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Informational Bulletin

Families First Coronavirus Response Act

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Families First Coronavirus Response Act Impact on Employee Benefits

SUMMARY:

The Families First Coronavirus Response Act (the "Act") was passed by Congress and has been signed by the President. It includes significant provisions that apply to private employers with fewer than 500 employees and public employers of any size.

The Act:

- Requires most health plans, including employer sponsored plans, to cover costs related to COVID-19 testing.
- Requires these employers to provide up to 80 hours of paid sick leave for certain employees who are affected by the COVID-19 virus.
- Expands FMLA protections, providing new partial paid leave to their employees who cannot work because they must stay home to care for children during school and daycare closures.

Employers required to comply with the expanded leave and benefits will be eligible for a tax credit to help cover costs related to these requirements.

The Families First Coronavirus Response Act (the “Act”) was passed by Congress and has been signed by the President. The Act requires most health plans, including employer sponsored plans, to cover costs related to COVID-19 testing. In addition, it includes significant provisions that apply to private employers with fewer than 500 employees and public employers of any size. The Act requires these employers to provide up to 80 hours of paid sick leave for certain employees who are affected by the COVID-19 virus. It also expands FMLA protections, providing new partial paid leave to their employees who cannot work because they must stay home to care for children during school and daycare closures. Employers required to comply with the expanded leave and benefits will be eligible for a tax credit to help cover costs related to these requirements.

COVID-19 Diagnostic Testing – Coverage with No Cost-Sharing

The Short Story

Most group health plans (both fully-insured and self-funded), government-sponsored coverage, and individual health plans must cover costs associated with COVID-19 diagnostic testing with no cost-sharing.

The Details
The regulations indicate that such testing must be available without "any cost sharing (including deductibles, copayments, and coinsurance) requirements or prior authorization or other medical management requirements." This includes related costs when an individual visits a medical provider's office, urgent care, or emergency care, or uses telemedicine for the diagnostic testing. However, any actual treatment following a positive diagnosis is not required to be covered and therefore will vary from plan to plan.

Prior to passage of the Act, there were a handful of states that mandated coverage for testing, and in some cases for treatment as well. Those mandates remain in effect, but now most health plans across the country are required to at least provide coverage for diagnostic testing at no cost to individuals. Unless agencies issue guidance indicating otherwise, it appears these requirements do not apply to excepted benefits, short-term health plans, retiree-only plans, or healthcare sharing ministries.

Keep in mind that under IRS guidance provided recently in Notice 2020-15, the coverage of COVID-19 related to testing or treatment prior to meeting an HDHP's plan deductible will not interfere with an individual's eligibility to contribute to a health savings account (HSA).

Although the Act does not include any specific employee benefit plan notification requirements, employers may wonder whether this change constitutes a material change to the content of the Summary of Benefits and Coverage (SBC) requiring a notice of modification. Obviously, employers and carriers cannot meet the 60-day advance notice requirement. Irrespective of any notification requirements, employers are encouraged to communicate to plan participants that this coverage is available without cost-sharing.

Effective Date: Not later than 15 days after the date of enactment and continuing until the Secretary of the Department of Health and Human Services (HHS) determines that the public health emergency has expired.

Expansion of FMLA – The "Emergency Family and Medical Leave Expansion Act"

The Short Story
Private employers with fewer than 500 employees and public employers of any size, must allow employees to take up to 12 weeks of job-protected leave for certain qualifying reasons beyond what is currently permitted under the Family Medical Leave Act (FMLA), including the need to stay home to care for a child due to a "public health emergency" that would include the closure of schools or daycare facilities. Affected employers are eligible for a refundable payroll tax credit to cover the costs of the extended paid leave and related employer health insurance costs.

The Details
Employers Subject to the Rule
These requirements apply to private employers with fewer than 500 employees and public employers of any size. Further guidance is needed clarifying exactly how the number of employees is counted; but for now we assume the same rules that apply under FMLA apply for this purpose. An employer of an employee who is a healthcare provider or an emergency responder is not required to provide this expanded protected leave to such employee.

Typically, the FMLA does not apply to private employers with fewer than 50 employees (although it does apply to all public entities such as schools and government entities regardless of size). However, these special FMLA protections will generally apply even to small private employers with fewer than 50 employees. The Act allows the Secretary of Labor to provide an exemption for small employers (those not normally subject to FMLA, if the expansion of protected leave "would jeopardize the viability of the business as a going concern." That being said, in the absence of such agency guidance providing that exemption, all public employers and private employers with fewer than 500 employees, including those with fewer than 50 employees, must assume they should provide protected leave (including pay and ongoing group health plan coverage) for certain employees through the end of 2020.

Employees Eligible for FMLA Protected Leave

Protected leave must be provided to an employee if:

- The employee has been employed for at least 30 calendar days (rather than the 12 months and 1,250 hours typically required under FMLA); and
- If "the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school [meaning a primary or secondary school only] or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency." For this purpose, a "public health emergency" is defined as "an emergency with respect to COVID-19 declared by a Federal, State, or local authority."

The expanded protected leave is not related to whether an employee or a family member is required to isolate or quarantine, or is actually infected with COVID-19. This expanded protected leave, including the pay requirements set forth below, are available only to employees who are unable to work because they need to care for a child who is home from school or daycare due to such facilities being shut down during this current public health emergency.

For employees who qualify, the first 10 days of leave may be unpaid, although employees could substitute any accrued vacation, personal, or sick leave (including sick leave as provided under the Act). The remainder of the protected leave (up to 12 weeks) must be paid at no less than 2/3 of the employee's regular rate of pay based on the number of hours the employee is normally scheduled to work, but no more than $200 per day, or $10,000 in the aggregate. This is different from standard FMLA-protected leave for other qualifying reasons, which does not require the employer to provide paid leave.

Note that employees not eligible for the expanded leave protections might also qualify for FMLA-protected leave when a COVID-19–related illness qualifies as a "serious health condition" under existing FMLA rules.

Health Insurance Requirements During an FMLA Leave

Unchanged is the requirement to continue offering group health plan benefits under the same terms as if the employee was actively at work, including the same employer and employee contributions for as long as the employee is eligible for FMLA-protected leave. Those employees who are covered under group health plans prior to requesting leave and who meet the requirements to qualify for this expanded protected leave would therefore also have the opportunity to continue group health plan benefits at the same cost for the duration

of their protected leave. Non-group health plan benefits would not have to be available to such employees during leave.

Employers must generally reinstate employees after their FMLA leave period ends, but there is an exception for small employers (those with fewer than 25 employees) required to offer this extended leave who are experiencing significant economic hardship.

Effective Date: Not later than 15 days after the date of enactment through the end of 2020.

Paid Sick Leave – The "Emergency Paid Sick Leave Act"

The Short Story
Private employers with fewer than 500 employees and public employers of any size must provide paid sick leave for all full-time and part-time employees for a number of COVID-19–related reasons. Affected employers are eligible for a refundable payroll tax credit to cover the costs of the paid leave and related employer health insurance costs.

The Details
Paid Leave Requirements
Private employers with fewer than 500 employees and public employers of any size must provide paid sick leave for all full-time and part-time employees who meet one of the following qualifying reasons:

- The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for an individual who: (i) is subject to a federal, state, or local quarantine or isolation order related to COVID-19; or (ii) has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
- The employee is caring for a son or daughter where the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
- The employee is experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

Employees are eligible regardless of how long they have been employed by an employer, and an employer may not require an employee to use other paid leave provided by the employer before using the new emergency paid sick leave.

Employees who qualify for this paid sick leave should be paid as follows:

- Full-time employees – 80 hours (2 weeks).
- Part-time employees – Equal to the number of hours generally worked in a 2-week period.

If the employee is sick or subject to quarantine, sick pay is calculated based on the employee's regular rate of pay or, if higher, the applicable minimum wage, up to $511 per day and $5,110 in the aggregate. If the employee is absent to care for a family member or child, sick pay is based on 2/3 of the regular rate of pay up to $200 per day and $2,000 in the aggregate.

An employer of an employee who is a healthcare provider or an emergency responder is not required to provide the paid sick leave to such employee.

Effective Date: Not later than 15 days after the date of enactment through the end of 2020.

Notice Requirement

A model notice will be provided by the Department of Labor within 7 days; it will describe the various provisions of the Act. Employers are required to post this notice on its premises (or where notices are customarily posted).

Employer Tax Credits

Tax credits will be provided to employers subject to these expanded FMLA and paid sick leave requirements to offset the cost. The employer refundable tax credits may be applied against the employer portion of Social Security taxes equal to the "qualifying" paid leave wages, and the amount of related employer's contributions toward group health costs. The IRS is expected to release guidance on the calculation method and process for employers to collect the credit.

Summary

This issue brief focuses on employee benefit–related issues. However, in addition to addressing the items described above, the Act also provides for food assistance focusing on children of families who are not able to get food through their school during this public health emergency, some additional unemployment insurance assistance, and increased Medicaid funding, among other things.

Private employers with 500 or more employees are not impacted by the requirements in this Act, other than for an employer sponsored plan to cover costs associated with COVID-19 diagnostic testing with no cost-sharing. The employer tax credits in the Act are designed to help employers with the costs associated with the expanded requirements contained in the Act, so these credits are not available to larger employers.

These requirements will be implemented through sub-regulatory guidance such as agency FAQs, memos, and announcements. We expect to receive additional guidance from the agencies within the next 15 days.

This legislative brief has been issued in partnership with Benefit Comply. For more information, please email us at info@kapnick.com or call at 888.263.4656.