

# 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 certain provisions related to health and welfare benefits and leave programs described in more detail below. 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.

### Mandate to Cover COVID-19 Testing

Effective March 18, 2020, all fully insured and self-insured group health plans<sup>1</sup> 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.<sup>2</sup> This 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.<sup>3</sup> The CARES Act redefined covered diagnostic testing to include:

- All testing approved by the Food & Drug Administration (FDA),
- 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,
- State-approved testing when the state has notified the U.S. Department of Health & Human Services (HHS) of its intent to use the test, and
- Other tests approved by HHS.

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. 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 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 article for information about state mandates.

### FFCRA Leave

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

- Emergency paid sick leave (EPSL); and
- Public health emergency leave under the Emergency Family and Medical Leave Expansion Act (referred to as the “EFMLEA” or “EFMLEA leave” in this article).

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<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.

<sup>3</sup> [DOL, HHS, and IRS FAQs, Q/A #6](#) and [CARES Act Section 3203](#).

EPSL AND EFMLEA	
Item	Guidance
<b>Effective Date</b>	Both are effective <b>April 1, 2020 through December 31, 2020</b> , unless extended If a leave that began before April 1 <sup>st</sup> otherwise qualifies, only the period of the leave occurring on or after April 1 <sup>st</sup> is covered
<b>Covered Employers</b>	<p>Private employers with fewer than 500 employees and state and local governmental employers<sup>4</sup> 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 <a href="#">Determining Employer Size</a> for more information</p> <div style="border: 1px solid black; padding: 5px;"> <p><b>Small Employer Exemption:</b> Employers with fewer than 50 employees may claim an exemption from EPSL and/or EFMLEA for <a href="#">Qualifying Purpose</a> (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:</p> <ol style="list-style-type: none"> <li>(1) Providing the leave will result in expenses exceeding revenues and cause the employer to cease effective operation;</li> <li>(2) The absence of certain key employees requesting leave places the employer in significant financial or operational jeopardy; or</li> <li>(3) There are not sufficient available workers to replace employees requesting the leave for the employer to continue effective operation.</li> </ol> <p>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).<sup>5</sup> This hardship exemption is not available for any other EPSL/EFMLEA Qualifying Purpose.</p> </div>

<sup>4</sup> 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.

<sup>5</sup> [DOL FAQs on FFCRA, Q/A #4](#) and [Temporary Department of Labor Regulation 29 CFR Section 826.40\(b\)\(2\)](#).

## EPSL AND EFMLEA

Item	Guidance														
<p><b>Qualifying Purpose</b></p> <p>Covered employers are required to provide EPSL and/or EFMLEA if the employee is unable to work for certain Qualifying Purposes (the leave <u>must</u> be due to COVID-19 to qualify)</p> <div data-bbox="142 586 428 964" style="border: 1px solid black; padding: 5px;"> <p><b>Working Remotely:</b> An employee who is actually able to work remotely despite the Qualifying Purpose is not eligible for EPSL or EFMLEA.</p> <p>Employees unable to work remotely due to a Qualifying Purpose are eligible.<sup>6</sup></p> </div>	<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 50%; text-align: center;">EPSL</th> <th style="width: 50%; text-align: center;">EFMLEA</th> </tr> </thead> <tbody> <tr> <td>(1) The employee is subject to a federal, state, or local government or agency quarantine or isolation order</td> <td style="background-color: #cccccc;"></td> </tr> <tr> <td>(2) A health care provider has specifically advised the employee to self-quarantine</td> <td style="background-color: #cccccc;"></td> </tr> <tr> <td>(3) The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis</td> <td style="background-color: #cccccc;"></td> </tr> <tr> <td>(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)</td> <td style="background-color: #cccccc;"></td> </tr> <tr> <td colspan="2">(5) The employee is caring for a son or daughter<sup>7</sup> 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               <ul style="list-style-type: none"> <li>a. Justification is required for children older than 14 during daylight hours</li> <li>b. A school providing online instruction is still "closed" for this purpose</li> <li>c. A child care provider can include an unpaid family member or friend</li> </ul> </td> </tr> <tr> <td>(6) The employee is experiencing any other substantially similar condition specified in regulations issued by HHS</td> <td style="background-color: #cccccc;"></td> </tr> </tbody> </table> <div data-bbox="451 1062 1852 1159" style="border: 1px solid black; padding: 5px;"> <p><b>Shelter in Place Orders:</b> If an employer has work for an employee to perform if the employee were able to report to work, a shelter in place order satisfies Qualifying Purpose (1). If there is no work to perform, the shelter in place order does not qualify, because the employee would not be working anyway.<sup>8</sup></p> </div>	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 <sup>7</sup> 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 <ul style="list-style-type: none"> <li>a. Justification is required for children older than 14 during daylight hours</li> <li>b. A school providing online instruction is still "closed" for this purpose</li> <li>c. A child care provider can include an unpaid family member or friend</li> </ul>		(6) The employee is experiencing any other substantially similar condition specified in regulations issued by HHS	
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<sup>6</sup> [DOL FAQs on FFCRA, Q/A #18 and 19](#)

<sup>7</sup> "Son or daughter" includes an employee's natural, adopted, step, or foster child, a child who is the legal ward of the employee (including under legal guardianship), a child for whom the employee acts as the parent (known as in *loco parentis*), and an adult child age 18 or older if incapable of self-care. Please also see [DOL FAQs on FFCRA, Q/A #40](#).

<sup>8</sup> [DOL FAQs on FFCRA, Q/A #23 – 27, 60, and 87](#) and [IRS FAQs on FFCRA, Q/A #44](#). Unemployment benefits may be available.

EPSL AND EFMLEA		
Item	Guidance	
Eligibility	EPSL	EFMLEA
	<p>All employees are eligible</p> <p>Employers cannot require employees to meet any service time or other eligibility requirements prior to taking EPSL</p>	<p>Employees who have been employed for at least 30 days at the time leave is requested with no minimum number of service hours<sup>9</sup></p> <p>Eligibility is determined without regard to whether the Covered Employer has 50 employees within a 75-mile radius</p>
<p><b>Note:</b> 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.</p>	<p><b>Health Care Providers and Emergency Responders:</b> 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. The term “health care provider” is not limited to the medical professionals themselves and includes 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.<sup>10</sup> The exclusion for emergency responders is similarly broad.</p>	
	<p>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</p> <p>An employee who contracts COVID-19 may qualify for workers’ compensation or disability (please see <a href="#">Certain Labor &amp; Employment Issues</a>)</p>	

<sup>9</sup> 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](#).

<sup>10</sup> [DOL FAQs on FFCRA, Q/A #56 and 67](#) and [Temporary Department of Labor Regulation 29 CFR Section 826.25\(c\)](#).

EPSL AND EFMLEA		
Item	Guidance	
Required Benefits	EPSL	EFMLEA
	<p>Covered employers must provide full-time employees<sup>11</sup> 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<sup>12</sup></p> <p>EPSL 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 per employee) for <a href="#">Qualifying Purposes</a> (1) – (3)</p> <p>If EPSL is taken for <a href="#">Qualifying Purposes</a> (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)</p>	<p>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 <a href="#">Other Notes</a>)</p> <p><b>Note:</b> EFMLEA leave <u>does not</u> 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.<sup>13</sup></p> <p>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</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>
<p><b>Payroll Taxes:</b> An employer must pay its share of Medicare tax for Required Benefits but not its share of Social Security taxes.</p>	<p>Combined, EPSL and EFMLEA can provide up to \$12,000 in paid leave for <a href="#">Qualifying Purpose</a> (5)</p> <p>An employer should withhold taxes and may withhold benefit deductions from paid FFCRA leave<sup>14</sup></p>	

<sup>11</sup> "Full-time employee" means an employee who works at least 40 hours per week and not the ACA's 30+ rule. [DOL FAQs on FFCRA, Q/A #48](#).

<sup>12</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. [DOL FAQs on FFCRA, Q/A #35 and 36](#)

<sup>13</sup> [DOL FAQs on FFCRA, Q/A #44 and 45](#).

<sup>14</sup> [IRS FAQs on FFCRA, Q/A #54 – 55](#).

EPSL AND EFMLEA	
Item	Guidance
Intermittent Leave	<p>An employer may permit employees working remotely to take intermittent leave for any <a href="#">Qualifying Purpose</a> if the employee is unable to work their normal schedule due to the Qualifying Purpose</p> <p>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<sup>15</sup></p> <div style="border: 1px solid black; padding: 5px;"> <p><b>Remember:</b> 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 effectively limits an employer's ability to provide EPSL or EFMLEA on an intermittent basis to salaried employees. The DOL may address this in later guidance.</p> </div>
Employer Notice	<p>The DOL released a <a href="#">model notice</a> which must be conspicuously displayed at worksite locations similar to the display requirements for other legal notices<sup>16</sup> (there is no requirement to provide the notice in another language)</p> <p>Employers may also satisfy the delivery requirement by mail, email, or posting the notice on its website</p>

<sup>15</sup> [DOL FAQs on FFCRA, Q/A #20 – 22.](#)

<sup>16</sup> This model notice addresses both FFCRA leaves. A separate notice applies to federal employees.

EPSL AND EFMLEA		
Item	Guidance	
Employee Notice and Substantiation	EPSL	EFMLEA
	An employer may require employees to provide reasonable notice of the need for continuing EPSL after the first paid sick day	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
<b>Example:</b> Please see <a href="#">Attachment A</a> for sample leave request forms.	<p>The DOL and Internal Revenue Service (IRS) indicate the following information will substantiate leaves for the purposes of qualifying for leave and reimbursement credits:</p> <ol style="list-style-type: none"> <li>(1) The employee's name;</li> <li>(2) The date or dates for requested leave;</li> <li>(3) The <a href="#">Qualifying Purpose</a> for the leave and a written statement supporting it (this includes the name of the school or day care closing and the name of any affected child); and</li> <li>(4) A statement that the employee is unable to work (including remotely) due to the Qualifying Purpose.<sup>17</sup></li> </ol> <p>The DOL and IRS do not require a doctor's note, which is consistent with the Centers for Disease Control's <a href="#">request that employers not require a doctor's note</a> to validate an absence or for return-to-work purposes</p>	
Employer Reimbursement	<p><a href="#">Covered Employers</a> are eligible for reimbursement for the following:</p> <ol style="list-style-type: none"> <li>(1) 100% of <a href="#">Required Benefits</a>;</li> <li>(2) The employer's share of Medicare taxes for the Required Benefits; and</li> <li>(3) The employer's <a href="#">Qualifying Health Plan Expenses</a> described later in this article.<sup>18</sup></li> </ol> <p>A Covered Employer should retain records substantiating the claimed reimbursements, but it does not file them<sup>19</sup></p> <p><b>Note:</b> Reimbursement is limited to Covered Employers for Required Benefits. Although state and local governmental employers are required to provide FFCRA leave, they are currently ineligible for reimbursement.<sup>20</sup></p>	

<sup>17</sup> [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](#).

<sup>18</sup> [IRS FAQs on FFCRA, Q/A #6 – 10 and 31 – 36](#). Credits are available for FFCRA leave that is earned but not paid until after December 31, 2020 ([IRS FAQs on FFCRA, Q/A #48](#)).

<sup>19</sup> [IRS FAQs on FFCRA, Q/A #45 and 46](#).

<sup>20</sup> [DOL FAQs on FFCRA, Q/A #52 and 53](#), [FFCRA Section 7001\(e\)\(4\)](#), and [preamble to IRS FAQs on FFCRA](#). [IRS FAQs on FFCRA, Q/A #16](#) erroneously states that only employers with <500 employees are required to provide FFCRA leave. This contradicts FFCRA and all other guidance indicating that all state and local governmental employers must provide FFCRA leave without regard to their size.

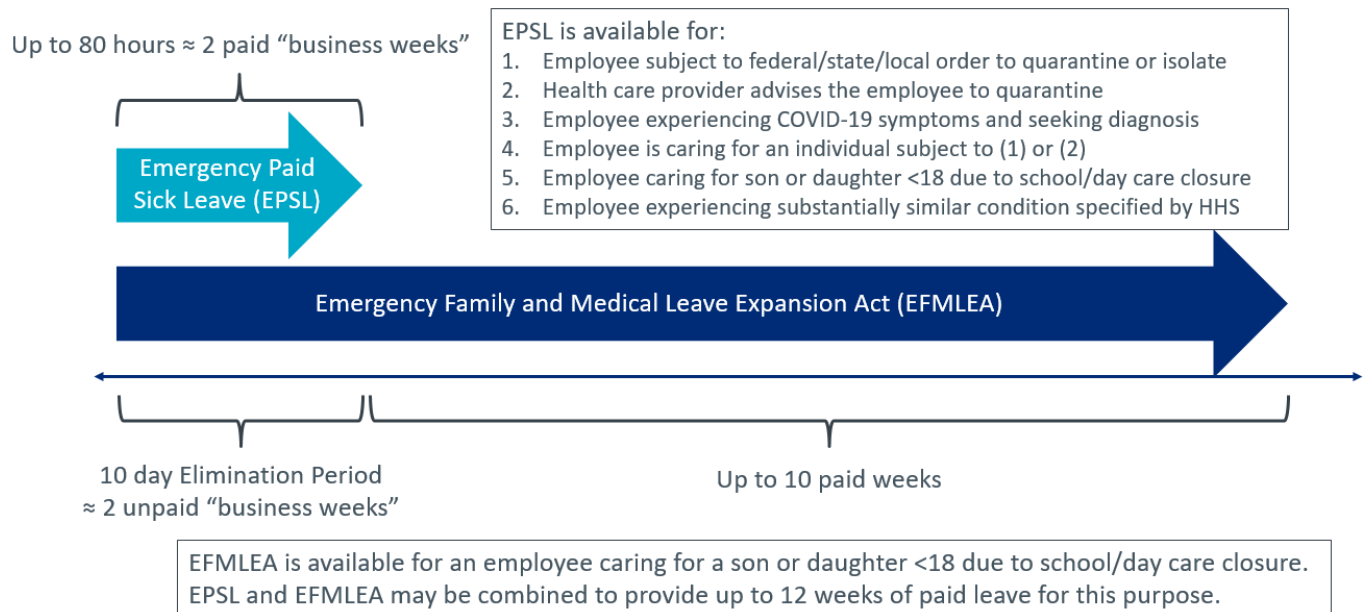


EPSL AND EFMLEA		
Item	Guidance	
Reimbursement Methods	<p>A <a href="#">Covered Employer</a> may use the following reimbursement methods:</p> <ol style="list-style-type: none"> <li>(1) Claim an offset by reducing its federal employment tax deposits reported on quarterly IRS Form 941;</li> <li>(2) Request an advance refund of credits using new <a href="#">IRS Form 7200</a>; and</li> <li>(3) True up and claim any remaining credits on quarterly IRS Form 941 (or pay any excess credits received).<sup>21</sup></li> </ol> <p>IRS guidance indicates an employer should use these methods in order, so (1) should be used to the fullest extent possible before (2), etc.</p>	
Other Notes	EPSL	EFMLEA
	<p>Employers cannot require employees to use other paid leave <u>before</u> using EPSL</p> <p>Employers may permit employees to use other paid leave in addition to EPSL to supplement their leave benefits</p>	<p>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</p> <p>Paid EFMLEA – Employers can require or may permit employees to use other paid leave to supplement their paid EFMLEA leave benefits</p>
	<p>The DOL indicates EPSL and EFMLEA are both job-protected leaves and employees must be permitted to continue their health coverage while on leave<sup>22</sup></p> <p>Unused leave does not carry over to a later year if EPSL or EFMLEA are extended beyond December 31, 2020</p> <p>An employee's EPSL/EFMLEA leave counts toward satisfying a waiting period under a health plan</p> <p>An employee who does not qualify for EPSL/EFMLEA may still qualify for FMLA or another form of leave (please see <a href="#">Paid/Unpaid Leave</a>)</p>	

<sup>21</sup> [IRS FAQs on FFCRA, Q/A #37 -- 43.](#)

<sup>22</sup> [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,<sup>23</sup> temporary and staffing agency employees<sup>24</sup> (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. This means some employees are covered 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:

1. Common management between the employers – Do the employers share common leadership and/or a significant overlap in human resource functions?

<sup>23</sup> This can include partners, LLC members, and other owners who perform employee functions for the employer.

<sup>24</sup> The staffing agency and client employer may be “joint employers” for these employees.

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.<sup>25</sup> 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 agency employees is the only entity that can provide the paid FFCRA leave and claim reimbursement for it.

### 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

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<sup>25</sup> [DOL FAQs on FFCRA, Q/A #74.](#)

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 the 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 for 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.

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 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.

$(\text{Total Premium} \div \text{Covered Employees}) \div 260 = \text{Average Daily Premium}$

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.

$(\text{Total Premium} \div \text{Covered Employees}) \div 260 \text{ for FTEs} = \text{Average Daily Premium}$

$(\text{Total Premium} \div \text{Covered Employees}) \div 174 \text{ for PTEs} = \text{Average Daily Premium}$

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 multiplies 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 2<sup>nd</sup> Quarter of 2020:

$60 \times \$48 = \mathbf{\$2,880}$  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.

$(\text{Total Premium} \div \text{Covered Employees}) \div 260 = \text{Average Daily Premium}$

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 multiplies 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 for during the 2<sup>nd</sup> 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
	= <b>\$4,320</b> 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 contribution for a full-time employee's HCFSA is \$2,750.  
 $\$2,750 \div 260 = \mathbf{\$10.58}$  average daily premium

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

## States are Addressing Coverage for COVID-19

**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. These state mandates apply to fully insured coverage and self-insured, non-ERISA coverage<sup>26</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. 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 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 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

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<sup>26</sup> This includes state and local governmental plans and church plans.



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.

### Plan Design Amendments and Communication

Summary plan descriptions (SPDs) and related plan materials will need updating 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 SPD changes to participants.<sup>27</sup> 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 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. 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.

**Agency Relief:** The DOL, HHS, and IRS have indicated that they will not take enforcement action for failures to meet notification requirements for expansions to eligibility or improved benefits coverage related to COVID-19, but explicitly stated that they will enforce the notification requirements for eliminations or reductions to eligibility or benefits.<sup>28</sup>

## 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.

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<sup>27</sup> 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 31<sup>st</sup> 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.

<sup>28</sup> [DOL, HHS, and IRS FAQs, Q/A #9](#).



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. The CARES Act addressed this potential conflict by exempting all telemedicine or other remote care<sup>29</sup> benefits from conflicting with HSAs for HDHP plan years beginning on or before December 31, 2021.

**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 1<sup>st</sup> 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.

## 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.

## 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

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<sup>29</sup> It is not clear what "other remote care" includes yet.

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.<sup>30</sup> Adding coverage for COVID-19 *treatment* at no cost likely is a QLE. An employer has some discretion to determine what a significant change is, 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 in coverage through another employer (such as a spouse's employer) or the public health insurance marketplace.<sup>31</sup> This QLE also occurs if the employee remains eligible for coverage but the employer reduces its employer contribution toward coverage to \$0.<sup>32</sup>

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.<sup>33</sup> 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.<sup>34</sup>

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<sup>30</sup> [26 CFR Section 1.125-4\(f\)\(3\)](#).

<sup>31</sup> [26 CFR Section 54.9801-6\(a\)\(3\)\(i\)](#).

<sup>32</sup> [26 CFR Section 54.9801-6\(a\)\(3\)\(ii\)](#). This variation would not be a COBRA qualifying event.

<sup>33</sup> Similar to the discussion under enrollment above, "significant" is a subjective standard. Please see [26 CFR Section 1.125-4\(f\)\(2\)](#).

<sup>34</sup> [45 CFR Section 155.420\(d\)\(6\)](#).

**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 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 of coverage permitting an employee to decrease an existing DCFSA election and/or stop future contributions.<sup>35</sup> 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. 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>36</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.

### 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 forfeited 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.

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<sup>35</sup> [26 CFR Section 1.125-4\(f\)\(3\)](#).

<sup>36</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.

### 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. Even if the program is considered 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.<sup>37</sup> 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. Please see [Mandatory COVID-19 Testing](#).

### 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.

### 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>38</sup> and this information should be

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<sup>37</sup> [DOL, HHS, and IRS FAQs, Q/A #11.](#)

<sup>38</sup> These include the Americans with Disabilities Act and state laws.

treated like “protected health information” with similar restrictions for those who may access it and how and when it may be disclosed.<sup>39</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. We will not address circumstances permitting employers to terminate or take disciplinary action against employees in this article.

### Mandatory COVID-19 Testing

Many employers 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 can require testing before employees enter the workplace, and send home employees who test positive or who decline to test. 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).<sup>40</sup>

### Return to Work

For ADA purposes, employers may 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 employee workspaces, 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 article.

### 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 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.

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<sup>39</sup> Although it may be overkill, treating all health information as if it is protected health information limits the possibility to make mistakes.

<sup>40</sup> [EEOC FAQs on ADA, Q/A #3 and 6](#), also referenced by the DOL in its [COVID-19 FAQs for the FMLA](#).

- **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. In general, employees receiving paid leave under the FFCRA are not eligible for unemployment benefits.<sup>41</sup> 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.<sup>42</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 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.<sup>43</sup>

## 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>44</sup> A furlough simply implies that an employer believes the

<sup>41</sup> Please see the [DOL’s FAQs on FFCRA, Q/A #29](#).

<sup>42</sup> Remember, the temporary expansion adding paid leave to the FMLA does not apply to employers with 500 or more employees.

<sup>43</sup> [DOL’s FAQs on FFCRA, Q/A #76](#).

<sup>44</sup> 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.



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. 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 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 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 special enrollment event for the marketplace if [a former employer stops subsidizing COBRA coverage](#). This contradicts applicable regulations, which indicate that the loss of a COBRA subsidy from a former employer is not a marketplace special enrollment event.<sup>45</sup> The regulations indicate that a COBRA participant cannot enroll in the marketplace until the earlier to occur of: (i) the next marketplace open enrollment period; (ii) the date COBRA coverage is exhausted; or (iii) the date that individual experiences a marketplace special enrollment event (e.g., marriage, gaining subsidy eligibility, etc.). It is unclear if HHS means to relax the marketplace special enrollment rules. Employers may wish to consult legal counsel before offering subsidized COBRA coverage to

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<sup>45</sup> [45 CFR Section 155.420\(e\)](#) citing [26 CFR Section 54.9801-6\(a\)\(3\)](#).

employees who may not return to work, as this might leave them without the ability to enroll in the marketplace when the COBRA subsidy ends. 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.<sup>46</sup>

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:

- Pay-as-you-go while on leave;
- Catch-up, recouping contributions upon return from leave; and
- Pre-payment before the leave begins.<sup>47</sup>

These payment approaches also apply if an individual's FFCRA leave benefits 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 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. Similarly, an employee may lose coverage for non-payment during an unpaid leave, and this is not a special enrollment event either.

### **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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<sup>46</sup> Please see the [DOL's FAQs on FFCRA, Q/A #30](#).

<sup>47</sup> 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 employee (FTE) status.

### Employer Uses Monthly Measurement Method

Under the monthly measurement method, employees on unpaid leaves of absence – including an unpaid furlough – lose their ACA FTE status for any month in which they do not have at least 130 hours of service. This means most furloughed employees will lose their FTE 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 FTE status immediately when an employer is using the look-back measurement method. Employees that are protected FTEs during a stability period do not lose that FTE status while still employed, even when on an unpaid leave. A lesser-known fact is that other FTEs do not generally lose their ACA FTE status for at least three full calendar months after the month of their status change while still employed.<sup>48</sup>

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

### 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.

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<sup>48</sup> [Treasury Regulation Section 54.4980H-3\(f\)\(2\)\(i\)](#).

## 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. If an employee is hired and furloughed or placed on other unpaid leave 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.<sup>49</sup> 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 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

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<sup>49</sup> A shorter period of time might apply if an employer is using the ACA's "rule of parity" for break-in-service purposes.

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 [Addressing the Coronavirus Outbreak](#).

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## About the Authors



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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
<input type="checkbox"/> Full Time <input type="checkbox"/> Part Time <input type="checkbox"/> _____ _____	<input type="checkbox"/> Yes <input type="checkbox"/> No
<input type="checkbox"/> Salaried <input type="checkbox"/> Hourly <input type="checkbox"/> _____ _____	<div style="border: 1px solid black; padding: 5px;"><b>Note:</b> If you are actually able to work remotely, you are not eligible for this leave.</div>

Requested Leave	
<input type="checkbox"/> Emergency Paid Sick Leave <input type="checkbox"/> 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:	
<input type="checkbox"/> I am subject to a federal, state, or local government or agency quarantine or isolation order	
<input type="checkbox"/> Copy of order attached, or Name of governmental entity issuing order and brief description: _____ _____	
<input type="checkbox"/> A health care provider has advised me to self-quarantine	
<input type="checkbox"/> Copy of health care provider's recommendation attached, or Name of health care provider issuing recommendation: _____	
<input type="checkbox"/> 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, or child care provider: \_\_\_\_\_

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.

\_\_\_\_\_  
Employee Signature

\_\_\_\_\_, 2020  
Date

**ATTACHMENT A**  
Sample Emergency Paid Sick Leave and  
Emergency Family and Medical Leave Request Form

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FOR OFFICIAL USE ONLY

<b>Requested Leave</b>
<input type="checkbox"/> Approved <input type="checkbox"/> Approved with modification (see below) <input type="checkbox"/> Denied (see below)
<b>Reason(s) for Approving Leave with Modification or Denial of Leave</b>
<hr/> <hr/> <hr/>

\_\_\_\_\_, 2020  
By \_\_\_\_\_ Date \_\_\_\_\_  
\_\_\_\_\_  
Title \_\_\_\_\_

# ATTACHMENT A

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

<b>Employee Name</b>	
<b>Title</b>	<b>Employee ID Number</b>
<b>Department</b>	<b>Manager</b>
<b>Leave Date(s)</b>	
Leave Begin Date: _____ Leave End Date: _____	

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



