

# A Coronavirus Update for Employers

## Trying to Remain Calm in Troubled Times

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

**Rudyard Kipling, “If” –**

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

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## Families First Coronavirus Response Act

The President signed the [Families First Coronavirus Response Act](#) (FFCRA) into law on March 18, 2020. The FFCRA includes the following provisions related to health and welfare benefits:

### Mandate to Cover COVID-19 Testing

All fully insured and self-insured group health plans,<sup>1</sup> as well as 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, telehealth visit, urgent care center visit, or emergency room visit.<sup>2</sup> This mandate does not require plans to cover the actual treatment of COVID-19 without cost sharing, but please see [States are Addressing Coverage for COVID-19](#) later in this article for information about state mandates.

The FFCRA indicates this provision includes telemedicine visits, but we do not interpret this to mean that employers must offer telemedicine coverage to employees. Plans are not required to cover other care or services received during a visit that are unrelated to COVID-19 at 100% without cost sharing. What happens when an individual goes to seek medical care for COVID-19 and it turns out it was just the common cold? Please see [Potential Increase in Appeals](#) later in this article.

### Emergency Paid Sick Leave

EMERGENCY PAID SICK LEAVE	
Item	Guidance
Effective Date	<p>On or before April 2, 2020, as specified in regulatory guidance to be issued by the U.S. Department of Labor (DOL) by that date</p> <p>Expires on December 31, 2020, unless extended</p> <p>Presumably, emergency paid sick leave beginning before December 31, 2020 may continue until completed</p>

<sup>1</sup> This includes grandfathered plans under the Affordable Care Act (ACA).

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

EMERGENCY PAID SICK LEAVE	
Item	Guidance
<b>Purpose</b>	<p>Requires covered employers to provide “emergency paid sick leave” if the employee is unable to work (including remotely) and needs leave because:</p> <ol style="list-style-type: none"> <li>(1) The employee is subject to a federal, state, or local government or agency quarantine or isolation order</li> <li>(2) A health care provider has advised the employee to quarantine</li> <li>(3) The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis</li> <li>(4) The employee is caring for an individual subject to (1) or (2)</li> <li>(5) The employee is caring for a son or daughter due to a school or day care provider closure or the unavailability of a child care provider</li> <li>(6) The employee is experiencing any other substantially similar condition specified in regulations issued by the U.S. Department of Health &amp; Human Services (HHS)</li> </ol> <p>In all instances, the sick time <u>must</u> be due to COVID-19.</p> <div style="border: 1px solid black; padding: 5px;"> <p><b>Note:</b> Purpose (6) was a late addition intended to give HHS the discretion to expand emergency paid sick leave eligibility, and we will have to wait for regulations for more information. An employee at increased risk due to age or an underlying health condition can already qualify for paid sick leave under (2) with a health care provider’s recommendation.</p> </div>
<b>Covered Employers</b>	<p>Private employers with fewer than 500 employees and federal, state, and local governmental employers<sup>3</sup> of any size</p> <div style="border: 1px solid black; padding: 5px;"> <p><b>Note:</b> The FFCRA does not specify how or when to determine if an employer has &lt;500 employees or if the calculation is on an EIN-by-EIN or controlled group basis. The DOL will address this in later guidance.</p> </div>

<sup>3</sup> We interpret an Indian Tribal Government to qualify as a covered governmental employer.

EMERGENCY PAID SICK LEAVE	
Item	Guidance
<b>Benefit</b>	<p>Covered employers must provide full-time employees with 80 hours of paid sick leave and part-time employees with paid sick leave equal to their average number of hours worked in a two-week period<sup>4</sup></p> <p>Emergency paid sick leave must be paid at a rate at least equal to the greater of: (i) the employee's regular rate of pay; (ii) the <a href="#">applicable minimum wage rate under the Fair Labor Standards Act</a>; or (iii) the applicable state/local minimum wage rate where the employee is employed</p> <p>The maximum benefit is \$511/day (up to a maximum total benefit of \$5,110) for the employee's own quarantine, diagnosis, or illness and up to \$200/day (up to a maximum total benefit of \$2,000) if the paid leave is to care for another</p>
<b>Eligibility</b>	<p>All employees are eligible, even if employed for only one day</p> <p>Employers cannot require employees to meet any service time or other eligibility requirements prior to taking emergency paid sick leave</p> <div style="border: 1px solid black; padding: 5px;"> <p><b>Note:</b> An employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of Emergency Paid Sick Leave</p> </div>
<b>Employer Notice</b>	<p>The DOL will provide a model notice by March 25, 2020 which must be conspicuously displayed at worksite locations (similar to the display requirements for other legal notices)</p>
<b>Employee Notice</b>	<p>An employer may require an employee to provide reasonable notice of the need for continuing emergency paid sick leave after the first paid sick day</p> <p>The FFCRA does not address substantiation requirements</p> <p>An employer could require a note from a health care provider or notice of a school or day care closure, but please note that the Centers for Disease Control <a href="#">has requested employers not require a doctor's note</a> to validate an absence or for return-to-work purposes due to the demands on health care providers' time</p>

<sup>4</sup> 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.

EMERGENCY PAID SICK LEAVE	
Item	Guidance
Other Notes	<p>Unused emergency paid sick leave does not carry over to the next year</p> <p>Employers cannot require employees to use other paid leave <u>before</u> using emergency paid sick leave</p> <div style="border: 1px solid black; padding: 5px;"> <p><b>Note:</b> Prior versions of the FFCRA stated that employers were required to provide emergency paid sick leave in addition to other existing sick leave or paid time off (PTO) and could not reduce existing sick leave or PTO to offset or account for emergency paid sick leave. This language was removed from the final law.</p> <p>This appears intended to allow an employer that already implemented a paid leave policy to address COVID-19 concerns to modify its policy to comply with the emergency paid sick leave requirements. It may also mean an employer can treat emergency paid sick leave as running concurrently with other PTO, since this would not be <u>before</u> using emergency paid sick leave. In that instance, we believe an employer would still be required to provide up to the maximum amount of required emergency paid sick leave time even if other sick leave or PTO is exhausted. We expect the DOL will address this.</p> </div>
Employer Reimbursement	<p>Reimbursable to employers in the form of a refundable payroll tax credit for 100% of covered paid leave</p> <p>Remember, this is up to \$511/day (up to a maximum of \$5,110 per employee) for the employee's own quarantine, diagnosis, or illness and up to \$200/day (up to a maximum of \$2,000 per employee) if the paid leave is to assist another person</p>

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

PUBLIC HEALTH EMERGENCY LEAVE	
Item	Guidance
Effective Date	<p>On or before April 2, 2020, as specified in regulatory guidance to be issued by the U.S. Department of Labor (DOL) by that date.</p> <p>The Public Health Emergency Leave provision is currently set to expire on December 31, 2020</p> <p>Presumably, public health emergency leave beginning before December 31, 2020 may continue until completed</p>

PUBLIC HEALTH EMERGENCY LEAVE	
Item	Guidance
<b>Purpose</b>	<p>Temporarily expands the FMLA to include “public health emergency leave” when an employee is unable to work because the employee must care for a son or daughter under age 18 due a school or day care provider closure or the unavailability of a child care provider<sup>5</sup></p> <p>The closure or unavailability <u>must</u> be due to COVID-19</p> <div style="border: 1px solid black; padding: 5px;"> <p><b>Note:</b> An employee who is able to work remotely while caring for a son or daughter is not eligible for public health emergency leave.</p> </div>
<b>Covered Employers</b>	<p>Employers with fewer than 500 employees<sup>6</sup></p> <div style="border: 1px solid black; padding: 5px;"> <p><b>Note:</b> This includes employers who are not traditionally subject to the FMLA due to their small size. The FMLA already applies to federal, state, and local government employers<sup>7</sup> of any size, and the FFCRA does not restate this.</p> </div> <p>The DOL has the authority to exclude certain health care providers and first responders from this expansion out of necessity</p> <p>Employers with fewer than 50 employees may apply to the DOL for hardship relief if this expansion will put the employer at risk of going out of business</p>
<b>Benefit</b>	<p>12 weeks of leave – After a 10-day elimination period, the remaining public health emergency leave is paid leave<sup>8</sup></p> <p>Covered employers must pay employees at least two-thirds of their regular rate of pay for the remainder of their FMLA leave period based on the employee’s regular work schedule<sup>9</sup></p> <p>For employees with variable work schedules, the average number of hours worked is determined using a 6-month lookback period from the date the leave began or a reasonable expectation of average hours worked for new hires</p> <p>The maximum benefit is \$200/day per employee (up to a maximum total benefit of \$10,000 per employee)</p>

<sup>5</sup> This is a significant reduction in leave availability from prior versions of the FFCRA, which had loosely matched the purposes for emergency paid sick leave. Congress did not include a provision allowing federal agencies to expand this.

<sup>6</sup> Similar to emergency paid sick leave, the FFCRA does not address how or when to determine if an employer has <500 employees or if the calculation is on an EIN-by-EIN or controlled group basis. The DOL will address this in later guidance.

<sup>7</sup> The DOL interprets an Indian Tribal Government to qualify as a covered governmental employer under the FMLA.

<sup>8</sup> It is no coincidence that emergency paid sick leave provides approximately two weeks of paid sick time.

<sup>9</sup> Special rules apply for employees covered under multi-employer collective bargaining agreements. An employer may satisfy its paid public health emergency leave requirement by contributing toward a union program that provides the paid sick time.

PUBLIC HEALTH EMERGENCY LEAVE	
Item	Guidance
<b>Eligibility</b>	<p>Employees who have worked for at least 30 days with no minimum number of service hours<sup>10</sup></p> <p>Eligibility is determined without regard to whether the covered employer has 50 employees within a 75-mile radius</p>
<b>Employer Notice</b>	<p>The FFCRA does not specify an employer notice requirement</p> <p>We expect the DOL will issue a revised FMLA model notice that includes public health emergency leave</p>
<b>Employee Notice</b>	<p>Standard FMLA notice rules apply</p> <p>If public health emergency leave is foreseeable, an employee should provide notice of the need for leave as soon as it is practical to do so</p> <p>The FFCRA does not address substantiation requirements</p> <p>An employer could require a notice of a school or day care closure</p>
<b>Other Notes</b>	<p>This is job-protected leave under the FMLA</p> <p>As with other FMLA leave, employees may use accrued paid leave or emergency paid sick leave during the unpaid leave period</p>
<b>Employer Reimbursement</b>	<p>Reimbursable to employers in the form of a refundable payroll tax credit for 100% of covered paid leave</p> <p>Remember, this is up to \$200/day per employee (up to a maximum of \$10,000 per employee)</p>

### Other FFCRA Notes

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

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

<sup>10</sup> This differs from the FMLA's usual 12 months/1,250 hours of service eligibility requirement.

## States are Addressing Coverage for COVID-19

**Note:** The FFCRA makes the state mandates for COVID-19 diagnosis and testing without cost sharing moot. 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. As of this article's publication date, [Alaska](#), [California](#), [Georgia](#), [Maryland](#), [Massachusetts](#), [New York](#), [Oregon](#), [Texas](#), [Vermont](#), and [Washington](#) all require or have requested insurance carriers cover testing at no cost to participants with Massachusetts also requiring coverage for COVID-19 treatment received in medical facilities without cost sharing. These state mandates apply to fully insured coverage and self-insured, non-ERISA coverage<sup>11</sup> issued in the respective states. Situs rules may apply depending upon the state, and employers should check with their insurance carriers to determine if these mandates will apply to a policy situated in another state. We anticipate one or more states may exercise emergency powers to override any situs rules and apply COVID-19 mandates to policies covering residents that are situated in other states.

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

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

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

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

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

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<sup>11</sup> This includes state and local governmental plans and church plans.



## Plan Design Amendments and Communication

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

Under ERISA, plan administrators have up to 210 days from the end of the plan year in which the change(s) took place to issue a summary of material modification or updated summary plan description.<sup>12</sup> Employers will want to communicate enhanced COVID-19 benefits and/or expanded eligibility much faster than this for practical reasons.

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

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

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

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

## High Deductible Health Plans

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

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

An employer could choose to address this by providing additional employer HSA contributions equal to the cost of a limited number of telemedicine visits. These contributions would count against the employee's

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<sup>12</sup> This is roughly July 31<sup>st</sup> of the following year for a calendar year plan and often enables plan administrators to simply wait to issue the updated summary plan description for the next plan year rather than issuing a separate summary of material modification. It is also common for employers to use a portion of the open enrollment materials as a summary of material modification to communicate changes for the next plan year.

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 IRS might revisit its relief to provide some sort of specific exception for telemedicine given the recommendations federal and state agencies are making to encourage the use of telemedicine.<sup>13</sup>

## Other Coverage Options for Employees

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

### 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

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

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

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<sup>13</sup> We wonder if telemedicine services will be able to support a surge in demand without service delays or interruption.

contributions. This would also apply if a child is required to stay home and is supervised by a parent or relative.

- Increase election – If day care needs increase (and are available) due to school closure, an employee could start contributing to a DCFSA or increase an existing election.

The maximum annual DCFSA reimbursement is \$5,000, which barely makes a dent in the childcare needs for most employees. It may be premature to be concerned about potential DCFSA forfeitures due to temporary closings of day care providers, schools, and related activities, but we do understand employees feeling comfortable with the additional money in their paychecks right now.<sup>14</sup>

### Expanded Eligibility for Medical Coverage

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

### Individual Coverage HRAs (ICHRAs)

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

### Onsite/Near-site COVID-19 Testing

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

### Taxable Cash

Financial resources permitting, an employer can always provide some sort of bonus to help employees pay for the cost of COVID-19 testing and/or services. This should be provided with no strings attached,

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<sup>14</sup> The situation may differ if the employer maintains a non-calendar year DCFSA and it is nearly the end of the plan year, or if an employee only elected DCFSA coverage to cover a specific event (e.g. camp) that is cancelled.

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 coverage for COVID-19 testing and treatment without cost sharing, it seems reasonable to expect an increase in appeals for denied benefits as a result. A participant might go to a health care provider due to COVID-19 concerns but end up diagnosed and treated for something else the medical plan does not cover at 100%. Participants may claim they would not have gone to the doctor but for COVID-19.

## Data Privacy Concerns

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

Other laws containing data privacy requirements may apply,<sup>15</sup> and we support employers treating this information as "protected health information" with similar restrictions for those who may access it and how and when it may be disclosed.<sup>16</sup> Lastly, employers can (and should) share COVID-19 health information with the Centers for Disease Control (CDC) and state/local health agencies.

## Certain Labor & Employment Issues

We will address certain frequently asked labor & employment questions related to COVID-19 testing and leave administration. Employers should contact their labor & employment counsel for these issues.

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

## Mandatory COVID-19 Testing

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

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<sup>15</sup> These include the Americans with Disabilities Act and state laws.

<sup>16</sup> Although it may be overkill, treating all health information as if it is protected health information limits the possibility to make mistakes.

**Note:** On March 18, 2020, the [Equal Employment Opportunity Commission \(EEOC\)](#) granted [limited testing relief under the Americans with Disabilities Act](#) permitting employers to measure the temperatures of their employees. The EEOC cautioned employers that an employee may still have COVID-19 even if the employee's temperature is in the normal range. This limited relief applies solely to temperature readings and does not apply to other forms of testing. Employees who display symptoms (such as a high temperature) or who refuse to have their temperature taken can be sent home.

## Paid/Unpaid Leave

This section assumes the employee cannot work remotely from home.

- **FFCRA** – Depending upon the timing of the leave and size of the employer, many COVID-19 related leaves should qualify for [emergency paid sick leave](#) or [public health emergency leave](#) under the FFCRA. Remember that these leaves do not actually require the employee (or immediate family member) to contract COVID-19 to apply.
- **Workers' Compensation** – Workers' compensation covers work-related illnesses and injuries. If an employee contracts COVID-19 during business travel or the employer is a health care provider and the employee contracts COVID-19 in the workplace through patient care or conducting research, the illness is likely a workers' compensation claim. It is less clear if the community spread of COVID-19 in a non-health care workplace will qualify for workers' compensation benefits. In any event, an individual will actually have to contract COVID-19 for workers' compensation to apply.
- **PTO Benefits** – Many employers provide employees with discretionary paid time off, sick, or vacation time. PTO can be used during the elimination period for one of the other forms of paid leave described in this section or to supplement an employee's other paid leave if the employer's leave policy permits it.
- **Employer-Provided Disability Plans** – These disability plans usually require an employee to satisfy a short elimination period before benefits begin and are generally only available for the employee to take leave due to the employee's own health condition. Most disability plans require participants to qualify for disability. This means actually having COVID-19, and a quarantine without a diagnosis does not qualify without amending the definition of disability.
- **State Disability/Paid Leave** – Where applicable, these may permit the employee to take leave due to his or her own health condition or to take care of an immediate family member. These leaves also may not require the employee or family member actually have COVID-19 to apply, and certain states have expanded their definition of qualifying disability to include quarantine.
- **Additional Paid Leave** – An employer will need to decide if it will modify its leave policy to provide paid leave to employees who must take a COVID-19 related leave that does not fit into one of the categories above and will be unpaid leave. This is especially true if the employer is requiring the employee to remain home. This will obviously depend upon each employer's particular circumstances and may be a difficult decision.

- **Unemployment Insurance** – A number of states are modifying their unemployment laws to allow for pay due to lost hours or layoffs due to COVID-19. For companies that do not have or cannot afford to have their own extended pay benefits, unemployment insurance is available. The [FFCRA](#) includes additional federal unemployment assistance for states hit hard by layoffs.
- **Unpaid Leave** – This includes the FMLA, which is both job-protected leave and gives employees the right to continue health benefits while on leave.<sup>17</sup> 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 FFCRA does not currently provide for an offset if one or more other forms of paid leave is available. The other forms of paid leave described in this section do typically offset when other paid leave is available, which should include FFCRA leave.

## Furloughs

The term “furlough” by itself does not automatically create certain legal rights for furloughed employees or bind an employer to specific legal obligations.<sup>18</sup> A furlough simply implies that an employer believes the layoff is temporary and expects to be able to return the employees to work. In other words, a furlough is really just another name for a type of leave, and an employer has a lot of flexibility to define how it works.

Furlough design considerations include:

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

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

<sup>18</sup> Collectively bargained agreements sometimes do define furloughs and create contractual rights and obligations.

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.

## **Paying for Benefits**

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

The FMLA provides for 3 payment options, but payment must be consistent with 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.<sup>19</sup>

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

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

## **Updating Leave Policies and Plan Eligibility Rules**

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

## **The Affordable Care Act and the Employer Mandate**

Placing employees on extended leaves of absence can have implications for an employer under the ACA's employer mandate and its reporting on IRS Forms 1094/1095. An offer of coverage, even COBRA coverage, to an individual who remains employed while on leave still qualifies as an offer of coverage for the purposes of avoiding [the Section 4980H\(a\) "no offer" penalty](#). The offer of coverage may not be affordable, particularly if the employee must pay for the full cost, potentially exposing an employer to the

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<sup>19</sup> We believe pay-as-you-go and catch-up are the most common approaches.

Section 4980H(b) “inadequate offer” penalty should one or more full-time employees obtain subsidized coverage in the public health insurance marketplace. The risk is likely low for relatively short leaves of absence of a month or less due to the time it takes to enroll in the marketplace and for coverage to actually begin. Further discussion is beyond the scope of this article.

## The WARN Act

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

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. 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 strongly encourage employers discuss the implications of the WARN Act with their labor & employment counsel.



## Additional Resources

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

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