



COVID-19: FFCRA, CARES Act and Employee Benefits

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Stacy Barrow
sbarrow@marbarlaw.com
(617) 830-5457

Agenda



- Federal Government Responses to COVID-19
- Families First Coronavirus Response Act (FFCRA)
 - Emergency Paid Sick Leave
 - Emergency FMLA
- Coronavirus Aid, Relief, and Economic Security (CARES) Act
- COVID-19 and Employee Benefits / Employment Issues
- DOL FAQs on FFCRA



Federal Government Responses



- Federal government has issued guidance for employers
- Agency guidance includes the following:
 - IRS: [COVID-19 Related Tax Credits for FFCRA Required Paid Leave](#) (**new**)
 - DOL: [COVID-19 and the American Workplace](#) (**new posters, Q&As**)
 - DOL: [Temporary Regulations on FFCRA Leave](#) (**new**)



Families First Coronavirus Response Act



- On March 18, the President signed the Families First Coronavirus Response Act (FFCRA)
- FFCRA includes Emergency FMLA and Emergency Paid Sick Leave provisions, free testing for coronavirus, increased funding for unemployment assistance, food aid, and Medicaid



Families First Coronavirus Response Act



- Coronavirus Testing: All group health plans (including self-insured plans and grandfathered plans) and health insurance issuers in the individual and group markets must provide COVID-19 testing with no cost-sharing or prior authorization requirements
 - Effective now through end of public health emergency as declared by HHS
 - Includes services for urgent care, emergency room, or provider visits that result in an order for or administration of a test for COVID-19
 - Under the CARES Act, if participants receive COVID-19 testing out-of-network, the plan must reimburse the provider based on their published cash rate



Coronavirus Aid, Relief, and Economic Security (CARES) Act



- Vaccine for COVID-19 not expected until 2021 at the earliest
- Once a vaccine is developed, current ACA rules require it to be covered without cost-sharing, when recommended by the federal government
- Under CARES Act, no-cost coverage must be available within 15 days after a coronavirus vaccine or preventive service receives an “A” or “B” recommendation from the USPSTF or is recommended by the CDC
 - Shorter timeframe than usual to adopt a new recommended vaccine or preventive service



Coronavirus Aid, Relief, and Economic Security (CARES) Act



■ HSA and Telehealth Expansion

- CARES Act was signed into law on March 27, 2020 and includes a new safe harbor under which HDHPs can cover telehealth and other remote care before participants meet their deductibles (i.e., without cost-sharing)
- This safe harbor applies for plan years beginning on or before December 31, 2021, unless extended
- Finally, clear guidance—albeit temporary— that no-cost telehealth may be provided without disrupting HSA eligibility



Coronavirus Aid, Relief, and Economic Security (CARES) Act



- **Over-The-Counter Medication Reimbursement under FSA/HRA/HSA**
- The CARES Act allows health flexible spending accounts (FSAs), Health Reimbursement Arrangements (HRAs), and Health Savings Accounts (HSAs) to pay for or reimburse over-the-counter medication and menstrual products without a prescription
- This is a *permanent* repeal of the ACA's prohibition on reimbursements under such plans for over-the-counter medication obtained without a prescription
- This change is effective January 1, 2020



Coronavirus Aid, Relief, and Economic Security (CARES) Act



- **Assistance for Businesses – Payroll Protection Program**
- Act implements loans for employers that have fewer than 500 employees
 - Loans can be utilized to pay for specific, operational costs
 - Interest rates cannot exceed 4%, with no prepayment penalties
 - This loan is capped at \$10 million, and requires a good-faith certification that: the loans are needed to continue operations during the emergency; funds will be used to retain workers and maintain payroll; to pay for mortgage, lease, and utility payments; that there is no other application pending for the same purpose; and that from Feb. 15, 2020 to Dec. 31, 2020 the applicant has not received duplicate amounts
- Larger employers may also be eligible for assistance that includes \$500 billion in loans and loan guarantees
 - Loan forgiveness is not allowed for these loans



Coronavirus Aid, Relief, and Economic Security (CARES) Act



- **Unemployment Assistance for Individuals**
- In states that adopt it, an additional federal unemployment benefit of \$600 per week is added to what is provided under state law, through July 31, 2020 (unless extended)
- Individuals unemployed or underemployed due to COVID-19 reasons may also be eligible for an additional 13 weeks of extended unemployment benefits, once state unemployment benefits end
- Additional funding is also available for states that waive the waiting period for unemployment benefits, and states are authorized to enter into agreements with the federal government to initiate short-term compensation agreements to help subsidize payments to employees that have hours reduced due to COVID-19



Coronavirus Aid, Relief, and Economic Security (CARES) Act



■ Assistance for Individuals

- Individuals will also be eligible to receive a recovery rebate up to \$1,200 (\$2,400 for joint filers), including an additional \$500 per child
- Assistance will phase out for taxpayers making \$75,000 or more (\$150,000 for joint filers, and \$112,500 for heads of household), with the rebate completely phasing out for those earning in excess of \$99,000 (\$198,000 for joint filers)
- 2018 tax filings will be utilized if filers have not yet filed 2019 taxes



Coronavirus Aid, Relief, and Economic Security (CARES) Act



- **Assistance for Individuals – Student Loans**
- Employers may use an educational assistance program to reimburse employees for qualifying student loans up to \$5,250 on a tax-free basis (state or local taxes may still apply)
- Applies to loan payments, including principal and interest, made between March 28, 2020 and December 31, 2020, unless extended
- Educational assistance programs are subject to Section 127 of the Internal Revenue Code and must be offered pursuant to a written plan document, be communicated to employees, and comply with certain nondiscrimination requirements



Families First Coronavirus Response Act



- Provisions include **Emergency Paid Sick Leave** and **Emergency FMLA**
 - These provisions apply to employers with fewer than 500 employees and public employers of any size
 - Effective for leave taken between 4/1/20 and 12/31/20, unless extended
- Assistance for employers available via a refundable payroll tax credit
 - Good news for non-profits, as they wouldn't benefit from an income tax credit
 - Tax credit available for health insurance premiums allocable to qualified sick leave payments



Emergency Paid Sick Leave



- Provides paid sick time to an employee who is unable to work (or telework) because the employee:
 1. is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 2. has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 3. has COVID-19 symptoms and is seeking medical diagnosis;
 4. is caring for an individual who is subject to a quarantine or isolation order;
 5. is caring for a child if the school or day care center has been closed, or the child care provider is unavailable, due to COVID-19 precautions; or
 6. is experiencing any other similar condition specified by the federal agencies



Emergency Paid Sick Leave



- Employees may be entitled to 80 hours of paid sick time (pro-rated for part-time employees)
 - All employees are immediately eligible for this leave
- Leave is paid at the employee's regular rate, up to \$511 per day (\$5,110 in the aggregate) when leave is taken due to an employee's own illness or quarantine, and paid at two-thirds of the regular rate, up to \$200 per day (\$2,000 in the aggregate) when leave is taken to care for others (or reason #6)



Emergency Family and Medical Leave Act



- Amends FMLA to provides up to 12 weeks of job-protected leave for “a qualifying need related to a public health emergency” to employees who have been employed for at least 30 days
- A “qualifying need” is when an employee is unable to work (or telework) due to a need to care for a minor child if the child’s school or place of care has been closed or is unavailable due to a public health emergency
 - Minor child: under age 15 unless special circumstances exist re: need to care for child during daylight hours
- After a 10-day elimination period, the rest of FMLA leave is paid at two-thirds of the employee’s regular rate based on normally scheduled hours, capped at \$200 per day and \$10,000 in total
 - Basically, a 10-week continuation of #5 under Emergency Paid Sick Leave
 - Employees may, but cannot be required to, use paid leave during elimination period



Emergency FMLA and Emergency Paid Sick Leave



- Exceptions may apply for small employers (under 50 EEs) if the required leave would jeopardize the viability of their business
- Employers may exclude health care providers and emergency responders from E-FMLA and EPSL
 - Includes anyone employed at any doctor's office, hospital, clinic, medical school, retirement facility, nursing home, home health care provider, any lab or medical testing, pharmacy, or any similar entity
 - Determination should be made on a case-by-case basis



COVID-19 and Employee Benefits Issues



- Info provided to an employer by an employee is not subject to HIPAA
 - For example, employee is self-quarantining because of exposure to the virus
 - If the employer uses health plan information to determine if an employee has the virus, that information would be subject to HIPAA
 - Even if not subject to HIPAA, treat as sensitive personal information
- Employees may seek to stop dependent care FSA elections due to school closures; such changes are permissible based on the change in provider cost (the cost is \$0 when day care is closed)



COVID-19 and Common Benefits Questions



- If employees are furloughed, review plan documents to determine if COBRA applies or if an extension of coverage is available
- Furloughs and layoffs: What are they?
 - Furlough is short of a layoff; benefits usually continue
 - Layoff is a job termination; any accrued leave is paid out
- When should COBRA be offered?
- How should employee contributions be handled during leave?



COVID-19 and Employment Issues



- The federal WARN Act applies to:
 - Employers with 100 or more full-time employees *-or-*
 - Employers with 100 or more employees who work at least a combined 4,000 hours per week.
- Requires **60 calendar days’ written notice** for:
 - Plant closing at a single site of employment affecting at least 50 employees
 - Layoff affecting at least 50 employees at a single site.
 - Hours reduction for 50 or more employees by 50% or more each month in any 6-mo. period
 - Layoff of 500 or more employees at a single site of employment during a 30-day period
 - Layoff of 50-499 employees when layoffs constitute 33% of total active workforce at single site of employment
- Part-time employees are not counted toward total number of employees, but they are entitled to the required notice
- **Exception to the notice requirement for “unforeseen business circumstances”**

COVID-19 and Employment Issues



- Are we required to pay employees out on leave?
- What should we do if an employee informs us that they've been exposed or tested positive for COVID-19?
 - Shut down office/area and clean/sanitize
 - Identify coworkers who may have been exposed
 - Inform affected coworkers—without identifying the employee—and recommend they speak to a health care provider and self-quarantine for at least 14 days
 - Encourage employees to contact HR with questions and advise the further communication will be forthcoming



Emergency FMLA and Emergency Paid Sick Leave



- “Telework” is work for which normal wages must be paid and is not compensated under either EPSL or E-FMLA
- An employee is “unable to work or telework” for COVID-19 related reasons the employer has work for them and one of the COVID-19 qualifying reasons prevents them from being able to perform that work
- Agreeing to work outside of normal hours means the employee is able to work, so the leave is not necessarily a COVID-19 qualifying reason
- To the extent an employee can telework while caring for a child, EPSL and E-FMLA is not available
 - EPSL and E-FMLA may be taken intermittently while teleworking
 - Employees may take leave in any increment, as long as the employer agrees

Emergency FMLA and Emergency Paid Sick Leave



- Unless teleworking, EPSL must be taken in full-day increments
 - It cannot be taken intermittently if the leave is being taken for any qualifying reason other than to care for a child whose school or day care provider is unavailable due to COVID-19 concerns
- Unless teleworking, once an employee begins taking EPSL (other than to care for a child whose provider is unavailable), they must continue to take EPSL each day until they either (1) use the full amount of EPSL or (2) no longer have a qualifying reason for taking EPSL



Emergency FMLA and Emergency Paid Sick Leave



- Employees are not eligible for E-FMLA or EPSL if:
 - their employer closes the worksite, even for a short period of time, although they may be eligible for unemployment
 - they are furloughed (but the company remains open)
- This is true whether the employer closes the worksite for lack of business or because it was required to close pursuant to a Federal, State, or local directive



Emergency FMLA and Emergency Paid Sick Leave



- Employees cannot use E-FMLA or EPSL solely because their hours are reduced
 - They are not prevented from working those hours due to a COVID-19 qualifying reason, even if the reduction in hours was somehow related to COVID-19
- Employees cannot collect unemployment for time they receive E-FMLA or EPSL
 - However, DOL recently provided additional flexibility to the States to extend partial unemployment benefits to workers whose hours or pay have been reduced

Emergency FMLA and Emergency Paid Sick Leave



- Employers must continue group health coverage during E-FMLA
 - Applies to EPSL too
 - DOL would consider it a violation of the ERISA/HIPAA “actively at work” rules if an employer treats an employee on EPSL differently from active employees in terms of group health plan coverage
- An employee in a waiting period for health coverage who is absent from work on EPSL will still have their coverage take effect after completion of the waiting period on the same day that the coverage would otherwise take effect
 - Employees are considered to be actively at work while on EPSL



Emergency FMLA and Emergency Paid Sick Leave



- For purposes of employees who may be exempted from EPSL or E-FMLA, a *health care provider* is anyone employed at any doctor's office, hospital, health care center, clinic, medical school, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar entity
 - This includes any individual employed by an entity that contracts with any of the above to provide services or to maintain the operation of the facility
 - This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments



Emergency FMLA and Emergency Paid Sick Leave



- For purposes of employees who may be exempted from EPSL or E-FMLA, an *emergency responder* is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of patients, or whose services are otherwise needed to limit the spread of COVID-19
- This includes military, law enforcement, prison guards, fire fighters, EMTs, doctors, nurses, public health personnel, 911 operators, public works personnel, and persons who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility





Advanced Benefits

1299 W Riverstone Dr Ste 200
Coeur d'Alene ID 83815
service@trustab.com
Phone: (208) 664-3482



CSNW Benefits

1437 SW Columbia Street
Portland, OR 97201
info@csnwinc.com
Phone: (503) 226-2171



Diversified Insurance Group

136 E South Temple, Suite 2300
Salt Lake City, UT 84111
www.diversifiedinsurance.com
Phone: (801) 325-5000

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