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 guide summarizes actions taken by both the federal and state governments affecting employer-provided health benefits as well as certain other related issues.

This guide covers the following:

Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act

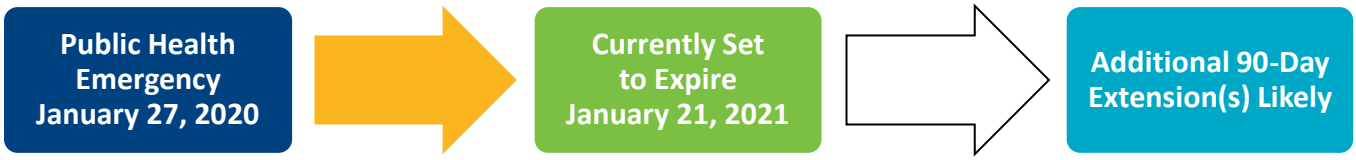
The President signed the Families First Coronavirus Response Act (FFCRA) into law on March 18, 2020. The FFCRA includes certain provisions related to health and welfare benefits and leave programs. This section also reflects changes made to the FFCRA by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), signed into law on March 27, 2020, which also added the COVID-19 diagnostic testing and preventive services mandates. This guide describes the effects of both laws on benefits and leave administration in detail.

Public Health Emergency Period versus Outbreak Period

The two terms are not interchangeable and should not be confused with one another.

- **COVID-19 Public Health Emergency Period ("PHE") –** The U.S. Department of Health & Human Services (HHS) has the authority to declare public health emergency periods granting HHS the authority to take various actions related to an identifiable health crisis.[1] The PHE was initially effective January 27, 2020. The PHE is currently set to expire on January 21, 2021, but HHS will likely extend it again for at least one additional 90-day period. For the purposes of this guide, the PHE primarily affects the COVID-19 diagnostic testing and preventive services mandates.

PHE – Snapshot



- **COVID-19 Outbreak Period ("Outbreak Period") –** The Outbreak Period relates to the declaration of the COVID-19 outbreak as a national emergency by the President of the United States, initially effective March 1, 2020. Federal agencies released guidance granting certain plan administration relief for participants and plan administrators during a defined Outbreak Period, which began March 1, 2020, and ends 60 days after the date the national emergency ends. Please see *Agencies Provide Limited Relief* for more information. There is no current end date for the Outbreak Period.

Outbreak Period – Snapshot

[1] Please see the HHS Public Health Emergency Declaration site for more information.

Mandate to Cover COVID-19 Diagnostic Testing

Effective March 18, 2020, all fully insured and self-insured group health plans[2] 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.[3] This coverage mandate is effective for the duration of the PHE.

Medically Appropriate Standard

The coverage mandate only applies if a health care provider determines the testing is medically appropriate for an individual, meaning the provider orders testing.[4] This differs from normal plan administration, in which it is the plan that determines whether a service or treatment is medically appropriate or medically necessary.

This medically appropriate standard means health plans are not required to cover diagnostic testing (with or without cost sharing) in certain situations, including:

- General workplace testing – An employer can require diagnostic testing before permitting employees to enter the workplace as part of a return-to-work process or periodic screening (please see *Certain Labor and Employment Issues*). This does not involve a provider's determination that testing is medically appropriate for each individual, and a health plan could refuse coverage.

- Surveillance testing – State and local governments may require periodic diagnostic testing of certain populations such as health care providers, school employees and/or students, etc. Again, this does not involve a provider's determination that testing is medically appropriate for each individual, and a health plan could refuse coverage.

- Walk-in/Drive-through testing – A health plan is not required to cover testing received by an individual at a clinic or other site that is performed without a health care provider's order.

Sponsors of self-insured health plans generally have the flexibility to determine what their plans will cover and will likely choose to cover general workplace and surveillance testing. By contrast, an insurance carrier may resist providing coverage for this testing with or without cost sharing. A state or local government could step in and mandate fully insured plans must cover required surveillance testing without cost sharing. This would also apply to self-insured plans subject to state and local law such as governmental plans.

Covered Diagnostic Testing

Covered diagnostic testing includes:

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[2] This includes grandfathered plans under the Affordable Care Act.
[3] Other FFCRA provisions extend this requirement to Medicare, Medicaid, and other government programs.
[4] April 11, 2020 DOL, HHS, and IRS FAQs, Q/A #5.

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 HHS of its intent to use the test, and

4. Other tests approved by HHS.

Covered diagnostic testing also includes elimination testing recommended by a health care provider to rule out other respiratory illnesses before performing COVID-19 diagnostic testing and vaccines once approved for use[5] as well as related facility fees and other charges. 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.[6] There is no limit to the number of tests a plan must cover for a particular individual provided an attending health care provider recommends each test.[7]

Although it is not really a form of diagnostic test, antibody testing is included in the FFCRA's definition of diagnostic testing and the mandate covers it, but please see *Certain Labor and Employment Issues* for more information about an employer's inability to require antibody testing for return-to-work purposes.

Health Plan Cost
The CARES Act and guidance state that a health plan's reimbursement rate to a provider for covered diagnostic testing is equal to:

- The plan's negotiated rate with the provider; or

- If the plan does not have a negotiated rate with the provider, the provider's published cost for testing. The CARES Act requires providers to publish their diagnostic testing rates and HHS has the authority to penalize providers who do not.

- The statute and guidance are clear that a plan must cover out-of-network diagnostic testing.[8] The CARES Act also prohibits balance billing for diagnostic testing (including related services and fees).

Other
The FFCRA mandate includes diagnosis and testing through telemedicine, but we do not interpret this to mean that employers must offer telemedicine coverage to employees. This mandate also does not require

[5] April 11, 2020 DOL, HHS, and IRS FAQs, Q/A #5 and CARES Act Section 3201.
[6] June 23, 2020 DOL, HHS, and IRS FAQs, Q/A #7. This assumes separate billing for the unrelated services.
[7] Health care providers should follow acceptable medical practice standards and the guidance urges them to consult CDC guidelines. June 23, 2020 DOL, HHS, and IRS FAQs, Q/A #6.
[8] CARES Act Section 3202(a) and June 23, 2020 DOL, HHS, and IRS FAQs, Q/A #12

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 guide for information about state mandates.

Mandate to Cover COVID-19 Preventive Services (Vaccination)

The preventive services mandate exists in two parts:

1. CARES Act – The CARES Act adds "qualifying coronavirus preventive services" to the preventive services mandate under the Affordable Care Act (ACA).[9] This means in-network coverage for COVID-19 vaccination and other COVID-19 preventive services without cost sharing is now a permanent part of the ACA.

2. Interim Final Regulations published November 6, 2020 – These regulations include additional guidance for the preventive services mandate, including out-of-network coverage and coverage timing requirements. This guidance is only effective during the PHE.

Note: The COVID-19 preventive services mandate does not apply to grandfathered plans under the ACA. Grandfathered plans can provide separate coverage arrangements or even none at all. A grandfathered plan may add coverage for COVID-19 preventive services and later remove them without jeopardizing its grandfathered status.[10]

Qualifying Coronavirus Preventive Services

These are primarily vaccines, but the broadly written mandate includes other COVID-19 preventive services that may become available. Qualifying coronavirus preventive services are services that receive at least one of the following recommendations:

1. A United States Preventive Services Task Force (USPSTF) recommendation with an A or B rating. This will address COVID-19 preventive services other than vaccines.

2. An immunization recommendation from the Advisory Committee on Immunization Practices to the Centers for Disease Control (CDC). This will address vaccines.

The USPSTF and CDC will limit recommendations to vaccines, medicines, and other products approved by the FDA, although this will include items approved for use under an emergency use authorization.

Health Plan Coverage Timing

The timing for health plans to cover qualifying coronavirus preventive services differ during and after the PHE.

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[9] CARES Act Section 3203.
[10] June 23, 2020 DOL, HHS, and IRS FAQs, Q/A #15.

- During the PHE – Health plans must cover a qualifying preventive service within 15 *business* days after receiving a qualifying preventive services recommendation.

  Pfizer and Moderna Vaccines: The Pfizer-BioNTech COVID-19 vaccine received its CDC recommendation on December 13, 2020. Plans must cover the Pfizer vaccine by or before **January 5, 2021**. The Moderna COVID-19 vaccine received its CDC recommendation on December 20, 2020. Plans must cover the Moderna vaccine by or before **January 12, 2021**. We expect insurance carriers will cover the vaccines before these dates without difficulty.

- After the PHE – Plans must cover additional qualifying preventive services for plan years beginning on or after one year from their recommendation's publication date. This is the standard coverage rule for preventive services under the ACA.

Health Plan Cost

Non-grandfathered fully insured and self-insured group health plans must cover qualifying coronavirus preventive services without cost sharing.

- In-network – This requirement is a permanent part of the ACA.

- Out-of-network – During the PHE, plans must reimburse out-of-network providers at the prevailing market rate for vaccination. The Medicare reimbursement rate for vaccination operates as a safe harbor.[11] The interim regulations prohibit balance billing for preventive services (including related services and fees). Plans are not required to cover out-of-network COVID-19 preventive services – with or without cost sharing – after the PHE.

A plan must pay for the entire office visit/encounter without cost sharing if the primary purpose for the visit is vaccination and the vaccination is not billed separately.

Note: There is a key difference between the COVID-19 diagnostic testing and COVID-19 preventive services mandates. The testing mandate only applies when a physician recommends testing. By contrast, the vaccination mandate does not require a physician's recommendation. This means a plan must cover vaccination required by an employer or a state or local government.

A Word about Vaccination Priority

The CDC directed states and U.S. territories to draft and submit vaccine distribution plans, and recommended prioritizing health care workers, first responders, and high-risk populations such as the elderly.

The state vaccine distribution plans tend to use the term "essential worker" to refer to health care workers, first responders, and other workers (if any) assigned high priority for distribution. An essential worker does

[11] November 2020 Interim Final Agency Regulations, preamble page 71175.

not mean all employees of an employer deemed an essential business by a state, and we are not aware of any state assigning priority merely based on essential business status. In general, there is no mechanism for employers to move their employees to higher priority for vaccine distribution.

Summary and Additional Notes

Remember, portions of the COVID-19 preventive services mandate are permanent, and the mandate does not apply to grandfathered plans.

	In-Network No Cost Sharing	Out-of-Network No Cost Sharing	Plan Coverage Timing
During PHE	Yes	Yes	Must cover within 15 *business* days after published recommendation
After PHE	Yes	No (so long as in-network access available) Balance Billing Permitted	Must cover for plan years beginning on or after one year from published recommendation

As written, the requirement to cover out-of-network vaccinations or other COVID-19 preventive services without cost sharing ends suddenly with the expiration of the PHE. Employers and/or plans should be prepared communicate any change quickly and may consider providing coverage for a longer period – such as through the end of the month – to avoid surprise.

An employer may choose to treat the mid-plan year addition of coverage for COVID-19 vaccines as a qualifying life event permitting eligible employees to enroll themselves and/or their spouses and dependents in medical coverage, but we do not believe employers must do so. Vaccination will be available through other sources at no or relatively low cost.[12] In most instances, the dollar value of the preventive services coverage will also be significantly lower than the employee's cost for the employer's medical coverage. An employer might consider allowing mid-year elections if it intends to require employee vaccinations.

Certain Labor and Employment Issues

We will address certain frequently asked labor & employment questions related to COVID-19 diagnostic testing and vaccination in this section. Employers should contact their labor and employment counsel for these issues. We will not address circumstances permitting employers to terminate or take disciplinary action against employees in this guide.

[12] Other sources include federal and state government-assisted programs (including community-based health centers), Medicare, Medicaid, CHIP, and other [non-grandfathered] health insurance.

Mandatory COVID-19 Testing and Vaccination

Employers generally can require employees to participate in testing or vaccination, but an employer will need to make exceptions for employees who fall into some sort of "protected class" as requiring testing or vaccination will violate one or more of their legal rights. The most likely protected class exceptions are:

- Religious exception – This applies to employees with sincerely held religious beliefs that do not permit traditional medicine or vaccination (e.g. Christian Scientists). An employer may request additional supporting information before granting this exception.

- Disability or related health exception – This applies to employees for whom vaccination is medically inadvisable due to a disability or related health condition.

Employers do not have to accommodate or excuse employees merely because they are opposed to vaccination. An employer can require testing or vaccination before employees enter the workplace and send home employees who test positive or who decline to test or vaccinate if no reasonable accommodation is available. This shifts the conversation to whether the employee can work remotely from home or should receive paid/unpaid leave. Guidance from the Equal Employment Opportunity Commission (EEOC) supports this and addresses concerns under the Americans with Disabilities Act (ADA) and Genetic Information Nondiscrimination Act.[13]

An employment contract, including a collective bargaining agreement, may prevent requiring vaccination without permission or agreement. Many state and local governments require periodic testing by certain employers, and they are likely to require vaccination as well. Examples include health care systems and providers and assisted living facilities/nursing homes.

Note: Although antibody testing is included in the FFCRA's definition of diagnostic testing for the purposes of the diagnostic testing coverage mandate, the EEOC is not subject to this definition and does not permit employers to require antibody testing before allowing employees to enter the workplace.[14] Requiring antibody testing before an employee can enter the workplace is an ADA violation. Please see MMA's COVID-19 Attestation Playbook for more information about implementing a COVID-19 return-to-work strategy.

Return to Work and Reasonable Accommodations

For ADA and other labor and employment purposes, employers need to consider whether reasonable accommodations are necessary in order to enable one or more employees to return to work. Examples of reasonable accommodations may include greater spacing in the employee workspace, providing personal protective equipment, or permitting certain employees to remain on leave (paid or unpaid, depending upon the circumstances). Other return-to-work issues are beyond the scope of this guide.

[13] EEOC FAQs on ADA, Q/A #3 and 6, and K.5 - 7. The DOL also references this in its COVID-19 FAQs for the FMLA.
[14] EEOC FAQs on ADA, Q/A #7.

Proof of Vaccination: An employer may require proof of vaccination from an employee. However, if the employee provides a doctor's note indicating that vaccination is medically inadvisable for him or her due to a disability or other health condition, the employer should not require further evidence or information about the employee's disability or other health condition.[15]

Employer Considerations Before Requiring Vaccination

Employers may wish to consider the following before requiring employees to vaccinate for COVID-19:

- The available vaccine supply in the area where employees are located;
- Whether the employer has liability protection if vaccination causes negative outcomes;
- Employee relations issues, such as: (1) concerns about the vaccine development process and whether employees will view mandatory vaccination as invasive; and (2) what the employer is prepared to do if critical employees or a significant number of employees refuse to participate;
- Whether the employer requires other vaccinations; and
- Who will pay for vaccinations for employees not covered by the employer's medical plan and who do not have ready access to free or low cost vaccination through other sources.

A Word about Wellness Incentives for Vaccination

The use of a wellness incentive, such as a medical plan premium differential or spending account contribution, in connection with vaccination is a health contingent wellness activity under HIPAA's wellness rules. Since the incentive requires vaccination but does not actually require the employee to develop immunity or resistance, this is likely an activity-only wellness standard.

An employer will need to provide a reasonable alternative standard to vaccination for employees who demonstrate: (1) it is unreasonably difficult for the employee to vaccinate due to a medical condition, or (2) it is medically inadvisable to attempt vaccination. This is consistent with the exception for disability or other related health conditions described above, although it may enable more employees to claim exception than under the ADA. As a result, employers should probably choose between either requiring vaccination or providing an incentive to vaccinate, but not both.

The EEOC indicated vaccination is not a medical examination, which means vaccination is not subject to the ADA's wellness rues.[16]

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[15] EEOC FAQs on ADA, K.3.
[16] EEOC FAQs on ADA, K.1.

FFCRA Leave

The FFCRA creates two paid leaves related to COVID-19:

1. Emergency paid sick leave (EPSL); and
2. Public health emergency leave under the Emergency Family and Medical Leave Expansion Act (referred to as the "EFMLEA" or "EFMLEA leave" in this guide).

We cover these paid leaves in detail on the following pages.

Note: EPSL and EFMLEA availability is set to end December 31, 2020. The federal agencies do not have the independent authority to extend these programs. An extension requires Congress to pass new legislation reauthorizing the programs and signed into law by the President of the United States. It is not clear this will occur. If an extension occurs after December 31, 2020, we do not know if the extension will be prospective only or retroactive to January 1, 2021.

EPSL AND EFMLEA	
Item	**Guidance**
Effective Date	Both are effective **April 1, 2020 through December 31, 2020**, unless extended If a leave that began before April 1st otherwise qualifies, only the period of the leave occurring on or after April 1st through December 31, 2020 is covered
Covered Employers	Private employers with fewer than 500 employees and state and local governmental employers[17] of any size Federal employers of any size are subject to EPSL, but most are not subject to EFMLEA EFMLEA applies to employers who are not traditionally subject to the FMLA due to their small size Please see *Determining Employer Size* for more information **Small Employer Exemption:** Employers with fewer than 50 employees may claim an exemption from EPSL and/or EFMLEA for *Qualifying Purpose* (5) if an authorized officer of the employer has determined that providing the paid leave would place the business in jeopardy due to any of the following: (1) Providing the leave will result in expenses exceeding revenues and cause the employer to cease effective operation; (2) The absence of certain key employees requesting leave places the employer in significant financial or operational jeopardy; or (3) There are not sufficient available workers to replace employees requesting the leave for the employer to continue effective operation. An employer should document its justification for claiming the exemption, but the rules do not require the employer to apply for approval with the U.S. Department of Labor (DOL).[18] This hardship exemption is not available for any other EPSL/EFMLEA Qualifying Purpose.

[17] We interpret an Indian Tribal Government to qualify as a covered governmental employer for EPSL purposes. The DOL interprets an Indian Tribal Government to qualify as a covered governmental employer under the FMLA.
[18] DOL FAQs on FFCRA, Q/A #4 and April 2020 Temporary Department of Labor Regulation 29 CFR Section 826.40(b)(2).

EPSL AND EFMLEA

Item	Guidance
Qualifying Purpose **Working Remotely:** Employee who are actually able to work remotely despite the Qualifying Purpose are not eligible for EPSL or EFMLEA. **School's Out?** A school is "closed" for Qualifying Purpose (5) when remote learning is the only option available to a student. If a parent has the choice between in-person and remote learning for their child(ren), the school is not considered closed.[19]	Covered employers are required to provide EPSL and/or EFMLEA if the employee is unable to work for certain Qualifying Purposes (the leave must be due to COVID-19 to qualify)

	EPSL	EFMLEA
(1)	The employee is subject to a federal, state, or local government or agency quarantine or isolation order	
(2)	A health care provider has specifically 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 immediate family member, a person who regularly resides in the employee's home, or a roommate who is subject to (1) or (2)	
(5)	The employee is caring for a son or daughter[20] under age 18 (or a disabled adult child) due to a school or day care provider closure or the unavailability of a child care provider a. Justification is required for children older than 14 during daylight hours b. A child care provider can include an unpaid family member or friend	
(6)	The employee is experiencing any other substantially similar condition specified in regulations issued by HHS (no guidance has been released for this)	

Work Availability Requirement: DOL guidance indicates an employee must actually miss paid work time to qualify for EPSL or EFMLEA. For example, if there is no work for employees to perform during a shelter-in-place order, the order does not satisfy Qualifying Purpose (1).

The work availability requirement was the subject of litigation. In response, the DOL restated this requirement in regulations with an effective date of September 16, 2020.[21] Please see *FFCRA Litigation*.

[19] DOL FAQs on FFCRA, Q/A #98 – 100. If a school uses an alternating in-person and remote learning schedule, the school is considered closed during the remote learning periods.
[20] DOL FAQs on FFCRA, Q/A #40 describes who qualifies as a "son or daughter."
[21] September 2020 Temporary Department of Labor Regulation 29 CFR Section 826.20. Unemployment benefits may be available.

EPSL AND EFMLEA		
Item	**Guidance**	
Eligibility **Note:** If an employee was receiving EPSL or EFMLEA prior to a closure or furlough, the employer must provide the FFCRA leave up to the closure or furlough date. An employee is ineligible while on furlough. Please see *FFCRA Litigation*.	EPSL	EFMLEA
	All employees are eligible Employers cannot require employees to meet any service time or other eligibility requirements prior to taking EPSL	Employees who have been employed for at least 30 days at the time leave is requested with no minimum number of service hours[22] Eligibility is determined without regard to whether the Covered Employer has 50 employees within a 75-mile radius
	Health Care Providers and Emergency Responders: FFCRA guidance gives an employer flexibility to exclude some or all of its health care providers and emergency responders from EPSL and/or EFMLEA, in whole or in part, if needed for the employer to continue to function. Initially, the term "health care provider" was not limited to the medical professionals themselves, and it included 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-19. The exclusion for emergency responders in the initial regulations was similarly broad (and remains unchanged).[23] The health care provider exception is the subject of ongoing litigation. In regulations that went into effect on September 16, 2020, the DOL removed non-medical staff from the definition of health care provider.[24] Whether non-medical staff were excludable before September 16, 2020 remains in dispute. Please see *FFCRA Litigation*. The DOL indicates the primary purpose of the FFCRA leaves is to minimize the spread of COVID-19 and encourages employers to exercise restraint when excluding employees An employee who contracts COVID-19 may qualify for workers' compensation or disability (please see *Other Leave Administration Issues*)	

[22] This differs from the FMLA's usual 12 months/1,250 hours of service eligibility requirement. Please also see DOL FAQs on FFCRA, Q/A #14.
[23] DOL FAQs on FFCRA, Q/A #56 and 57 and April 2020 Temporary Department of Labor Regulation 29 CFR Section 826.25(c).
[24] September 2020 Temporary Department of Labor Regulation 29 CFR Section 826.30(c).

<table>
<tr><th colspan="3">EPSL AND EFMLEA</th></tr>
<tr><th>Item</th><th colspan="2">Guidance</th></tr>
<tr><td rowspan="3">Required Benefits

Payroll Taxes: An employer must pay its share of Medicare tax for Required Benefits but not its share of Social Security taxes.</td><td>EPSL</td><td>EFMLEA</td></tr>
<tr><td>Covered employers must provide full-time employees[25] 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 period[26]

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

The maximum benefit is $511/day (up to a maximum total benefit of $5,110 per employee) for Qualifying Purposes (1) – (3)

If EPSL is taken for Qualifying Purposes (4) – (6), the rate described above is reduced to two-thirds and the maximum benefit is $200/day (up to a maximum total benefit of $2,000 per employee)</td><td>12 weeks of leave – After a 10-day elimination period, the remaining EFMLEA is paid leave (if available, EPSL can fill this elimination period – please also see Other Notes)

Note: EFMLEA leave does not 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 EFMLEA.[27]

Covered employers must pay employees at least two-thirds of their regular rate of pay for the remainder of their EFMLEA leave period based on the employee's regular work schedule

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

The maximum benefit is $200/day per employee (up to a maximum total benefit of $10,000 per employee)</td></tr>
<tr><td colspan="2">Combined, EPSL and EFMLEA can provide up to $12,000 in paid leave for Qualifying Purpose (5)

An employer should withhold taxes and may withhold benefit deductions from paid FFCRA leave[28]</td></tr>
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[25] "Full-time employee" means an employee who works at least 40 hours per week and not the ACA's 30+ hours of service rule. DOL FAQs on FFCRA, Q/A #48.
[26] 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. DOL FAQs on FFCRA, Q/A #35 and 36.
[27] DOL FAQs on FFCRA, Q/A #44 and 45.
[28] IRS FAQs on FFCRA, Q/A #54 – 55.

EPSL AND EFMLEA	
Item	**Guidance**
Intermittent Leave	An employer may permit employees working remotely to take intermittent leave for any *Qualifying Purpose* if the employee is unable to work their normal schedule due to the Qualifying Purpose Employees working at a work location may only take intermittent leave for Qualifying Purpose (5) and a leave for any other Qualifying Purpose must be taken in full day increments[29] An employer's discretion to permit intermittent leave was the subject of litigation. The DOL restated this discretionary authority in regulations with an effective date of September 16, 2020.[30] The DOL indicates that an employee whose child(ren)'s school is operating on an alternating schedule with both in-person and remote learning days would not need to take intermittent leave since each remote learning period is considered a separate Qualifying Purpose (5) event. For example, if the school has in-person classes Monday, Wednesday and Friday, with remote learning Tuesday and Thursday, the employee could qualify for two one-day leaves each week rather than a single leave taken intermittently two days per week. This means an employer does not have the discretion to deny an employee's request for paid FFCRA leave for the remote learning periods (assuming the employee has remaining paid leave time). Please see *FFCRA Litigation*. **Remember:** Under the Fair Labor Standards Act, and subject to limited exceptions, salaried employees must be paid for an entire week if any work is performed during that week. This may hinder an employer from providing EPSL or EFMLEA on an intermittent basis to salaried employees. The DOL may address this in later guidance.
Employer Notice	The DOL released a model notice which must be conspicuously displayed at worksite locations similar to the display requirements for other legal notices[31] (there is no requirement to provide the notice in another language) Employers may also satisfy the delivery requirement by mail, email, or posting the notice on its website

[29] DOL FAQs on FFCRA, Q/A #20 – 22.
[30] September 2020 Temporary Department of Labor Regulation, preamble page 57678 (no change to existing regulations).
[31] This model notice addresses both FFCRA leaves. A separate notice applies to federal employees.

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<tr><th colspan="3">EPSL AND EFMLEA</th></tr>
<tr><th>Item</th><th colspan="2">Guidance</th></tr>
<tr><td rowspan="2">Employee Notice and Substantiation

Example: Please see Attachment A for sample forms.</td><td>EPSL</td><td>EFMLEA</td></tr>
<tr><td>An employer may require employees to provide reasonable notice of the need for continuing EPSL after the first paid sick day</td><td>Standard FMLA notice rules apply
If EFMLEA is foreseeable, an employee should provide notice of the need for leave as soon as it is practical to do so

The DOL revised this notice requirement in regulations with an effective date of September 16, 2020.[32] If an employee has prior notice of a school or day care closure, the employer can require reasonable advance notice from the employee.</td></tr>
<tr><td colspan="2"></td><td>The DOL and Internal Revenue Service (IRS) indicate the following information will substantiate leaves for the purposes of qualifying for leave and reimbursement credits:
(1) The employee's name;
(2) The date or dates for requested leave;
(3) The Qualifying Purpose for the leave and a written statement supporting it (this includes the name of the closed school, day care, or summer camp, and the name of any affected child); and
(4) A statement that the employee is unable to work (including remotely) due to the Qualifying Purpose.[33]
The DOL and IRS do not require a doctor's note to validate an absence or for return-to-work purposes for FFCRA leave. The DOL indicates an employer cannot require a doctor's note for Qualifying Purpose (3) under EPSL.

The substantiation timing requirements were the subject of litigation. As initially drafted, an employer could require substantiation before leave began. This was at odds with EPSL, which does not even require notice of the need for leave until after the first paid sick day. The DOL addressed this in regulations with an effective date of September 16, 2020.[34] Employers may now require substantiation as soon as practicable under the circumstances, and the DOL believes this will generally be the same day leave is requested. Please see FFCRA Litigation.</td></tr>
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[32] September 2020 Temporary Department of Labor Regulation 29 CFR Section 826.90(b).
[33] DOL FAQs on FFCRA, Q/A #15 and 16 and IRS FAQs on FFCRA, Q/A #44. Generally, only one parent or guardian can qualify. Please see DOL FAQs on FFCRA, Q/A #69.
[34] September 2020 Temporary Department of Labor Regulation 29 CFR Section 826.100.

EPSL AND EFMLEA	
Item	**Guidance**
Employer Reimbursement	*Covered Employers* are eligible for reimbursement for the following: (1) 100% of *Required Benefits*; (2) The employer's share of Medicare taxes for the Required Benefits; and (3) The employer's *Qualifying Health Plan Expenses* described later in this guide.[35] A Covered Employer should retain records substantiating the claimed reimbursements for at least four years after the due date for the corresponding payroll tax, but does not need to file them.[36] Reimbursements are available for EPSL and/or EFMLEA leave paid after December 31, 2020 provided the leave was taken by or before December 31, 2020. **Note:** Reimbursement is limited to Covered Employers for Required Benefits. Although state and local governmental employers are required to provide FFCRA leave, they are ineligible for reimbursement.[37] Indian Tribal Governments are eligible for reimbursement if subject to EPSL and EFMLEA.[38]
Reimbursement Methods	A *Covered Employer* may use the following reimbursement methods: (1) Claim an offset by reducing its federal employment tax deposits reported on quarterly IRS Form 941; (2) Request an advance refund of credits using new IRS Form 7200; and (3) True up and claim any remaining credits on quarterly IRS Form 941 (or repay any excess credits received).[39] IRS guidance indicates an employer should use these methods in order, so (1) should be used to the fullest extent possible before (2), etc. A Covered Employer is eligible for a refund if the credits are greater than the employer's payroll tax liability.

[35] IRS FAQs on FFCRA, Q/A #6 – 10 and 31 – 36.
[36] IRS FAQs on FFCRA, Q/A #45 and 46.
[37] DOL FAQs on FFCRA, Q/A #52 and 53, FFCRA Section 7001(e)(4).
[38] IRS FAQs on FFCRA, Q/A #5 and IRS FAQs on FFCRA, Q/A #19g.
[39] IRS FAQs on FFCRA, Q/A #37 -- 43.

<table>
<tr><th colspan="3">EPSL AND EFMLEA</th></tr>
<tr><th>Item</th><th colspan="2">Guidance</th></tr>
<tr><td rowspan="3">Other Notes

Potential Offset:
Other forms of paid leave may reduce benefits by the amount(s) received under paid FFCRA leave.</td><td>EPSL</td><td>EFMLEA</td></tr>
<tr><td>Employers cannot require employees to use other paid leave before using EPSL

Employers may permit employees to use other paid leave in addition to EPSL to supplement their leave benefits</td><td>Unpaid EFMLEA – If available, employees may use EPSL during the unpaid leave period; an employer may permit employees to use other accrued paid leave during the unpaid leave period

Paid EFMLEA – Employers can require or may permit employees to use other paid leave to supplement their paid EFMLEA leave benefits</td></tr>
<tr><td colspan="2">The DOL indicates EPSL and EFMLEA are both job-protected leaves and employees must be permitted to continue their health coverage while on leave[40]

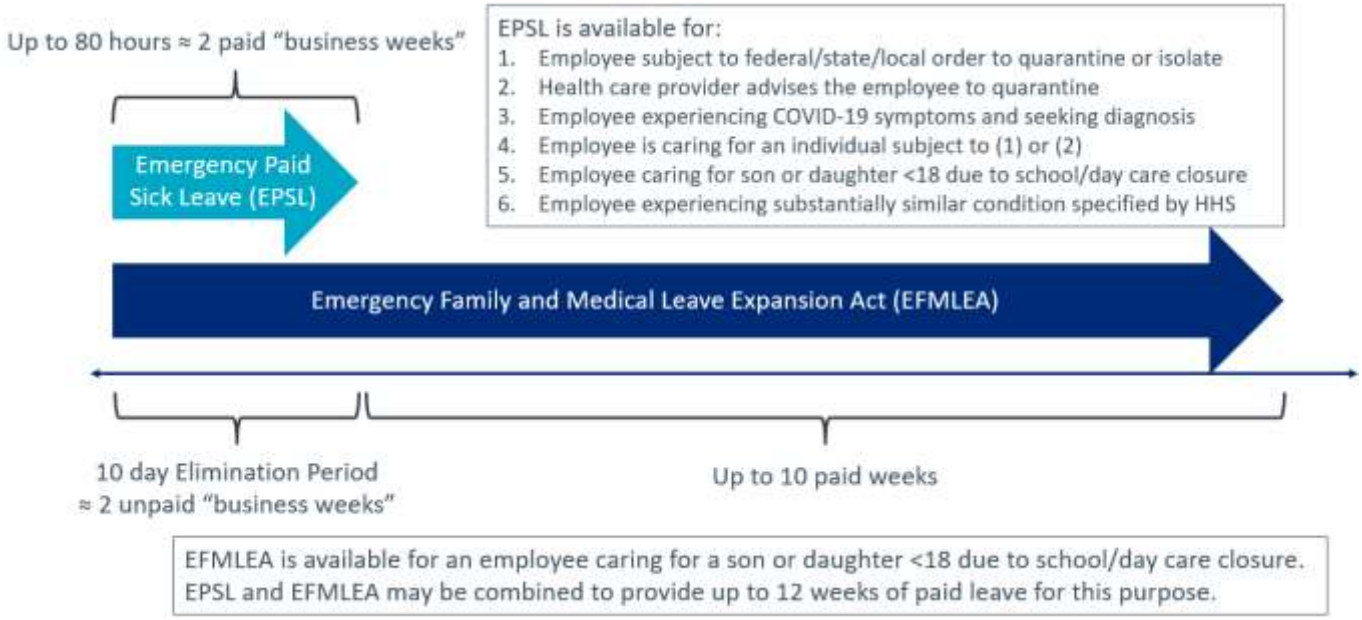
Unused leave does not carry over to a later year if EPSL or EFMLEA are extended beyond December 31, 2020

An employee's EPSL/EFMLEA leave counts toward satisfying a waiting period under a health plan

An employee who does not qualify for EPSL/EFMLEA may still qualify for FMLA or another form of leave (please see Paid/Unpaid Leave)</td></tr>
</table>

[40] DOL FAQs on FFCRA, Q/A #30 and 43.

At a Glance



Determining Employer Size

Counting Employees

In general, all full-time and part-time employees,[41] temporary and staffing agency employees[42] (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 each employee's FFCRA leave is to begin. Some employers may find themselves moving in and/or out of being subject to FFCRA leave, causing some employees to be eligible while others are not. A safe harbor from the DOL would be welcome.

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:

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[41] This can include partners, LLC members, and other owners who perform employee functions for the employer.
[42] The staffing agency and client employer may be "joint employers" for these employees.

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.

Staffing Agency Employees

Staffing agency employees generally count as employees of both the staffing agency and client employer for the purposes of determining whether an employer has <500 employees. The DOL has been somewhat vague addressing whether the staffing agency or client employer is responsible for providing paid FFCRA leave to the staffing agency employees.[43] Factors supporting treating the staffing agency as the responsible party include:

1. Hire/fire authority – The staffing agency actually hires the employees and has the authority to terminate their employment. A client employer merely requests one or more staffing agency employees for an assignment. Similarly, a client employer can remove a staffing agency employee from the assignment, but the staffing agency is generally free to reassign the employee elsewhere.

2. Terms and conditions of compensation – The staffing agency usually sets the employee's compensation amount and payment terms. The client employer pays the staffing agency a fee for use of the employee, but this usually differs from the compensation amount and payment terms set by the staffing agency for the employee.

3. Employment and benefits administration – The staffing agency usually handles the employment and benefits administration for the employee, which includes payroll. The entity paying the staffing

[43] DOL FAQs on FFCRA, Q/A #74 and 90.

agency employees is the only entity that can provide the paid FFCRA leave and claim reimbursement for it.[44]

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 EFMLEA. 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.

Note: SCA/DBA employees may be unable to work (including remotely) due to the closure of a government worksite because of COVID-19. Section 3610 of the CARES Act authorizes federal agencies to reimburse government contractors (if funds are available) for up to 40 hours of paid leave per week provided to affected employees through September 30, 2020 to keep them in a "ready state" to perform the government contract. This means reimbursement for paid leave may be available for an SCA/DBA employee who does not qualify for EPSL or EFMLEA. If an SCA/DBA employee does qualify for EPSL or EFMLEA, any credits received by the employer for those leaves will offset Section 3610 reimbursements. SCA/DBA contractors should discuss the availability of Section 3610 reimbursement for paid leave with their applicable contracting federal agency.

Qualifying Health Plan Expenses

A Covered Employer can claim reimbursement for the cost of maintaining health coverage for employees on FFCRA leave. This is limited to the premium (or premium-equivalent for a self-insured plan) for the health coverage and includes both the employer's contribution plus any portion paid by the employee on a pre-tax basis during the leave. This reimbursement does not include paid claims.

Health coverage includes medical, dental, vision, health care flexible spending account (HCFSA), and health reimbursement arrangement (HRA) coverage, but it does not include health savings accounts or a qualified small employer health reimbursement arrangement.

The applicable cost is equal to the "average daily premium" multiplied by the number of days of paid FFCRA leave. The IRS guidance indicates an employer can use any reasonable method to calculate the average daily premium including:

Using a blended average daily premium rate

Step One: Divide the total premiums paid by the number of covered employees.

Step Two: Divide the result by the expected average number of workdays for covered employees. The IRS indicates an employer may use 260 workdays for full-time employees. An employer may make a

[44] DOL FAQs on FFCRA, Q/A #90.

reasonable adjustment for part-time employees or use the full-time average daily premium for all employees.

Example 1: ABC Company has 100 covered employees under its medical plan with an expected total annual premium of $1,250,000. Assume only full-time employees are eligible for coverage or ABC Company elects to treat all covered employees as full-time and uses 260 expected workdays when calculating the average daily premium.

(Total Premium ÷ Covered Employees) ÷ 260 = Average Daily Premium

Total Premium	Covered Employees	Average Daily Premium
$1,250,000	100	$48.07

Example 2: The same facts as Example 1 except that certain part-time employees are also eligible to enroll in medical coverage and pay the same premiums as full-time employees. ABC Company adjusts the average daily premium for its part-time employees by using 174 expected workdays.

(Total Premium ÷ Covered Employees) ÷ 260 for FTEs = Average Daily Premium
(Total Premium ÷ Covered Employees) ÷ 174 for PTEs = Average Daily Premium

Total Premium	Covered FTEs	Covered PTEs	Average Daily Premium
$875,000	70		$48.07
$375,000		30	$71.84

Step Three: The result from Step Two is the average daily premium. The employer multiples this by the number of days of paid FFCRA leave for the applicable employees.

Example 3: Using the average daily premium calculated in Example 1, assume ABC Company has 60 days of covered FFCRA leave during the 2nd Quarter of 2020 taken by enrolled employees:
60 x $48 = **$2,880** in Qualifying Health Expenses

Determining the average daily premium by tier of coverage

Step One: Divide the total premiums paid by the number of covered employees in each tier of coverage.

Step Two: Divide the results for each tier of coverage by the expected average number of workdays for covered employees. The IRS indicates an employer may use 260 days for full-time employees. An employer may make a reasonable adjustment for part-time employees or use the full-time average daily premium for all employees.

Example 4: ABC Company has 100 covered employees under its medical plan with an expected total annual premium of $1,250,000. Assume only full-time employees are eligible for coverage or ABC Company elects to treat all covered employees as full-time and uses 260 expected workdays when calculating the average daily premium.

(Total Premium ÷ Covered Employees) ÷ 260 = Average Daily Premium

Tier of Coverage	Total Premium	Covered Employees	Average Daily Premium
Employee-only	$400,000	55	$27.97
Employee + Spouse	$100,000	7	$54.95
Employee + Child(ren)	$300,000	20	$57.69
Family	$450,000	18	$96.15

Step Three: The results from Step Two equals the average daily premium for a covered employee in that tier of coverage. The employer multiples this by the number of days of paid FFCRA leave.

Example 5: Using the average daily premiums calculated in Example 4, assume ABC Company has the following days of covered FFCRA leave taken by enrolled employees during the 2nd Quarter of 2020:

Employee-Only 10 x $28 = $280
Employee+ Spouse = $0
Employee + Child(ren) 20 x $58 = $1,160
Family 30 x $96 = $2,880
= **$4,320** in total Qualifying Health Expenses

An employer can use either approach for fully insured and/or self-insured coverage. For self-insured coverage, an employer may instead use any reasonable actuarial method to determine the average daily premium. Remember, the employer cannot claim any portion of the premium paid by the employees on an after-tax basis.

HCFSA/HRA

Step One: Determine the expected annual contribution for the HCFSA or HRA. This is an employee-specific amount meaning the average daily premium may vary among the covered employees.

Step Two: Divide this amount by the expected average number of workdays for the covered employee. The IRS indicates an employer may use 260 days for full-time employees. An employer may make a reasonable adjustment for part-time employees or use the full-time average daily premium for all employees.

Example 6: Assume the expected annual 2020 contribution for a full-time employee's HCFSA is $2,750. $2,750 ÷ 260 = **$10.58** average daily premium

FFCRA Litigation

The State of New York sued the DOL in United States District Court for the Southern District of New York (the "court") on behalf of its residents on April 14, 2020, claiming certain provisions of the DOL's regulations limiting access to paid leave benefits exceeded the DOL's authority under FFCRA. The court agreed with New York in its decision issued August 3, 2020. Please see our earlier Alert for a detailed discussion of the court's ruling. This section focuses on the actions taken since the court's ruling.

The DOL's Response

Although the court's decision was arguably limited to New York employees, the DOL took the position that the court's ruling applies nationwide.[45] It seems likely the DOL did this for administrative consistency. The DOL also took the position that the court's decision only applies beginning August 3, 2020, and is not retroactive to April 1, 2020.[46] This position does not appear to be consistent with the court's ruling.

The DOL issued revised temporary regulations with a September 16, 2020 effective date in reaction to the court's decision. The regulations oppose two of the court's rulings while partially conceding the remaining two. The DOL spent a lot of time justifying its position for the work availability and intermittent leave provisions, appearing to lay the groundwork for an appeal.

A summary of the position of the New York district court and the DOL, through its revised temporary regulations on the contested issues, is below:

- **Work Availability Requirement –** The district court struck down the DOL's requirement that employees must actually miss paid work time to satisfy a Qualifying Purpose for paid FFCRA leave.

  The DOL argued it operated within its discretionary authority to require employees to miss paid work time to satisfy a Qualifying Purpose and that both paid FFCRA leave and the concept of leaves of absence in general are understood to mean authorized absences from work. If there is no work, there is no need for leave. The DOL also argued that it would be an absurd result if a furloughed employee with a Qualifying Purpose receives a paycheck for paid FFCRA leave while other furloughed employees do not receive paychecks because they are not working. The DOL also noted paid FFCRA leave is not a substitute for, or intended to duplicate, the federal Payroll Protection Program or traditional unemployment benefits.

- **Employer Consent Required for Intermittent Leave –** The district court held that the DOL failed to justify why intermittent leave should require an employer's prior consent and struck the requirement down in its entirety.

[45] DOL FAQs on FFCRA, Q/A #102.
[46] DOL FAQs on FFCRA, Q/A #101.

The DOL argued it operated within its discretionary authority to require employer consent for intermittent leave and that this is consistent with the FMLA. The EFMLEA is itself a temporary expansion of the FMLA.

- **The Definition of Health Care Provider for Exclusion Purposes –** The district court rejected the inclusion of non-medical staff in the DOL's expanded definition of health care provider as inconsistent with FFCRA, limiting the exclusion to actual health care workers.

  The DOL appeared to concede this point, and the definition of health care provider in the revised temporary regulations excludes non-medical staff. The definition of health care provider includes employees whose roles are integrated with and necessary for patient care, including laboratory and diagnostic technicians, employees who transport patients or samples for laboratory work, and employees who bathe, dress, and/or feed patients. Examples of employees now excluded from the definition of health care provider include clerical and administrative employees, IT professionals, maintenance employees, and food service employees.

- **Notice and Substantiation Timing Requirements –** The district court held that the regulations' requirement that employees must generally apply for and substantiate a leave before it begins was inconsistent with FFCRA and not feasible in the event of a COVID-19-related health emergency.

  The DOL partially conceded this point. Under the revised temporary regulations, employers may only require substantiation as soon as practicable under the circumstances. However, the DOL believes this will generally be the same day as the leave request.

And Nothing Happened…
The DOL did not appeal the court's decision, and the State of New York has not challenged the DOL's interpretation that the court's decision is not effective before August 3, 2020, or the revised temporary regulations' work availability and intermittent leave rules.

It is possible New York viewed the DOL's revised regulations as enough of a victory to leave the matter alone. It is also possible that New York realized shifting New York residents to retroactive paid FFCRA leave might mean having to claw back unemployment or other benefits already paid to them and viewed this as too much of a hardship to pursue further. Retroactive paid FFCRA leave is also not an option if the employer no longer exists.

For now, the DOL's revised regulations stand. The State of New York may revisit the issue if a paid FFCRA leave extension occurs for 2021. We recommend employers consult with legal counsel for any questions related to the status of paid FFCRA leave as it applies to them.

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 guide addressing unemployment insurance, food assistance, safety protocols for health care providers and first responders, and other welfare-related matters.

States are Addressing COVID-19

State and Local Leave Laws

In addition to the FFCRA, some states, cities and counties implemented or updated their own leave laws to address COVID-19. In the case of California, the leave law applies to employers with more than 500 employees, emergency responders and health care workers who would otherwise not be subject to FFCRA.[47] The details of state and local COVID-19 leave laws are beyond the scope of this guide.

State Coverage Mandates

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. 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. We expect a number of states will adopt similar mandates for vaccination. These state mandates apply to fully insured coverage and self-insured, non-ERISA coverage[48] 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 situsd in another state. One or more states may exercise emergency powers to override any situs rules and apply COVID-19 mandates to policies covering residents that are situsd in other states, although this has not occurred. A detailed discussion of state mandates it beyond the scope of this guide.

Several major insurance carriers, including Aetna, Anthem, Cigna, United Healthcare, and Humana are 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 and CARES Act mandate coverage for COVID-19 diagnosis, testing, and vaccination 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.

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[47] California Assembly Bill No. 1867
[48] 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 diagnostic testing or vaccination, 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*). Fortunately, ERISA provides a very generous amount of time to communicate these SPD changes to participants.[49] Employers will generally 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 require communication for a mid-year plan design change materially affecting an SBC's contents at least 60 days *before* the effective date without regard to whether the change is an enhancement. It is possible that the additional COVID-19 benefits will not actually affect the corresponding SBC. For example, if an existing SBC states that preventive services are covered at 100% before meeting the deductible, coverage for COVID-19 diagnostic testing without cost sharing may already fit within that description.

Note: ACA grandfathered plans that add coverage for COVID-19 related benefits and services will not lose grandfathered status for later revoking these benefits and services after the emergency period expires.[50]

Please see *Agencies Provide Limited Relief* below for information about temporary relief available for participant communications.

[49] For enhancements or benign changes to a plan, this is up to 210 days from the end of the plan year in which the change(s) took place. This is roughly July 31st of the following year for a calendar year plan. By contrast, material reductions in eligibility or benefits (or the elimination of plan entirely) must generally be communicated within 60 days of the date the employer adopts the change. State law will determine timing requirements for non-ERISA plans.

[50] June 23, 2020 DOL, HHS, and IRS FAQs, Q/A #15.

Agencies Provide Limited Relief

In April, the IRS and DOL granted limited relief extending deadlines for Forms 5500, M-1, and 990 tax returns and payments that were due on or after April 1, 2020 through July 14, 2020 until **July 15, 2020**. Please see our Alert for more information about these extended filing deadlines.

The IRS and DOL granted additional relief by suspending various plan administration deadlines during the Outbreak Period. Most of this relief gives employees/participants more time to enroll when certain events occur, file claims for benefits or appeal denied claims, and elect and pay for COBRA. Group health plans must administer these employee/participant rights but get limited consolation in the form of COBRA election notice relief as well as limited relief from specific notice and disclosure timing requirements provided the material is communicated in good faith as soon as it is reasonably practical to do so. Please see our Alert for more information about this additional relief.

Note: Other agency guidance indicates plans are still required to notify participants "within a reasonable timeframe" in advance before eliminating coverage for COVID-19 benefits added during the national public health emergency.[51]

In May, the IRS also issued guidance giving employers additional flexibility to permit employees to make mid-year benefit election changes and access unused FSA funds for reimbursement during 2020. Please see our Alert for more information about this 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. IRS Notice 2020-29 expanded the exception for testing and treatment to include diagnostic testing for influenza A & B, norovirus and other coronaviruses, and respiratory syncytial virus (RSV). This guidance is effective until revoked by the IRS.

The relief includes testing and treatment received through telemedicine, although we understand it may be administratively difficult to identify telemedicine visits for COVID-19 care separately. The CARES Act exempts all telemedicine or other remote care[52] benefits from conflicting with HSAs for HDHP plan years beginning on or before December 31, 2021. This permits 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 during this relief period without jeopardizing the participant's ability to make or receive HSA contributions.

[51] June 23, 2020 DOL, HHS, and IRS FAQs, Q/A #13.
[52] It is 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 also 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. The CARES Act relief described above renders this moot through the 2021 HDHP plan year, but it remains a viable longer-term strategy to address potential HSA conflicts.

Other Telemedicine Relief

As temporary relief, the DOL, HHS, and IRS will not enforce the ACA's plan design mandates against a telemedicine program offered as a stand-alone benefit to employees who are not eligible for the employer's major medical coverage. This relief applies to a telemedicine plan year that begins before the end of the COVID-19 national public health emergency.[53] This relief only applies to "large employers" defined under the Public Health Services Act, which are employers who employed an average of 51 employees or more during the prior calendar year and have at least 2 employees on the first day of the telemedicine plan year.[54]

The agencies indicate that other ACA provisions and compliance laws applicable to group health plans will continue to apply.

Note: This reinforces our belief that employer-sponsored telemedicine programs are group health plans subject to compliance requirements that are difficult to satisfy when offered on a stand-alone basis.

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. This is not a qualifying life event permitting a mid-year election changes for a health care flexible spending account.

[53] June 23, 2020 DOL, HHS, and IRS FAQs, Q/A #14.
[54] PHSA Section 300gg-91(e)(2).

Mental Health Parity Guidance

As temporary relief, the DOL, HHS, and IRS indicate a group health plan does not need to include coverage for COVID-19 related benefits and services for the purposes of determining if the plan satisfies the parity requirements under the Mental Health Parity and Addiction Equity Act. HHS encourages states to adopt similar rules for fully insured plans. The agency guidance does not specify a beginning or end date for this temporary relief, but it presumably applies to plan years that fully or partially overlap with the COVID-19 national public health emergency.

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.[55] Adding coverage for COVID-19 *treatment* at no cost likely is a QLE. An employer has some discretion to determine whether a change is significant, 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

[55] 26 CFR Section 1.125-4(f)(3).

in coverage through another employer (such as a spouse's employer) or the public health insurance marketplace.[56] This QLE also occurs if the employee remains eligible for coverage but the employer reduces its employer contribution toward coverage to $0.[57]

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 significantly increased.[58] 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.[59]

Harmless Technicality? A loss or reduction of the employer's contribution toward coverage in connection with a reduction in hours (i.e. a furlough) is technically a COBRA qualifying event. An employer charging less than 102% of the cost of coverage for furloughed employees to remain on the plan and that will offer COBRA continuation coverage for up to the maximum period later should another COBRA qualifying event occur (e.g. termination or divorce) is treating the furloughed employees better than COBRA requires. Federal agencies have not historically punished employers for not providing COBRA notices to furloughed employees under similar circumstances.

- **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 in coverage permitting an employee to decrease an existing DCFSA election and/or stop future contributions.[60] This would also apply if a child is required to stay home and a parent or relative provides supervision.
  - 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. Existing IRS guidance does not permit employers to refund DCFSA contributions already made.

[56] 26 CFR Section 54.9801-6(a)(3)(i).
[57] 26 CFR Section 54.9801-6(a)(3)(ii). This variation would not be a COBRA qualifying event.
[58] Similar to the discussion under enrollment above, "significant" is a subjective standard. Please see 26 CFR Section 1.125-4(f)(2).
[59] 45 CFR Section 155.420(d)(6).
[60] 26 CFR Section 1.125-4(f)(3).

Late Potential Relief: A draft bill for H.R. 133, "The Consolidated Appropriations Act, 2021" (a federal spending bill) appeared on December 21, 2020 containing limited relief for DCFSAs. The proposed relief does not include refunds for unused amounts, but it does permit unlimited carryovers and additional grace period extensions. This relief was not law as of this Guide's publication date. We will address this relief in a separate alert if and when it becomes law.

- **"Amnesty QLE" –** IRS Notice 2020-29 gives employers additional flexibility to permit employees to make mid-year benefit election changes outside the normal QLE rules during 2020, and we refer to this flexibility as a new amnesty QLE. Employers are not required to administer amnesty QLEs. In general, election changes for amnesty QLEs must be prospective.[61] As a reprieve for employers who made impermissible exceptions to the normal QLE rules during 2020 and prior to May 12, 2020, the guidance permits plans to treat these impermissible exceptions as amnesty QLEs retroactively. Please see our separate Alert for more information.

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 guide.

Modify Flexible Spending Account (FSA) Forfeiture Rules

Most FSAs provide that any unused balance at the end of a specified run-out period following an employee's termination is forfeit under the use-it-or-lose-it rule unless the employee elects COBRA (which isn't available for a dependent care FSA). An employer could choose to modify its FSA forfeiture rules to delay forfeiture for employees terminated due to COVID-19 reasons. For example, an employer could delay forfeitures for affected employees until sometime after the end of the plan year on the same terms as employee participants who remain employed. Please also see *Agencies Provide Limited Relief* for information about the ability to allow additional time to access unused FSA funds for reimbursement during 2020.

Existing IRS guidance does not permit employers to refund FSA contributions already made.

Late Potential Relief: A draft bill for H.R. 133, "The Consolidated Appropriations Act, 2021" (a federal spending bill) appeared on December 21, 2020 containing limited relief for FSAs. The proposed relief does not include refunds for unused amounts, but it does permit unlimited carryovers and additional grace period extensions. This relief was not law as of this Guide's publication date. We will address this relief in a separate alert if and when it becomes law.

[61] If any amnesty QLE is adopted permitting employees to elect HCFSA coverage and/or increase an existing HCFSA election, IRS Notice 2020-33 permits the employer to allow the amnesty HCFSA elections to pay for expenses incurred retroactive to the start of a plan year beginning on or after January 1, 2020. The IRS informally confirmed this position in conversation.

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 or Vaccination

An employer should be able to pay for its employees (and any spouses and dependents) to receive COVID-19 testing or vaccination 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 service 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. Even if the program is an ERISA plan, agency guidance indicates that a program providing only COVID-19 diagnosis and testing can qualify as an excepted benefit avoiding many of the mandates applicable to group health plans.[62] It may be impractical or undesirable to perform testing or vaccination onsite in groups due to the potential for community spread of COVID-19. Please see *Mandatory COVID-19 Testing and Vaccination*.

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.

Guidance from the IRS and DOL suspended the deadlines to file claims for benefits and appeals of adverse benefit determinations during the COVID-19 crisis (defined in the guidance as the "Outbreak Period"). This also means a participant may still file a claim or appeal previously deemed denied during the Outbreak Period due to the participant's failure to timely file the claim or appeal. Please see our separate Alert for more information about this additional relief.

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[62] April 11, 2020 DOL, HHS, and IRS FAQs, Q/A #11.

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,[63] 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.[64] Lastly, employers can (and should) share COVID-19 health information with the Centers for Disease Control (CDC) and state/local health agencies.

Other Leave Administration Issues

This section addresses certain frequently asked labor and employment questions related to leave administration. Employers should contact their labor & employment counsel for these issues. We will not address circumstances permitting employers to terminate or take disciplinary action against employees in this guide.

Paid/Unpaid Leave

This section assumes the employee cannot work remotely from home. The paid/unpaid leave that may be available to one or more employees includes all of the following:

- **FFCRA –** Depending upon the timing of the leave and size of the employer, many COVID-19 related leaves should qualify for 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.

- **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

[63] These include the Americans with Disabilities Act and state laws.
[64] Although it may be overkill, treating all health information as if it is protected health information limits the possibility to make mistakes.

take leave due to the employee's own health condition. A participant will usually have to contract COVID-19 or another serious illness to qualify for disability unless the plan's definition of disability is amended to include a quarantine period without a diagnosis.

- **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 may not require the employee or family member actually contract 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 may be available. In general, employees receiving paid leave under the FFCRA are not eligible for unemployment benefits.[65] The FFCRA and the CARES Act include 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.[66] 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: The other forms of paid leave described in this section typically offset benefits when other paid leave is available, which may include FFCRA leave. Employees cannot generally qualify for FFCRA leave while receiving workers' compensation or disability benefits.[67]

Furloughs

The term "furlough" by itself does not automatically create certain legal rights for furloughed employees or bind an employer to specific legal obligations.[68] 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.

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[65] Please see the DOL's FAQs on FFCRA, Q/A #29.
[66] Remember, the temporary expansion adding paid leave to the FMLA does not apply to employers with 500 or more employees.
[67] DOL's FAQs on FFCRA, Q/A #76.
[68] 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.

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 an active employee 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.

- *COBRA Subsidies and the Public Health Insurance Marketplace:* Healthcare.gov indicates that an individual experiences a Marketplace special enrollment event if a former employer stops subsidizing COBRA coverage. This contradicts applicable HHS regulations, which indicate that the loss of a COBRA subsidy from a former employer is not a Marketplace special enrollment event. In its recent COVID-19 FAQs for Participants and Beneficiaries, the DOL indicated that the loss of a COBRA subsidy from a former employer is a Marketplace special enrollment event. Clients may wish to discuss this with legal counsel before offering COBRA subsidies, but it appears the federal agencies intend to disregard the HHS regulations and treat the loss of a COBRA subsidy as a Marketplace special enrollment event. Certain state-run health insurance marketplaces (e.g., New York) have offered enrollment opportunities during the COVID-19 crisis without requiring a special enrollment right. Other

state-run exchanges might also adopt this practice or relax their special enrollment rules to provide relief from this potential problem.

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.[69]

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.[70]

These payment approaches also apply if an individual's FFCRA leave benefits are 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 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, but please see *COBRA Subsidies and the Public Health Insurance Marketplace* for a discussion of special enrollment rights when a COBRA subsidy is lost. An employee who loses coverage for non-payment during an unpaid leave does not experience a special enrollment event. COBRA participants also have temporary relief for non-payment during the Outbreak Period. Please see *Agencies Provide Limited Relief* for more information.

Updating Leave Policies and Plan Eligibility Rules

If affected by FFCRA, an employer should communicate the availability of EPSL and EFMLEA to its employees. Employers should also update their leave policies to account for any other changes including

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[69] Please see the DOL's FAQs on FFCRA, Q/A #30.
[70] We believe pay-as-you-go and catch-up are the most common approaches.

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 unpaid leaves of absence can have implications for an employer under the ACA's employer mandate and its IRS Form 1094/1095 reporting requirements based on the ACA's rules for determining full-time (FT) employee status.

Employer Uses Monthly Measurement Method

Under the monthly measurement method, employees on unpaid leaves of absence – including an unpaid furlough – lose their ACA FT status for any month in which they do not have at least 130 hours of service. This means most furloughed employees will lose their FT status immediately and pose little risk of triggering employer mandate penalties if the employer does not offer affordable, minimum value coverage or even no coverage at all.

Employer Uses Look-Back Measurement Method

By contrast, employees on unpaid leaves of absence generally do not lose their ACA FT status immediately when an employer is using the look-back measurement method. Employees that are protected FT employees during a stability period do not lose that FT status while still employed, even when on an unpaid leave. A lesser-known fact is that other FTs do not generally lose their ACA FT status for at least three full calendar months after the month of their status change while still employed.[71]

Note: Depending upon the medical plan's eligibility rules, employees who are ACA FTs may remain eligible for active coverage if still employed during a leave of absence.

Potential Look-Back Measurement Effects on Large Employer and FT Status

A lengthy furlough or layoff period may cause some employers to average fewer than 50 FT equivalent employees during 2020. Assuming the employer is not part of a group of closely related employers, this means the employer is not an "applicable large employer" during 2021 for the purposes of the ACA's employer mandate.

An unpaid furlough or layoff may also mean some employees will not measure as FT for the coming year and may be ineligible for employer medical coverage (and likely other benefits) as a result. An employer could choose to modify its 2020 measurement practice due to COVID-19 and apply the FMLA look-back measurement or similar rules to the furlough or layoff period. For example, under the look-back measurement rules applicable to FMLA leave, an employer must choose one of the following approaches:

[71] Treasury Regulation Section 54.4980H-3(f)(2)(i).

1. The employer must calculate the average number of hours worked during the non-FMLA leave period and credit the employee with the same number of average hours during the FMLA leave period; or

2. The employer must drop the FMLA leave period out of the average hours worked calculation.

If an employer chooses to adopt this or a similar approach, we recommend applying it consistently across the entire workforce. An employer will also need insurance carrier approval before modifying its plan eligibility rules. This prior approval includes any stop-loss carrier for self-insured coverage.

Offers of Coverage

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. This 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 ACA FTEs obtain subsidized coverage in the public health insurance marketplace. Employers using the Form W-2 or rate of pay (salaried) affordability safe harbors may still face affordability issues when coverage remains offered at the active contribution rates for unpaid employees. The risk is 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 begin. Employers may wish to consider terminating employees furloughed for more than a month to six weeks if the offers of coverage are unaffordable to avoid potential employer mandate penalties.

New Hire Waiting Periods

The ACA limits waiting periods for eligible employees to 90 calendar days. Under HIPAA's nondiscrimination rules, health plans cannot use "actively at work" provisions for coverage to become effective when the absence is due to health reasons. If an employee is hired and placed on unpaid leave for health reasons (such as due to COVID-19) while still employed, the rules indicate the employee continues to satisfy the waiting period.

Rehires/Continuing Employees

Remember that employees who return to work after a break in service of less than 13 weeks – 26 weeks in the case of educational organizations – are continuing employees for ACA purposes and should not be treated as new hires.[72] Among other things, this means they should not be subjected to a new waiting period before medical coverage is effective.

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

[72] A shorter period of time might apply if an employer is using the ACA's "rule of parity" for break-in-service purposes.

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 our Coronavirus Resource Page.

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ATTACHMENT A

Sample Emergency Paid Sick Leave and Emergency Family and Medical Leave Request Form

Employee Name	
Title	**Employee ID Number**
Department	**Manager**
Regular Work Schedule	**Ability to Work Remotely**
☐ Full Time ☐ Part Time ☐ _____ _____	☐ Yes ☐ No
☐ Salaried ☐ Hourly ☐ _____ _____	**Note:** If you are actually able to work remotely, you are not eligible for this leave.

Requested Leave	
☐ Emergency Paid Sick Leave ☐ Emergency Family and Medical Leave (Public Health Emergency Leave)	
Requested Leave Date(s)	
From: _____ To: _____	**Total Hours Requested: _____**

Qualifying Reason for Leave Related to COVID-19

I CERTIFY THAT I AM UNABLE TO WORK DUE TO THE FOLLOWING QUALIFYING REASON:

☐ **I am subject to a federal, state, or local government or agency quarantine or isolation order**

☐ Copy of order attached, **or**

Name of governmental entity issuing order and brief description: _____

_____

_____

☐ **A health care provider has advised me to self-quarantine**

☐ Copy of health care provider's recommendation attached, **or**

Name of health care provider issuing recommendation: _____

☐ **I am experiencing COVID-19 symptoms and am seeking a medical diagnosis**

ATTACHMENT A

Sample Emergency Paid Sick Leave and Emergency Family and Medical Leave Request Form

☐ **I am caring for _____**

[insert name and relationship to employee]**, who:**

(1) is subject to a federal, state, or local government or agency quarantine or isolation order

☐ Copy of order attached, **or**

Name of governmental entity issuing order and brief description: _____

_____

_____

or

(2) has been advised by a health care provider to self-quarantine

☐ Copy of health care provider's recommendation attached, **or**

Name of health care provider issuing recommendation: _____

Note: An individual must be an immediate family member, regularly reside in your home, or be a roommate in order for you to qualify.

☐ **I am caring for my child(ren) due to a school or day care closure or the unavailability of a child care provider**

☐ Name and ages of affected child(ren): _____

_____

Name of school, day care, child care provider or summer camp: _____

_____

Special circumstances requiring me to care for a child older than 14 during daylight hours: _____

_____

Note: This is the only qualifying reason for Emergency Family and Medical Leave and is limited by the amount of Family and Medical Leave you have remaining.

☐ **I am experiencing a substantially similar condition designated by the U.S. Department of Health and Human Services as a basis for leave**

I certify that the above information is truthful and understand that misrepresenting my need for leave is grounds for discipline, up to and including termination.

_____ _____ _____, 2020

Employee Signature Date

ATTACHMENT A

Sample Emergency Paid Sick Leave and Emergency Family and Medical Leave Request Form

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FOR OFFICIAL USE ONLY

Requested Leave
☐ Approved ☐ Approved with modification (see below) ☐ Denied (see below)
Reason(s) for Approving Leave with Modification or Denial of Leave
_____ _____ _____

_____ _____ _____, 2020

By Date

_____

Title

ATTACHMENT A

Sample Emergency Paid Sick Leave and Emergency Family and Medical Return-to-Work Form

Employee Name	
Title	**Employee ID Number**
Department	**Manager**
Leave Date(s)	
Leave Begin Date: _____ Leave End Date: _____	

Returning from Leave Related to COVID-19
I WAS ON A LEAVE OF ABSENCE FOR THE FOLLOWING REASON:
☐ **I was diagnosed with and/or tested positive for COVID-19 or experienced COVID-19 symptoms and sought a medical diagnosis or treatment**
☐ **I was subject to a federal, state, or local government or agency quarantine or isolation order**
☐ **A health care provider advised me to self-quarantine**
☐ **I took care of an individual who was diagnosed with and/or tested positive for COVID-19, was subject to a federal, state, or local government or agency quarantine or isolation order, or who was advised to self-quarantine by a health care provider**
☐ **I cared for my child(ren) due to a school or day care closure or the unavailability of a child care provider**
☐ **Another approved reason for leave related to COVID-19**

ATTACHMENT A

Sample Emergency Paid Sick Leave and Emergency Family and Medical Return-to-Work Form

Employee Self-Certification

I CERTIFY THAT ON MY RETURN-TO-WORK DATE:

☐ **I have recovered from COVID-19 or other illness, do not have any symptoms, and have been cleared by my health care provider to return to work**

☐ **The federal, state, or local government or agency quarantine or isolation order I was subject to has ended, and I never had any COVID-19 or flu-like symptoms or have not had any symptoms for at least 14 continuous days**

☐ **I have completed 14 continuous days of quarantine or self-isolation and have not experienced any COVID-19 or flu-like symptoms**

☐ **My need to care for another individual has ended, and I never had any COVID-19 or flu-like symptoms or have not had any symptoms for at least 14 continuous days**

I certify that the above information is truthful and understand that misrepresenting my need for leave is grounds for discipline, up to and including termination.

_____ _____ _____, 2020

Employee Signature Date

FOR OFFICIAL USE ONLY

Return to Work

☐ Approved

☐ Approved with Accommodation (see below)

☐ Denied (see below)

Reason(s) for Approving Return with Accommodation or Denial

_____

_____

_____

_____ _____ _____, 2020

By Date

_____

Title