

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 President signed the [Families First Coronavirus Response Act](#) (FFCRA) into law on March 18, 2020. The FFCRA includes certain provisions related to health and welfare benefits and leave programs described in more detail below. This section also reflects changes made to the FFCRA by the [Coronavirus Aid, Relief, and Economic Security Act](#) (CARES Act) signed into law on March 27, 2020.

Mandate to Cover COVID-19 Testing

Effective March 18, 2020, all fully insured and self-insured group health plans¹ and individual health insurance policies must provide coverage for COVID-19 diagnosis and testing without cost sharing or prior authorization when performed during a health care provider office visit, telemedicine visit, urgent care center visit, or emergency room visit.² Plans are not required to cover other care or services received during a visit that are unrelated to COVID-19 diagnosis or testing without cost sharing. The mandate's effective date may require a plan to reprocess claims for services already performed.

Note: The FFCRA does not address whether this testing mandate is limited to in-network care. Since the mandate includes testing performed in urgent care centers and emergency rooms, we believe the mandate will not be limited to in-network care for at least those settings. The U.S. Department of Labor (DOL) is likely to clarify this in later guidance.

The CARES Act redefined covered testing to include:

1. All testing approved by the Food & Drug Administration (FDA),
2. non-FDA approved testing under an emergency use authorization request unless denied or the test developer fails to timely file the request with the FDA,
3. state-approved testing when the state has notified the U.S. Department of Health & Human Services (HHS) of its intent to use the test, and
4. other tests approved by HHS.

Although the FFCRA indicates the mandate includes diagnosis and testing through telemedicine, we do not interpret this to mean that employers must offer telemedicine coverage to employees. This mandate also does not require plans to cover the actual treatment for COVID-19 without cost sharing, but please see [States are Addressing Coverage for COVID-19](#) later in this article for information about state mandates.

¹ This includes grandfathered plans under the Affordable Care Act (ACA).

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

Emergency Paid Sick Leave (EPSL)

EMERGENCY PAID SICK LEAVE	
Item	Guidance
Effective Date	<p>April 1, 2020 through December 31, 2020, unless extended</p> <p>If a leave that began before April 1st otherwise qualifies as EPSL, only the period of the leave occurring on or after April 1st is covered as EPSL</p>
Purpose	<p>Requires covered employers to provide “emergency paid sick leave” if the employee is unable to work and needs leave because:</p> <ol style="list-style-type: none"> (1) The employee is subject to a federal, state, or local government or agency quarantine or isolation order (2) A health care provider has advised the employee to self-quarantine (3) The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis (4) The employee is caring for an individual subject to (1) or (2) (5) The employee is caring for a son or daughter³ under age 18 due to a school or day care provider closure or the unavailability of a child care provider (6) The employee is experiencing any other substantially similar condition specified in regulations issued by the U.S. Department of Health & Human Services (HHS) <p>In all instances, the sick time <u>must</u> be due to COVID-19.</p> <p>An employee who is able to work remotely is not eligible for EPSL</p> <div style="border: 1px solid black; padding: 5px;"> <p>Notes: Based on DOL guidance released March 27, 2020, a general shelter in place order from a state, county, or city does not qualify for purpose (1).⁴ HHS may later indicate that a shelter in place order qualifies for purpose (6), but this appears unlikely. Purpose (5) is available even if an employee’s teenage son or daughter is generally self-sufficient and does not require constant monitoring. Please also see EPSL Eligibility later in this table.</p> </div>

³ “Son or daughter” is defined broadly to include an employee’s natural, adopted, step, or foster child, a child who is the legal ward of the employee (including under legal guardianship), or a child for whom the employee acts as the parent (known as in *loco parentis*). The DOL indicates this will also include an adult child age 18 or older if incapable of self-care. Please see [DOL’s FAQs on FFCRA, Q/A #40](#).

⁴ Please see the [DOL’s FAQs on FFCRA, Q/A #27](#). Unemployment benefits may be available.

EMERGENCY PAID SICK LEAVE	
Item	Guidance
Covered Employers	<p>Private employers with fewer than 500 employees and federal, state, and local governmental employers⁵ of any size</p> <p>Please see Determining Employer Size for more information</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: Employers with fewer than 50 employees may also apply to the DOL for hardship relief if this expansion will put the employer at risk of going out of business. This hardship relief is available for purpose (5) only. The DOL will address how to apply for the exemption in later guidance.</p> </div>
EPSL Benefit	<p>Covered employers must provide full-time employees with up to 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 period⁶</p> <p>An employer may agree to provide EPSL on an intermittent basis</p> <p>EPSL must be paid at a rate at least equal to the greater of: (i) the employee's regular rate of pay; (ii) the applicable minimum wage rate under the Fair Labor Standards Act; or (iii) the applicable state/local minimum wage rate where the employee is employed</p> <p>If EPSL is taken for purposes (4) – (6), the rate described above is reduced to two-thirds</p> <p>The maximum benefit is \$511/day (up to a maximum total benefit of \$5,110) for the employee's own quarantine, diagnosis, or illness and up to \$200/day (up to a maximum total benefit of \$2,000) if the paid leave is to care for another⁷</p>

⁵ We interpret an Indian Tribal Government to qualify as a covered governmental employer.

⁶ Special rules apply for employees covered under multi-employer collective bargaining agreements. An employer may satisfy its emergency paid sick time requirement by contributing toward a union program that provides the paid sick time.

⁷ An employer could provide a larger benefit, but the excess will not be reimbursable to the employer as a credit. Please see [Employer Reimbursement](#) later in this table.

EMERGENCY PAID SICK LEAVE	
Item	Guidance
EPSL Eligibility	<p>All employees are eligible, even if employed for only one day</p> <p>An employer may exclude health care providers and emergency responders from EPSL if needed for the employer to continue to function</p> <p>The term “health care provider” is not limited to the medical professionals themselves and includes any employee working at the health care provider’s location as well as employees who manufacture medical products for the diagnosis, treatment, or prevention of COVID-19⁸</p> <p>Although the permitted exclusion broadly includes nearly any type of health care provider, the DOL indicates the primary purpose of EPSL is to minimize the spread of COVID-19 and encourages employers to exercise restraint when excluding employees</p> <p>The exclusion for emergency responders is similarly broad</p> <p>An employer may still want to provide EPSL for a health care provider or first responder who actually contracts COVID-19</p> <p>Employers cannot require employees to meet any service time or other eligibility requirements prior to taking EPSL</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: Based on DOL guidance released March 27, 2020, employees who are not working due to a work location closure or furlough for business reasons or because of a general shelter in place order are not eligible for EPSL. The rationale is these employees would not be working anyway.⁹ If an employee was receiving EPSL prior to the closure or furlough, the employer must provide covered EPSL up to the closure or furlough date.</p> </div>
Employer Notice	<p>The DOL released a model notice which must be conspicuously displayed at worksite locations similar to the display requirements for other legal notices¹⁰ (there is no requirement to provide the notice in another language)</p> <p>In FAQs, the DOL indicated that employers may also satisfy the delivery requirement by mail, email or posting the notice on its website</p> <p>Employers are not required to post the notice before April 1, 2020, but employers may wish to provide the notice earlier</p>

⁸ Please see the [DOL's FAQs on FFCRA, Q/A #56](#).

⁹ Please see the [DOL's FAQs on FFCRA, Q/A #23 – 27](#). Unemployment benefits may be available.

¹⁰ This model notice addresses both the emergency paid sick and public health emergency leaves. A separate notice applies to federal employees.

EMERGENCY PAID SICK LEAVE	
Item	Guidance
Employee Notice and Substantiation	<p>An employer may require employees to provide reasonable notice of the need for continuing EPSL after the first paid sick day</p> <p>The DOL indicates that employees are required to provide documentation supporting the leave and that the employer should retain the substantiation to support its claim for reimbursement if needed¹¹</p> <p>The DOL's recommendation conflicts with the Centers for Disease Control's request that 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</p>
Other Notes	<p>The DOL indicates this is job-protected leave similar to the FMLA</p> <p>Unused EPSL does not carry over to the next year</p> <p>Employers cannot require employees to use other paid leave <u>before</u> using EPSL</p> <p>Employers may permit employees to use other paid leave in addition to EPSL to supplement their leave benefits up to 100% of the employee's regular compensation</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: It appears an employer that already implemented a paid leave policy to address COVID-19 concerns may modify its policy to comply with the EPSL requirements.</p> </div>
Employer Reimbursement	<p>100% of covered EPSL benefits described earlier in this table are reimbursable to the employer</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: Employers who are not required to provide EPSL are not eligible for reimbursement.</p> </div> <p>Although the FFCRA provides that EPSL is reimbursable to employers in the form of a refundable payroll tax credit, the IRS indicated it intends to permit employers to offset their estimated credits against payroll taxes owed and will also provide rapid payment to employers owed refunds as a result</p> <p>We expect IRS guidance will provide for some sort of true-up mechanism to address reimbursement overpayments/underpayments</p>

¹¹ [DOL's FAQs on FFCRA, Q/A #15 and 16](#). Q/A #15 also indicates an employer may provide leave without substantiation.

EMERGENCY PAID SICK LEAVE	
Item	Guidance
Additional Credits	<p>Additional tax credits are available to reimburse employers for the cost of maintaining health coverage for employees on EPSL, which cover the employer's share of premiums or the premium-equivalent</p> <p>These credits are not available to reimburse for paid claims related to COVID-19</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: There are unknowns for the IRS to address in later guidance, including:</p> <p>(1) Is an employer required to collect employee contributions for coverage during or after the leave, or are credits also available if the employer pays or forgives them?</p> <p>(2) How will an employer be required to substantiate its costs for maintaining health coverage for employees on leave?</p> <p>(3) Is this credit also allowed as an offset against payroll taxes?</p> <p>We expect IRS guidance will indicate that an employer cannot receive a credit for any portion of the coverage paid for by an employee during the leave or recouped after the employee returns and will provide for some sort of mechanism for the IRS to recover overpayments.</p> </div>

Public Health Emergency Leave (PHEL)

PUBLIC HEALTH EMERGENCY LEAVE	
Item	Guidance
Effective Date	<p>April 1, 2020 through December 31, 2020, unless extended</p> <p>If a leave that began before April 1st otherwise qualifies as PHEL, only the period of the leave occurring on or after April 1st is covered as PHEL</p>
Purpose	<p>Temporarily expands the Family and Medical Leave Act (FMLA) to include "public health emergency leave" when an employee is unable to work <i>solely</i> because the employee must care for a son or daughter under age 18 due to a school or day care provider closure or the unavailability of a child care provider (please see Footnote #3 for the definition of "son or daughter")</p> <p>The closure or unavailability <u>must</u> be due to COVID-19</p> <p>An employee who is able to work remotely is not eligible for PHEL</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: Please also see PHEL Eligibility later in this table.</p> </div>

PUBLIC HEALTH EMERGENCY LEAVE	
Item	Guidance
Covered Employers	<p>Employers with fewer than 500 employees and state and local governmental employers¹² of any size¹³ (most federal employers are exempt)</p> <p>This includes employers who are not traditionally subject to the FMLA due to their small size</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: 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. The DOL will address how to apply for the exemption in later guidance.</p> </div> <p>Please see Determining Employer Size for more information</p>
PHEL Benefit	<p>12 weeks of leave – After a 10-day elimination period, the remaining PHEL is paid leave (if available, EPSL can fill this elimination period)</p> <p>An employer may agree to provide PHEL on an intermittent basis</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: PHEL leave <u>does not</u> provide an additional 12 weeks of FMLA leave and is merely another qualifying reason to take FMLA leave. If an employee has already used some or all of their FMLA leave during the current FMLA leave year, it reduces the remaining time available for PHEL.</p> </div> <p>Covered employers must pay employees at least two-thirds of their regular rate of pay for the remainder of their PHEL leave period based on the employee's regular work schedule¹⁴</p> <p>For employees with variable work schedules, the average number of hours worked is determined using a 6-month lookback period from the date the leave began or a reasonable expectation of average hours worked for new hires</p> <p>The maximum benefit is \$200/day per employee (up to a maximum total benefit of \$10,000 per employee)</p>

¹² The DOL interprets an Indian Tribal Government to qualify as a covered governmental employer under the FMLA.

¹³ State and local governmental employers are not specifically mentioned in the FFCRA under public health emergency leave, but they are already subject to the portion of the FMLA amended. Most federal employers are not, which is why PHEL will not apply to most federal employers.

¹⁴ Special rules apply for employees covered under multi-employer collective bargaining agreements. An employer may satisfy its paid public health emergency leave requirement by contributing toward a union program that provides the paid sick time.

PUBLIC HEALTH EMERGENCY LEAVE	
Item	Guidance
PHEL Eligibility	<p>Employees who have been employed for at least 30 days with no minimum number of service hours¹⁵</p> <p>Eligibility is determined without regard to whether the covered employer has 50 employees within a 75-mile radius</p> <p>An employer may exclude health care providers and emergency responders from PHEL if needed for the employer to continue to function</p> <p>The term “health care provider” is not limited to the medical professionals themselves and includes any employee working at the health care provider’s location as well as employees who manufacture medical products for the diagnosis, treatment, or prevention of COVID-19¹⁶</p> <p>The exclusion for emergency responders is similarly broad</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: Based on DOL guidance released March 27, 2020, employees who are not working due to a work location closure or furlough for business reasons or because of a general shelter in place order are not eligible for PHEL. The rationale is these employees would not be working anyway.¹⁷ If an employee was receiving PHEL prior to the closure or furlough, the employer must provide covered PHEL up to the closure or furlough date.</p> </div>
Employer Notice	<p>The DOL released a model notice which must be conspicuously displayed at worksite locations similar to the display requirements for other legal notices¹⁸ (there is no requirement to provide the notice in another language)</p> <p>In FAQs, the DOL indicated that employers may also satisfy the delivery requirement by mail, email or posting the notice on its website</p> <p>Employers are not required to post the notice before April 1, 2020, but employers may wish to provide the notice earlier</p>
Employee Notice	<p>Standard FMLA notice rules apply</p> <p>If PHEL is foreseeable, an employee should provide notice of the need for leave as soon as it is practical to do so</p> <p>The DOL indicates that employees are required to provide documentation supporting the leave and that the employer should retain the substantiation to support its claim for reimbursement if needed¹⁹</p>

¹⁵ This differs from the FMLA’s usual 12 months/1,250 hours of service eligibility requirement.

¹⁶ Please see the [DOL’s FAQs on FFCRA, Q/A #56](#).

¹⁷ Please see the [DOL’s FAQs on FFCRA, Q/A #23 – 27](#). Unemployment benefits may be available.

¹⁸ This model notice addresses both the emergency paid sick and public health emergency leaves. A separate notice applies to federal employees.

¹⁹ [DOL’s FAQs on FFCRA, Q/A #15 and 16](#). Q/A #15 also indicates an employer may provide leave without substantiation.

PUBLIC HEALTH EMERGENCY LEAVE	
Item	Guidance
Other Notes	<p>This is job-protected leave under the FMLA</p> <p>Unused PHEL does not carry over to the next FMLA year</p> <p>As with other FMLA leave, employees may use EPSL or other accrued paid leave during the unpaid leave period</p> <p>Employers may permit employees to use other paid leave to supplement their paid PHEL leave benefits up to 100% of the employee's regular compensation</p>
Employer Reimbursement	<p>100% of covered paid public health emergency benefits described earlier in this table are reimbursable to the employer</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: Employers who are not required to provide PHEL are not eligible for reimbursement.</p> </div> <p>Although the FFCRA provides that covered leave is reimbursable to employers in the form of a refundable payroll tax credit, the IRS indicated it intends to permit employers to offset their estimated credits against payroll taxes owed and provide rapid payment for employers owed refunds as a result</p> <p>We expect IRS guidance will provide for some sort of true-up mechanism to address reimbursement overpayments/underpayments</p>
Additional Credits	<p>Additional tax credits are available to reimburse employers for the cost of maintaining health coverage for employees on PHEL, which cover the employer's share of premiums or the premium-equivalent</p> <p>These credits are not available to reimburse for paid claims related to COVID-19</p> <div style="border: 1px solid black; padding: 5px;"> <p>Note: There are unknowns for the IRS to address in later guidance, including:</p> <p>(1) Is an employer required to collect employee contributions for coverage during or after the leave, or are credits also available if the employer pays or forgives them?</p> <p>(2) How will an employer be required to substantiate its costs for maintaining health coverage for employees on leave?</p> <p>(3) Is this credit also allowed as an offset against payroll taxes?</p> <p>We expect IRS guidance will indicate that an employer cannot receive a credit for any portion of the coverage paid for by an employee during the leave or recouped after the employee returns and will provide for some sort of mechanism for the IRS to recover overpayments.</p> </div>

At a Glance

Up to 80 hours ≈ 2 paid “business weeks”



EPSL is available for:

1. Employee subject to federal/state/local order to quarantine or isolate
2. Health care provider advises the employee to quarantine
3. Employee experiencing COVID-19 symptoms and seeking diagnosis
4. Employee is caring for an individual subject to (1) or (2)
5. Employee caring for son or daughter <18 due to school/day care closure
6. Employee experiencing substantially similar condition specified by HHS



10 day Elimination Period
≈ 2 unpaid “business weeks”

Up to 10 paid weeks

PHEL is available for an employee caring for a son or daughter <18 due to school/day care closure. EPSL and PHEL may be combined to provide up to 12 weeks of paid leave for this purpose.

Determining Employer Size

Counting Employees

In general, all full-time and part-time employees,²⁰ temporary and staffing agency employees²¹ (even if paid by the staffing agency), and employees on leaves of absence count for the purposes of determining employer size. This will also generally include employees performing services for a client company through a professional employer organization (PEO). The PEO rules are complex, and employers should review the employment relationship status of PEO employees with their labor & employment counsel. Independent contractors and [most unpaid interns/students](#) do not count toward employer size.

The <500 employee calculation is performed on the day an employee’s FFCRA leave is to begin. Employers who are very close to the 500-employee mark may find themselves moving in and out being subject to FFCRA leave. This may mean some employees will be covered while others are not. A safe harbor from the DOL would be welcome.

²⁰ This can include partners, LLC members, and other owners who perform employee functions for the employer.

²¹ The staffing agency and client employer may be “joint employers” for these employees.

Integrated Employers

In general, each business entity is a single employer for the purposes of determining employer size. Separate businesses are combined for determining employer size if they are deemed “integrated employers” using a four-factor test:

1. Common management between the employers – Do the employers share common leadership and/or a significant overlap in human resource functions?
2. Interrelation of the employers’ business operations – Do the employers coordinate their business activities? Does one employer provide services to another? Do they share building space, equipment, bank accounts, or other financials?
3. Centralized control of labor relations – Do the employers share employees, transfer employees between them, or exercise any control over hiring, firing, training, or other personnel decisions with respect to each other?
4. Common ownership or financial interests – This is fairly self-explanatory, but it is worth a mention that this does not require the traditional controlled group standard of 80% or more common ownership or financial interest.

More than one factor is usually necessary for the DOL or courts to determine an integrated employer relationship exists, and no single factor controls. Interestingly, the common ownership or financial interests factor is usually considered the *least* important when determining whether an integrated employer relationship exists.

Service Contract Act/Davis Bacon Act Employees

Service Contract Act (SCA) and Davis Bacon Act (DBA) employees count when determining if an employer is a covered employer. If an employer is a covered employer, SCA and DBA employees can qualify for EPSL and PHEL. Since a covered employer is required to provide these paid leaves under federal law, they do not count toward satisfying the employer’s applicable SCA or DBA wage or fringe benefit rates.

Other FFCRA Notes

Employers should consider communicating the new leave requirements in conjunction with their existing leave policies. The 500-employee limitation for the paid leaves feels arbitrary. Congress probably believes larger employers are more likely to have paid leave programs in place to assist their workers in situations 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.

States are Addressing Coverage for COVID-19

Note: The FFCRA supersedes the state mandates for COVID-19 diagnosis and testing without cost sharing. It does not affect state mandates requiring coverage for treatment without cost sharing.

A number of states have enacted mandates requiring insurance coverage for COVID-19 testing without cost sharing for covered participants, including [Alaska](#), [California](#), [Georgia](#), [Maryland](#), [Massachusetts](#), [New York](#), [Oregon](#), [Texas](#), [Vermont](#), and [Washington](#). Each requires or has requested insurance carriers cover testing at no cost to participants with Massachusetts also requiring coverage for COVID-19 treatment received in medical facilities without cost sharing. These state mandates apply to fully insured coverage and self-insured, non-ERISA coverage²² 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 covering residents that are situated in other states.

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. 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.

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

The FFCRA mandates coverage for COVID-19 diagnosis and 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.

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 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.

²² This includes state and local governmental plans and church plans.

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.²³ Employers will 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:

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

Example: The existing SBC may state that 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.

2. Under the circumstances, the DOL may 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.

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. The CARES Act addresses this potential conflict by exempting all telemedicine or other remote care²⁴ benefits from conflicting with HSAs for HDHP plan years beginning on or before December 31, 2021.

²³ 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.

²⁴ It's not clear what "other remote care" includes yet.

Example: An employer with a calendar year HDHP can provide telemedicine benefits – whether or not COVID-19 related – at a \$0 or below fair market value copayment before a participant has met the applicable minimum statutory deductible for both the 2020 and 2021 HDHP plan years without affecting the participant’s ability to make or receive HSA contributions. The exemption would also apply to an HDHP with a plan year beginning on July 1st for the July 1, 2020 – June 30, 2021 and July 1, 2021 – June 30, 2022 plan years.

An employer could choose to assist its employees further 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 off. It is possible that some employees have already reached their annual HSA contribution limits.

Spending Account Plans

The CARES Act permits HSAs, health care flexible spending accounts, health reimbursement arrangements, and Archer medical savings accounts to reimburse for the cost of over-the-counter drugs and other medicine purchased after December 31, 2019 without a prescription. This relief is permanent.

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.

Medicare/Medicaid/CHIP and the Uninsured

Even if they are not eligible under their employer’s plan, employees may have other options available to obtain coverage. The FFCRA requires federal programs, such as Medicare, Medicaid, and CHIP, to cover diagnosis and testing at 100% and gives states the option to expand Medicaid eligibility to address this.

The FFCRA also allocates funds to reimburse health care providers for performing diagnosis and testing services for the uninsured. While the law requires emergency rooms to provide diagnosis and testing for those in need, it does not require a hospital to waive its costs for those who are uninsured or cannot pay.

Qualifying Life Events (QLEs)

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. The underlying benefit coverage issuer also needs to permit the election change.

- **Medical coverage –**
 - Enrollment – Adding coverage for COVID-19 diagnosis and testing at no cost may qualify as a significant improvement of a benefit option permitting a mid-year election change to enroll

in the plan by itself, and we are aware that many plans are taking the position that it does.²⁵ Adding coverage for COVID-19 *treatment* at no cost likely is a QLE. An employer has some discretion to determine what a significant change is, and the rules merely indicate a change is significant if the average participant would consider it significant. The employer should confirm if its insurance carrier or stop-loss carrier will allow these specific mid-year election changes

- Dropping coverage – The loss of eligibility for medical coverage as a result of a closure or furlough is generally a COBRA qualifying event and may result in a QLE permitting the employee to enroll in coverage through another employer (such as a spouse’s employer) or the public health insurance marketplace.²⁶ This QLE also occurs if the employee remains eligible for coverage but the employer reduces its employer contribution toward coverage to \$0.²⁷

If the employer merely reduces – but does not eliminate – its contribution toward coverage, this may result in a QLE permitting the employee to change to a lower cost medical option or enroll in coverage through another employer if the cost of the employer’s coverage has significantly²⁸ increased. This event is a QLE for the public health insurance marketplace if the increased cost for the employer’s coverage causes the employee to become newly eligible for premium subsidies.²⁹

- **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 would likely qualify as a significant reduction of coverage permitting an employee to decrease an existing DCFSA election and/or stop future contributions.³⁰ This would also apply if a child is required to stay home and is supervised by a parent or relative.
- Increase election – 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. It may be 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.³¹

²⁵ Please see [26 CFR Section 1.125-4\(f\)\(3\)](#).

²⁶ Please see [26 CFR Section 54.9801-6\(a\)\(3\)\(i\)](#).

²⁷ Please see [26 CFR Section 54.9801-6\(a\)\(3\)\(ii\)](#). This variation would not be a COBRA qualifying event.

²⁸ Similar to the discussion under enrollment above, “significant” is a subjective standard. Please see [26 CFR Section 1.125-4\(f\)\(2\)](#).

²⁹ Please see [45 CFR Section 155.420\(d\)\(6\)](#).

³⁰ Please see [26 CFR Section 1.125-4\(f\)\(3\)](#).

³¹ 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.

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 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 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.

Potential Increase in Appeals?

As employers expand coverage under their medical plans to include 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%. Participants may claim they would not have gone to the doctor but for COVID-19.

Data Privacy Concerns

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,³² and this information should be treated like “protected health information” with similar restrictions for those who may access it and how and when it may be disclosed.³³ 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 COVID-19 testing and leave administration. Employers should 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

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 should be put on paid/unpaid leave.

Note: The [Equal Employment Opportunity Commission \(EEOC\) granted limited testing relief under the Americans with Disabilities Act](#) permitting employers to measure the temperatures of their employees. The EEOC cautioned employers that an employee may still have COVID-19 even if the employee’s temperature is in the normal range. This limited relief applies solely to temperature readings and does not apply to other forms of testing. Employees who display symptoms (such as a high temperature) or who refuse to have their temperature taken can be sent home.

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

³² These include the Americans with Disabilities Act and state laws.

³³ Although it may be overkill, treating all health information as if it is protected health information limits the possibility to make mistakes.

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.

- **PTO Benefits** – Many employers provide employees with discretionary paid time off, sick, or vacation time. PTO can be used during 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 without a 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 or 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. In general, employees receiving paid leave under the FFCRA are not eligible for unemployment benefits.³⁴ The [FFCRA](#) includes additional federal unemployment assistance for states hit hard 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.³⁵ Other forms of unpaid leave may be available due to the employer's leave policy or under other federal or state law. Please see *Furloughs* below.

Note: An individual cannot use other paid leaves to supplement FFCRA paid leave in excess of 100% of regular earnings while on FFCRA leave. The other forms of paid leave described in this section do typically offset when other paid leave is available, which should include FFCRA leave.

³⁴ Please see the [DOL's FAQs on FFCRA, Q/A #29](#).

³⁵ Remember, the temporary expansion adding paid leave to the FMLA does not apply to employers with 500 or more employees.

Furloughs

The term “furlough” by itself does not automatically create certain legal rights for furloughed employees or bind an employer to specific legal obligations.³⁶ A furlough simply implies that an employer believes the layoff is temporary and expects to be able to return the employees to work. In other words, a furlough is really just another name for a type of leave, and an employer has a lot of flexibility to define how it works.

Furlough design considerations include:

- *Will furloughed employees be on full or partial pay during some or all of the furlough period?* This obviously depends upon an employer’s financial circumstances. Paid furlough will generally offset unemployment benefits. Remember that furloughed employees are not eligible for FFCRA leave during the furlough period.
- *Will furloughed employees remain eligible for benefits as if they are active employees or lose eligibility (due to a reduction in hours) and be offered COBRA?* If furloughed employees remain eligible as active employees, they will still have their full COBRA continuation coverage period available if terminated. This is a change in eligibility, and an employer should seek the approval of the insurance carrier or stop-loss carrier, if applicable. Remaining eligible for benefits as active employees should not affect eligibility for unemployment benefits. Furloughed employees may lose eligibility for certain ancillary benefits (e.g. life insurance, long-term disability) because they will not meet required actively-at-work requirements during the furlough period.
- *Will the employer subsidize the cost of coverage for all or a portion of the furlough period or require furloughed employees to pay for the full cost?* Again, this depends on the employer’s financial circumstances. If the employer intends to subsidize coverage, the employer may want to consider specifying whether the subsidy will last for a limited time or reserve the right to reduce or eliminate the subsidy later in order to avoid disputes that the subsidy is open-ended. If the furloughed employees remain eligible as active employees, this should appear in the furlough communication. If the furloughed employees are offered COBRA, this should appear in the COBRA election notice.

Note: Remember that a loss of eligibility for medical coverage or the elimination or reduction of employer contributions toward coverage can trigger a [QLE](#) permitting enrollment in other medical coverage.

Paying for Benefits

Employers frequently treat employees as eligible active employees when 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 DOL indicates that employees are entitled to continue their coverage while on FFCRA leave on the same terms as active employees.³⁷

³⁶ Special “furlough” rules may apply to public sector employees working for federal, state, and local governments. Collectively bargained agreements sometimes also define furloughs and create contractual rights and obligations.

³⁷ Please see the [DOL's FAQs on FFCRA, Q/A #30](#).

The FMLA provides for 3 payment options, but payment must be consistent with the 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.³⁸

These payment approaches also apply if an individual's FFCRA leave benefits not enough to cover the required contributions. 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 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 or enroll in other group health coverage (such as through a spouse's employer). The 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 special enrollment event.

Updating Leave Policies and Plan Eligibility Rules

If affected by 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 including whether employees will remain eligible to participate in benefits while on leave and how contributions will be paid.

The Affordable Care Act and the Employer Mandate

Placing employees on extended leaves of absence can have implications for an employer under the ACA's employer mandate and its reporting on IRS Forms 1094/1095. An offer of coverage, even COBRA coverage, to an individual who remains employed while on leave still qualifies as an offer of coverage for the purposes of avoiding [the Section 4980H\(a\) "no offer" penalty](#). The offer of coverage may not be affordable, particularly if the employee must pay for the full cost, potentially exposing an employer to the Section 4980H(b) "inadequate offer" penalty should one or more full-time employees obtain subsidized coverage in the public health insurance marketplace. The risk is likely low for relatively short leaves of absence of a month or less due to the time it takes to enroll in the marketplace and for coverage to actually begin. Further discussion is beyond the scope of this article.

³⁸ We believe pay-as-you-go and catch-up are the most common approaches.

Note: Depending upon the medical plan's eligibility rules, employees in a protected "full-time employee" status during a stability period may remain eligible for coverage if still employed during a leave of absence.

The WARN Act

[The WARN Act](#) requires employers to provide written notice at least 60 calendar days in advance of a plant closing (WARN's term for a work location) or mass layoff at a work location. The notice is intended to ensure that assistance can be provided to affected workers and their families through a [State Rapid Response Dislocated Worker Unit](#), and it also allows workers and their families transition time to seek alternative jobs or enter skills training programs.

At a high level, the WARN Act applies to private employers (both for profit and non-profit) with at least 100 employees who will lay off at least 50 employees at a single work location within a 30-day period. For this purpose, a layoff means an actual termination of employment (even if only temporary) or a 50% or greater reduction in hours for 6 months. An employer can exclude employees who have worked for less than 6 months and/or who work less than 20 hours per week for the purposes of determining if the employer has 100 or more employees.

If WARN applies, the employer is generally required to provide written notice of the layoff at least 60 calendar days in advance. The notice has to include certain information such as whether the layoff is expected to be temporary or permanent, the expected date the layoff will begin, and contact information for questions. If an employer gives less than 60-days' advance notice, it must generally continue pay and benefits for the affected employees for the gap period. For example, if WARN applies and an employer only provided 10 days' advance notice, it would generally have to continue pay and benefits for another 50 days.

There are three exceptions to the 60-day advance WARN notice requirement. An employer claiming an exception must still provide the notice as soon as it is reasonably practical to do so and must state the reason for the shortened notice period.

1. **Faltering company** – This can apply when a company is actively seeking financing or business and reasonably believes in good faith that advance notice would harm its ability to get financing or business, and this new financing or business would allow the employer to avoid or postpone a shutdown for a reasonable period.
2. **Unforeseeable business circumstances** – This can apply when the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.
3. **Natural disaster** – This can apply when a closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, drought, storm, tidal wave, or similar effects of nature. In this case, notice may be given after the event.

A mass layoff due to COVID-19 may qualify as an unforeseeable business circumstance. We encourage employers discuss the implications of the WARN Act with their labor & employment counsel.

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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