

## COVID-19 (Coronavirus) – Benefit-Related FAQ

Last Updated March 30, 2020

### Families First Coronavirus Response Act (FFCRA) – General Requirements

#### **Q. Which group health plans have to provide coverage for COVID-19 diagnostic testing with no cost-sharing?**

A. All group health plans, but not excepted benefits, are required to provide coverage for diagnostic testing related to COVID-19 at no cost to plan participants. This includes both fully-insured AND self-funded group health plans; and applies to group health plans offered by employers of any size (not just those with fewer than 500 employees).

In addition to the federal mandate to provide coverage for diagnostic testing, there are a few states that have mandated coverage for treatment beyond testing as well. Coverage beyond diagnostic testing will vary by state and by carrier.

NOTE: IRS guidance indicates that providing coverage with no cost-sharing for COVID-19 diagnostic testing or treatment prior to meeting the HDHP plan deductible will NOT cause an individual to be ineligible to contribute to an HSA: <https://www.irs.gov/pub/irs-drop/n-20-15.pdf>

#### **Q. What is the effective date of the new paid leave requirements and group health plan coverage requirements under The Families First Coronavirus Response Act?**

A. The new paid leave requirements go into effect on April 1, 2020 and will be in effect through December 31, 2020. There is no retroactive effect. Employees who are provided paid leave prior to April 1 will still be eligible for the full paid leave beginning April 1 if they are out on leave for a qualifying reason. In addition, employers may not qualify for the refundable tax credit for paid leave provided prior to April 1.

#### **Q. The new Paid Sick Leave and Expanded FMLA requirements apply to private employers with fewer than 500 employees and public entities of all sizes. How do we count employees for private employers?**

A. To determine the employee count, count all employees (full-time and part-time) in the U.S. **at the time leave is requested**. This means that an employer may need to repeat the count multiple times.

- It is necessary to count all common law employees, even those who may be considered seasonal, variable hour or temporary, but independent contractors are not counted.
- If two entities are found to be “joint employers” as defined under the Fair Labor Standards Act (FLSA), all of their common employees must be counted by each entity.
- If two or more entities are considered to be an “integrated employer” as defined under the Family and Medical Leave Act (FMLA), then employees of all entities making up the integrated employer may need to be counted.

See pg. 11 of the DOL's FMLA Guide for Employers for more details about how separate entities are required to be combined under the existing FMLA rules - <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>.

Employers with 500+ employees do NOT have to comply with the paid leave requirements under the FFCRA.

Employers with <50 employees may qualify for an exemption if the paid leave requirements would jeopardize the viability of the business as a going concern.

**Q. How do small employers (<50 employees) qualify for an exemption from the new Emergency Paid Sick Leave and Expanded FMLA requirements?**

A. An employer with less than 50 employees might qualify for an exemption if providing the Paid Sick Leave or Expanded FMLA would jeopardize the viability of the small business as a going concern. The exemption is only for paid leave for employees who request leave to care for a child due to COVID-19 related school or daycare closure. There is no exemption available for the Paid Sick Leave available for up to 2 weeks for other qualifying reasons (e.g. employee symptoms, quarantine or isolation; or an employee caring for another individual subject to quarantine or isolation). The employer must be able to claim one of the following in order to qualify for the exemption:

- The provision of Paid Sick Leave or Expanded FMLA would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting Paid Sick Leave or Expanded FMLA would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting Paid Sick Leave or Expanded FMLA, and these labor or services are needed for the small business to operate at a minimal capacity.

See more detail in Q&A #58 and 59 found here - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#52>.

**Q. Are employers who consider themselves to be health care providers exempt from the new Emergency Paid Sick Leave and Expanded FMLA requirements?**

A. Employers may choose not to provide the Emergency Paid Sick Leave or Expanded FMLA that might otherwise apply to those employees meeting the definition of a "health care provider" or "emergency responder." DOL guidance indicates a very broad application, allowing many employers considered to be operating in the medical field to avoid having to offer paid sick leave to most of their employees. See more detail in FAQ #56 – 57 found here – <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#52>.

The guidance says the term "**health care provider**" includes anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. It also includes any individual employed by an entity that contracts with a health care provider to provide services or to maintain the operation of the facilities. And finally, it includes any individual employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments.

The guidance says the term "**emergency responder**" includes an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19 (e.g. military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, and public works personnel).

**Q. For employers required to provide the new Emergency Paid Sick Leave or paid leave under Expanded FMLA, can employees take leave on an intermittent basis?**

A. The answer is generally “Yes”, at the employer’s discretion, although the DOL encourages employers to be flexible.

For Emergency Paid Sick Leave:

- If the employer is working on site, intermittent leave is permissible (at the employer’s discretion) solely if the employee is requesting leave to care for a child under age 18 due to Coronavirus-related school or daycare closure. For all other qualifying reasons, intermittent leave is not permitted and employees should remain on paid leave for up to 2 weeks or until the qualifying reason is gone (if sooner).
- If the employer permits working remotely (telework), intermittent leave is permissible (at the employer’s discretion) for any of the qualifying reasons.
- Employees may only qualify for up to 2 weeks of Emergency Paid Sick Leave total during 2020, even if the employee experiences multiple qualifying reasons.

For Expanded FMLA-protected leave (available for up to 12 weeks), intermittent leave is permissible (at the employer’s discretion) for any employee who requests leave to care for a child under age 18 due to COVID-19 related school or daycare closure. Keep in mind that this does not extend the total of 12 weeks of protected leave available to employees for any FMLA qualifying reason.

**Q. If we place employees on furlough or terminate employment, do such employees qualify for the new Emergency Paid Sick Leave or Expanded FMLA?**

A. It appears that in most cases such employees would NOT qualify for the new paid leave (Emergency Paid Sick Leave or Expanded FMLA). See Q&A 23-28 here - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

The DOL indicates the paid leave requirements do not apply for employees if there is a reduction in hours or closure of the worksite due to *“lack of business or because it was required to close pursuant to a Federal, State, or local directive.”*

**Q. Are there any documentation requirements for employees who request leave for qualifying reasons under Emergency Paid Sick Leave or Expanded FMLA?**

A. In order to be eligible for the refundable tax credits to offset the employer’s cost of providing such paid leave (and employer contributions toward health insurance premiums during such leave), employers should request documentation from employees and keep that in employer records. See further details in Q&A 15-16 here - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

**Q. Will time off related to COVID-19 be covered by short-term disability (STD) plans?**

A. If the employee is suffering from a medical condition related to COVID-19, an STD plan would pay benefits in the same manner as employee suffering from any other similar medical condition such as the flu. It is less likely that an STD plan would pay benefits to an employee who chooses to self-quarantine due to potential exposure to COVID-19 but is not experiencing any medical symptoms, but the particular benefits would be subject to the terms of the plan.

We need further clarification on how STD benefits coordinate with the Paid Sick Leave required under the FFCRA. It seems likely that employers would be required to pay employees at their regular rate for the first two weeks, during which time additional STD benefits/payments are unlikely to be available. Whether STD benefits run concurrently with the Paid Sick Leave or start following exhaustion of the Sick Paid Leave will likely depend upon the specific state or carrier policy. There is likely to be further clarification on this item as well as many other things in agency guidance over the next several weeks and months.

**Q. Does the Expanded FMLA provision extend already existing FMLA-protected leave from 12 to 24 weeks?**

A. No, the Expanded FMLA provided in the FFCRA does not extend FMLA coverage already available (generally 12 weeks). It adds an additional qualifying reason that FMLA may be available (i.e. away from work to care for a child due to school or daycare closure). For example, if an employee already used 5 weeks of FMLA in the current 12-month period for maternity leave and then requests leave to stay home with a child due to coronavirus-related school or daycare closure, the employee would have only 7 weeks of protected leave remaining as Expanded FMLA. The expanded FMLA also requires that the employee be paid for a portion of the FMLA leave. This extended FMLA is applicable to private employers with fewer than 500 employees and all public entities.

If an employee qualifies for FMLA due to a serious health condition or is caring for another family member with a serious health condition, the standard FMLA-protected leave would be available for up to 12 weeks (and is not required to be paid). However, the first two weeks may be paid under the paid sick leave provision of the new legislation, if applicable.

If an employee qualifies for FMLA due to being out to care for a child because of a school or daycare closure related to COVID-19, FMLA-protected leave is available for up to 12 weeks and must be paid leave after the first 10 days. In addition, the first two weeks must be paid under the paid sick leave provision of the new legislation.

**Section 125 Issues**

**Q. If we reduce an employee's pay due to economic conditions related to COVID-19, but their hours and work status do not change, can we allow them to make changes to their benefit elections?**

A. Assuming employee elections are made on a pre-tax basis through an employer's §125 (Cafeteria) plan, elections are generally irrevocable for the plan year unless the employee experiences a recognized event under the §125 election change rules. A reduction in pay without a change in employment status and corresponding change in benefit eligibility is not one of these recognized events, so technically the employer should typically not allow such a change in election. However, we believe that the COVID-19 crisis presents unique and unprecedented challenges to employers and employees. We would be very surprised if the IRS would choose to enforce this rule if an employer decided to make an exception and allow election changes during this difficult time.

**Q. Can employees make mid-year changes to Dependent Care Account Plan (DCAP) elections if daycare needs change related to the Coronavirus?**

- A. Generally, the permitted election change events that apply to DCAPs fall into the following broad categories:
- Change in status. Various changes in status may justify a midyear DCAP election change when the change in status affects eligibility of dependent care expenses for the Code §129 tax exclusion.
  - Change in cost and coverage. Certain changes in cost and coverage of the DCAP will justify a midyear change in election.
  - FMLA. Employees who take FMLA leave are entitled to revoke elections of non-health benefits (such as a DCAP) under a cafeteria plan to the same extent as employees taking non-FMLA leave. And certain reinstatement rules apply on return from FMLA leave.

The rules also allow for a change in DCAP elections mid-year on account of a change in childcare providers and/or a change in the cost of care. The flexibility for DCAP changes mid-plan year is best illustrated by the examples found in §1.125-4(f)(6).

Even if the rules do not clearly allow a mid-year election change for some employees requesting a change, we would be very surprised if the IRS would choose to enforce the irrevocability rule if an employer decided to make an exception and allow election changes during this difficult time.

## Other Coverage Issues

**Q. We have heard that HHS has relaxed enforcement efforts against providers who use telehealth services during the COVID-19 public health emergency. How does the relaxing of telehealth regulations impact employers?**

A. The Office for Civil Rights (OCR) has recently announced that, effective immediately, it will exercise its enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers in connection with the good faith provision of telehealth using such non-public facing audio or video communication products during the COVID-19 nationwide public health emergency. OCR released an FAQ related to this decision, which can be found here: <https://www.hhs.gov/sites/default/files/telehealth-faqs-508.pdf>.

In light of this announcement, CMS also issued an FAQ (<https://www.cms.gov/files/document/faqs-telehealth-covid-19.pdf>), in which it encourages all issuers to promote the use of telehealth services – e.g., by notifying policyholders and beneficiaries of their availability and by “ensuring access to a robust suite of telehealth services, including mental health and substance user disorder services, and by covering telehealth services without cost-sharing or other medical management requirements.” As part of this effort, CMS encourages states to support this expansion – e.g., by considering whether they can relax state licensing laws to enable more in-state and out-of-state providers to offer telehealth services during this period of public health emergency.

In the FAQ, CMS indicated that it will not take enforcement action against fully-insured individual and group issuers for amending plan benefits during the plan year to: 1) provide or expand coverage for telehealth services; and 2) to reduce or eliminate cost-sharing for such services. This enforcement discretion applies even if the specific telehealth services covered by the change are not related to COVID-19. Furthermore, issuers would not be expected to further amend their plans at the end of the period during which a public health emergency or national emergency declaration is in effect to undo any changes made under this policy. (Note that CMS recognizes that it is not able to exercise enforcement discretion with respect to midyear changes for self-insured employer-sponsored group health plans and that its guidance will not affect provisions enforced by the DOL against such plans.)

Finally, CMS indicates that it will not take enforcement action during this public health emergency or any national emergency against issuers who amend their catastrophic plans to provide pre-deductible coverage for telehealth services, even if the specific telehealth services covered by the amendment are not related to COVID-19. It encourages states to take a similar enforcement stance.

## HIPAA Issues

**Q. What if we get information about individuals receiving treatment for COVID-19 from the group health plan, what do we need to do to comply with HIPAA privacy and security requirements?**

A. If the information comes from the employer’s health plan records (e.g., on a claims report), then it is PHI and it is subject to protections under HIPAA. Employers, as plan sponsors, may only use or disclose this information for purposes of plan administration or as otherwise permitted or required by law. Sharing such information with other employees would not be permitted. However, the employer could potentially use or disclose PHI for certain public health activities. For example:

- An employer could disclose PHI to a state public health agency as needed to report all prior and prospective cases of participants exposed to, or suspected or confirmed to have, COVID-19.
- An employer could also disclose PHI if it believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public. Note that this exception only permits a disclosure to a person (or persons) who are reasonably able to prevent or lessen the threat (e.g., a public health department). This allowance defers to the covered entity’s “professional judgment.”

- In addition, HIPAA permits disclosures of PHI to persons at risk of contracting or spreading a disease as necessary to prevent or control the spread of the disease or otherwise carry out public health investigations **if otherwise authorized by applicable law**. So in this case, the employer would need to have some independent legal authority to make this type of disclosure.

Employers should seek the advice of legal counsel before relying on these exceptions for using/disclosing PHI, especially since certain state laws may impose more stringent privacy/confidentiality requirements on employee's medical information than HIPAA does.

### **Furloughs, Layoffs, and Leaves of Absence**

**Q. If an employer has to reduce hours or put employees on a temporary leave of absence due to economic conditions or a lack of work related to COVID-19, are the employees still eligible for benefits? What if employment is terminated?**

A. For employees who are furloughed, but still employed, the answer depends upon the plan eligibility rules and whether there are any leave of absence policies which extend benefit eligibility. If the employees no longer meet plan eligibility requirements or qualify for a leave of absence which extends benefit eligibility, coverage may need to be terminated and COBRA offered unless the employer coordinates a benefit extension with the carrier or stop-loss vendor.

For employees who are laid off (employment is terminated), even if it is expected to be temporary, the former employees will no longer meet the plan eligibility requirements, and therefore coverage may need to be terminated and COBRA offered. As mentioned above for a furlough, the employer could extend benefit eligibility temporarily beyond employment if the carrier or stop-loss vendor is willing to cooperate.

These items are discussed in more detail in our issue brief found here - [https://benefitcomply.com/wp-content/uploads/2020/03/COVID19SickLeaveFurloughsLayoffs\\_Mar2020.docx](https://benefitcomply.com/wp-content/uploads/2020/03/COVID19SickLeaveFurloughsLayoffs_Mar2020.docx).

NOTE: The DOL has advised that employers who have furlough or lay-off employees will generally not have to offer such employees Emergency Paid Sick Leave or Expanded FMLA as provided under the new legislation. The DOL indicates this is true whether the furlough/lay-off is due to lack of business or because it was required to close pursuant to a Federal, State, or local directive. See Q&As 23-28 here - <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

**Q. Can employers subsidize COBRA premiums for those who lose coverage due to a furlough or lay-off related to COVID-19?**

Yes, but the safest approach is to subsidize coverage in the same fashion for all similarly situated individuals, especially if the plan is self-funded and subject to §105(h) nondiscrimination rules, which generally restrict the extent to which employers can favor highly compensated individuals on a tax-favored basis.

If the employer plans to subsidize COBRA premiums only temporarily (e.g. 2-3 months), that should be clearly communicated to employees in case the situation continues beyond that time frame. Also keep in mind that termination of employer contributions toward COBRA coverage may not trigger a special enrollment right for other group health plan coverage or individual coverage through a public Exchange (although public Exchanges have become more flexible on this).

**Q: For an applicable large employer who uses the look-back measurement method to determine full-time status, will a break in service due to furlough or temporary lay-off impact full-time status for the next plan year?**

A. §4980H rules do not require any hours of service to be counted when the employee is not being paid unless there is a break in service due to FMLA, USERRA or jury duty. In other words, if the time is unpaid, the break in service could negatively impact full-time status (i.e. it would reduce total number of hours over the measurement

period) unless we get additional guidance over the next couple months requiring employers to impute hours or exclude these breaks in service from the measurement period during the public health emergency we're currently experiencing.

**Q. If the employer extends group health plan benefit eligibility during a furlough or lay-off related to Coronavirus, how will that impact the employees' ability to qualify for unemployment benefits?**

A. While many states will still consider an individual eligible for unemployment benefits even if the employer continues to make group health plan coverage available, it is not safe to assume that this is the case in all 50 states as each state has its own requirements. See here for a consolidated list of UI-related information published on the National Association of State Workforce Agencies Website: <https://www.naswa.org/resources/coronavirus>

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