoing administration by the employer. This is the same rationale employers and legal practitioners use to determine that onsite flu shots do not constitute an ERISA group health plan. It's not a perfect solution, however. It may be impractical or undesirable to perform this testing onsite in groups due to the potential for community spread of COVID-19. This option may also be limited by the availability of tests.

Taxable Cash

Financial resources permitting, an employer can always provide some sort of bonus to help employees pay for the cost of COVID-19 testing and/or services. This should be provided with no strings attached, meaning the employees get the bonus whether they use it for this purpose or not. The bonus is still tax deductible to the employer as paid wages.

¹³ The situation may differ if the employer maintains a non-calendar year DCFSA and it is nearly the end of the plan year, or if an employee only elected DCFSA coverage to cover a specific event (e.g. camp) that is cancelled.

Potential Increase in Appeals?

As employers expand coverage under their medical plans to include coverage for COVID-19 testing and treatment without cost sharing, it seems reasonable to expect an increase in appeals for denied benefits as a result. A participant might go to a health care provider due to COVID-19 concerns but end up diagnosed and treated for something else the medical plan does not cover at 100%. We can easily see participants complaining that they would not have gone to the doctor but for COVID-19.

Data Privacy Concerns

It may feel counterintuitive, but the HIPAA privacy rules do not generally apply to most health information collected and disclosed by an employer related to leave administration because the health information is not going to or coming from the employer's health plan(s). By contrast, employers who are health care providers may learn about COVID-19 from treating participants as patients. This really is protected health information (PHI) for HIPAA purposes.

Other laws containing data privacy requirements may apply,¹⁴ and we support employers treating this information as "protected health information" with similar restrictions for who may access it and how and when it may be disclosed.¹⁵ Lastly, employers can (and should) share COVID-19 health information with the Centers for Disease Control (CDC) and state/local health agencies.

Certain Labor & Employment Issues

We will address certain frequently asked labor & employment questions related to testing and leave administration. We strongly recommend employers contact their labor & employment counsel for these issues.

Note: We will not address circumstances permitting employers to terminate or take disciplinary action against employees in this article.

Mandatory COVID-19 Testing

This is a murky issue at best. Many employers probably cannot require all of their employees to submit to COVID-19 testing because one or more employees likely fall into some sort of "protected class" and requiring testing will violate one or more of their legal rights. An employer could give an employee the [option of testing or being sent home for a minimum quarantine period](#), which shifts the conversation to whether the employee can work remotely from home or paid/unpaid leave.¹⁶

¹⁴ These include the Americans with Disabilities Act and state laws.

¹⁵ Although it may be overkill, treating all health information as if it is protected health information limits the possibility to make mistakes.

¹⁶ Please note that the Centers for Disease Control [has requested employers not require a doctor's note](#) to validate an absence or for return-to-work purposes due to the demands on health care providers' time.

Paid/Unpaid Leave

This section assumes the employee cannot work remotely from home.

- **FFCRA** – Depending upon the timing of the leave and size of the employer, many COVID-19 related leaves should qualify for emergency paid sick leave or public health emergency leave under the FFCRA. Remember that these leaves do not actually require the employee (or immediate family member) to contract COVID-19 to apply.
- **Workers' Compensation** – Workers' compensation covers work-related illnesses and injuries. If an employee contracts COVID-19 during business travel or the employer is a health care provider and the employee contracts COVID-19 in the workplace through patient care or conducting research, the illness is likely a workers' compensation claim. It is less clear if the community spread of COVID-19 in a non-health care workplace will qualify for workers' compensation benefits. In any event, an individual will actually have to contract COVID-19 for workers' compensation to apply.
- **Paid Time Off (PTO) Benefits** – Many employers provide employees with discretionary paid time off, sick, or vacation time. PTO might be used to satisfy the elimination period for one of the other forms of paid leave described in this section or to supplement an employee's other paid leave if the employer's leave policy permits it.
- **Employer-Provided Disability Plans** – These disability plans usually require an employee to satisfy a short elimination period before benefits begin and are generally only available for the employee to take leave due to the employee's own health condition. Most disability plans require participants to qualify for disability. This means actually having COVID-19, and a quarantine with no diagnosis does not qualify without amending the definition of disability.
- **State Disability/Paid Leave** – Where applicable, these may permit the employee to take leave due to his or her own health condition or to take care of an immediate family member. These leaves also may not require the employee or family member actually have COVID-19 to apply, and certain states have expanded their definition of qualifying disability to include quarantine.
- **Additional Paid Leave** – An employer will need to decide if it will modify its leave policy to provide paid leave to employees who must take a COVID-19 related leave that does not fit into one of the categories above and will be unpaid leave. This is especially true if the employer is requiring the employee to remain home. This will obviously depend upon each employer's particular circumstances and may be a difficult decision.
- **Unemployment Insurance** – A number of states are modifying their unemployment laws to allow for pay due to lost hours our layoffs due to COVID-19. For companies that do not have or cannot afford to have their own extended pay benefits, unemployment insurance is available. The **FFCRA** includes additional federal unemployment assistance for states hard hit by layoffs.

- **Unpaid Leave** – This includes the FMLA, which is both job-protected leave and gives employees the right to continue health benefits while on leave.¹⁷ Other forms of unpaid leave may be available due to the employer’s leave policy or under other federal or state law.

Note: The FFCRA does not currently provide for an offset if one or more other forms of paid leave is available. The other forms of paid leave described in this section do typically offset when other paid leave is available, which should include FFCRA.

Paying for Benefits

It is common for employers to treat employees as eligible active employees on certain forms of paid leave. Depending on the source of the paid leave benefits, these employees may also be able to continue their pre-tax payroll deductions for benefits or by paying via check or electronically.

The FMLA provides for 3 payment options, but payment must be consistent with employer’s approach for other unpaid leave unless impermissible under FMLA:

1. Pay-as-you-go while on leave;
2. Catch-up recouping contributions upon return from leave; and
3. Pre-payment before the leave begins.¹⁸

The FMLA’s consistency rule means that the payment option(s) used for other forms of unpaid leave – assuming the employee remains benefits eligible while on other unpaid leave – and the FMLA must match. Employers also typically use the same approach when employees are required to pay for contributions that are in excess of an employee’s paid leave benefits.

If an employee loses eligibility for employer-provided group health coverage during an unpaid leave, the employee experiences a COBRA qualifying event due to a reduction in hours. An employer may choose to subsidize COBRA coverage, although that could adversely affect the individual’s ability to purchase coverage in the public health insurance marketplace. The marketplace special enrollment window for a loss of employer-provided group health coverage closes when an individual elects COBRA, and the loss of a COBRA subsidy is not a marketplace special enrollment right.

Updating Leave Policies and Plan Eligibility Rules

If affected by the FFCRA, an employer should communicate the availability of emergency paid sick leave and public health emergency leave to its employees. Employers should also update their leave policies to account for any other changes to available leave including whether employees will remain eligible to participate in benefits while on leave and how contributions will be paid.

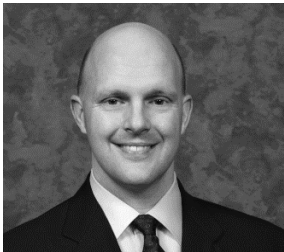
¹⁷ Remember, the temporary expansion adding paid leave to the FMLA does not apply to employers with 500 or more employees.

¹⁸ We believe pay-as-you-go and catch-up are the most common approaches.

Additional Resources

For additional information and resources to assist in managing the effects of COVID-19 on your company and employees, please see [Addressing the Coronavirus Outbreak](#).

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