The Families First Coronavirus Response Act:

Impact on Employers and Plan Sponsors

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The Families First Coronavirus Response Act was passed in response to the spread of COVID-19 and remains in effect until December 31, 2020. This article reviews the key provisions affecting employers and plan sponsors.

At the time of this writing, governors in many states have ordered their residents to stay at home and nonessential businesses to close in an effort to slow the spread of COVID-19. As employees stayed at home for various reasons related to COVID-19, including a loss of work, to care for children whose schools and places of care have closed, or to deal with health issues related to the coronavirus, Congress stepped in to provide some relief.

President Trump signed the Families First Coronavirus Response Act (FFCRA) into law on March 18, 2020 to further efforts to reduce exposures to COVID-19 and mitigate the economic impact of the pandemic. Parts of FFCRA were later amended by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which became law on March 27, 2020.[1]

Because new guidance was being issued regularly at the time of publication, regulations may continue to change, and developments should be monitored. This article explores the impact FFCRA will have on employers and plan sponsors for the remainder of 2020 and, potentially, beyond. The law remains in effect through December 31, 2020, but the effects of the pandemic likely will last beyond the end of the year. Not only may the public health emergency last into 2021, but employers and plan sponsors will need to deal with ancillary effects, such as administering continuation health coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) and determining eligibility for benefits.

Generally, FFCRA enables free coronavirus testing, expands paid leave, and provides additional funding for Medicaid, unemployment benefits and food assistance programs.

Following are the key provisions for employers and plan sponsors.

1. Group health plans and most insurers must cover COVID-19 testing and items and services related to testing without cost sharing, prior authorization or other medical management requirements.[2]
2. Employers with fewer than 500 employees must provide two weeks of emergency paid sick leave to employees who cannot work for certain reasons related to COVID-19 (referred to hereafter as paid sick leave).[3]
3. Employers with fewer than 500 employees must extend paid Family and Medical Leave Act (FMLA) leave to employees who cannot work because they need to care for their children due to school and child-care center closures from COVID-19 (referred to hereafter as expanded FMLA).[4]
4. Employers may receive payroll tax credits for providing the paid sick leave and expanded FMLA.[5]

The COVID-19 testing requirement took effect on March 18, 2020 and ends the earlier of the end of the public health emergency declared by the Secretary of Health and Human Services (HHS) or June 16, 2020, unless the Secretary of HHS extends the emergency declaration for additional 90-day periods.[6] The paid sick leave and expanded FMLA requirements took effect on April 1, 2020 and end on December 31, 2020.[7]

Health Plan Coverage Requirements

Group health plans and most health insurers must cover COVID-19 testing and visits for testing without cost sharing, prior authorization or other medical management requirements. Specifically, plans and insurers must cover and cannot impose cost sharing for the following.

1. In vitro diagnostic tests for COVID-19, including those approved by the Food and Drug Administration (FDA), provided on an emergency basis, developed by states or otherwise deemed appropriate by HHS [8]
2. Administration of the diagnostic tests
3. Items and services provided during an office visit (including a telehealth visit), urgent care visit or emergency room visit that result in an order for a test or its administration, to the extent the items and services relate to furnishing or administration of or evaluation for the test.[9]

At the time of publication, neither FFCRA nor the underlying guidance require plans and insurers to cover treatment, either before or after a COVID-19 diagnosis. However, numerous insurers have advised that they will be covering treatment without cost sharing and have begun asking their self-funded clients whether they would like to do the same.

FFCRA also does not specifically state whether plans and insurers must provide coverage without cost sharing, prior authorization or other medical management both in and out of network. However, the Departments of HHS, Labor and Treasury have advised that services furnished by out-of-network providers must also be covered.[10]

Beyond this limited guidance, the extent of what group health plans must cover is uncertain. There are more outstanding questions than answers. For example:

- Can a group health plan limit the number of COVID-19 tests an individual receives?
- Can a group health plan limit the cost of out-of-network visits that result in a test to the usual, customary and reasonable amount?
- Must a group health plan contract with a third-party telehealth platform (e.g., MDLive, LiveHealth Online, or Doctor on Demand) to provide telehealth visits in addition to providing virtual visits from a provider that a patient would normally visit in person?

Can High-Deductible Health Plans Provide 100% Coverage Before the Deductible?

High-deductible health plans (HDHPs) may fully cover health benefits associated with testing for and treatment of COVID-19, including FFCRA-mandated telehealth and other remote care services, before application of the deductible.[11] All telehealth and other remote care services received on and after March 27, 2020 may be covered before application of the deductible.[12]

Do the Health Coverage Requirements Apply to Grandfathered Plans and Excepted Benefits Under the Affordable Care Act?

FFCRA does not distinguish between types of group health plans for the purposes of the COVID-19 testing requirement. Rather, the law incorporates the Employee Retirement Income Security Act (ERISA) and Internal Revenue Code definitions of group health plans: generally, an employee welfare benefit plan to the extent that the plan provides health care to employees, former employees or their dependents.[13] However, the HHS, Labor and Treasury departments have confirmed that COVID-19 testing requirements under FFCRA apply to both grandfathered and nongrandfathered plans under the Affordable Care Act (ACA) but do not apply to plans that qualify as excepted benefits, such as limited scope dental plans, limited scope vision plans and retiree-only plans.[14]

takeaways

- The Families First Coronavirus Response Act (FFCRA) was passed in March with the aim of slowing the spread of COVID-19 and mitigating the economic impact of the pandemic.
- FFCRA enables free coronavirus testing, expands paid leave, and provides additional funding for Medicaid, unemployment benefits and food assistance programs.
- One of the key provisions of FFCRA is a requirement for group health plans and most insurers to cover COVID-19 testing and items and services related testing without cost sharing, prior authorization or other medical management.
- The law requires employers with fewer than 500 employees to provide two weeks of emergency paid sick leave to employees who cannot work for certain reasons related to COVID-19 and to extend paid Family Medical Leave Act (FMLA) leave to employees who cannot work because they need to care for their children due to school and child-care center closures from COVID-19.
- FFCRA provides payroll tax credits for employers that provide the paid sick leave and expanded FMLA.

Paid Leave Requirements

FFCRA provides for two types of paid leave—paid sick leave and expanded FMLA. Depending on the reason an employee needs leave, an employee can qualify for both types. Generally, all employees are eligible for two weeks (up to 80 hours) of paid sick leave if they take leave for a qualifying reason (more detail on that below). Employees who have been employed for at least 30 days may also qualify for 12 weeks of expanded FMLA, the first two weeks of which are unpaid.[15] However, employees may substitute any other accrued leave or, if qualified, use their paid sick leave to receive pay for the first two weeks.[16]

Employers can elect to not provide paid sick leave or expanded FMLA to employees who are health care providers or emergency responders.[17]

Employees will qualify for paid sick leave if they cannot work (or telework) for the following reasons.

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. A health care provider advised the employee to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
4. The employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
5. The employee is caring for a child[18] because the child's school or place of care is closed or a child-care provider is unavailable due to COVID-19 precautions, or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of HHS, in consultation with the Secretaries of Treasury and Labor.[19]

Employees will qualify for expanded FMLA if they cannot work (or telework) because they are caring for a child whose school or place of care is closed or whose child-care provider is unavailable due to COVID-19 precautions.[20]

Which Private Sector Employers Are Subject to the FFCRA Paid Leave Requirements?

Employers with fewer than 500 employees must provide paid sick leave and expanded FMLA.[21] However, an employer with fewer than 50 employees is exempt from providing paid sick leave or expanded FMLA to employees who need to care for their child due to their school or place of care being closed because of COVID-19 precautions if complying would jeopardize the viability of the business as a going concern.[22] To qualify for this exemption, an authorized officer of the employer must determine the following.

1. Providing paid sick leave or expanded FMLA would result in the employer's expenses and financial obligations exceeding available business revenues and cause the employer to cease operating at a minimal capacity.
2. The absence of the employees who are requesting paid sick leave or expanded FMLA would cause substantial risk to the financial health or operational capabilities of the employer because of the employees' specialized skills, knowledge of the business or responsibilities, or
3. There are not sufficient workers who are able, willing and qualified and who will be available at the time and place needed to perform the labor or services provided by the employees requesting paid sick leave or expanded FMLA, and the employees' labor or services are needed for the employer to operate at a minimal capacity.[23]

The employer must maintain documentation of its decision that it qualifies to claim the exemption, but it does not need to send anything to the Department of Labor (DOL).[24]

Which Employees Count Toward the 500-Employee Threshold?

All employees employed within the U.S. at the time an employee is to take leave count toward the 500-employee threshold, including other employees on leave, temporary employees who are jointly employed with another employer (regardless of which entity carries them on payroll) and day laborers supplied by a temporary agency.[25]

An entity, such as a corporation, is typically considered a single employer, and only that entity's employees (including employees at any separate establishments or divisions) will count toward the 500-employee threshold.[26] There are two exceptions to this general rule. First, if two entities are joint employers under the Fair Labor Standards Act (FLSA), all of their common employees count toward the 500-employee threshold.[27] Second, if two or more entities meet the "integrated employer" test under FMLA, employees of all of the integrated employer entities count toward the 500-employee threshold.[28]

How Much Must an Employer Pay Employees for the Leave?

Employees who take leave for reasons 1, 2 or 3 above must be paid the higher of their regular rate, the federal minimum wage to which the employee is entitled, or any state or local minimum wage to which the employee is entitled, up to a maximum of $511 per day and $5,110 in the aggregate.[29] Employees who take leave for reasons 4, 5 or 6 above must be paid at two-thirds of their regular rate, up to a maximum of $200 per day and $2,000 in the aggregate, for paid sick leave.[30] Employees taking leave for reason 5 must also be paid at two-thirds of their regular rate, up to a maximum of $200 per day and $10,000 in the aggregate, for expanded FMLA.[31]

What Rights Do Employees Have Following Leave?

Employees have the right to return to their positions after returning from paid sick leave or expanded FMLA leave.[32] However, that right to return is limited for expanded FMLA leave for key employees if necessary to prevent serious economic injury to the employer, and when an employer with fewer than 25 employees must eliminate the position due to economic circumstances caused by COVID-19.[33]

What Documentation Can an Employer Require for Paid Sick Leave and Expanded FMLA?

Employers must keep appropriate documentation of an employee's request for paid sick leave or expanded FMLA, whether it is approved or denied.[34] This includes the employee's name, the dates for which leave is requested, the reason for the leave, a statement from the employee that he or she is unable to work because of that reason, and documentation specified in forms, instructions and information from the Internal Revenue Service.[35] If an employee is requesting leave due to a quarantine or isolation order or a health care provider's recommendation to self-quarantine, employers should also request the name of the government entity issuing the order or health care provider giving the advice to self-quarantine.[36] Finally, if an employee is requesting leave due to a child's school or place of care closing, employers should also request the child's name, the name of the school or place of care that is closed, and a statement from the employee that no other suitable child care is available.[37] The DOL has confirmed that an employee may provide this information either orally or in writing, but if an employee provides information orally, the employer must document and maintain such information in its records.[38]

Employers should retain this documentation in their records for a minimum of four years or as long as they keep records for similar tax purposes.[39] Employers are not required to provide an employee with leave if the employee does not provide materials to support the tax credit.[40]

Employers can continue to require employees taking regular FMLA leave to provide the additional documentation allowed under FMLA certification rules.[41]

Does an Employer Need to Continue Employees' Group Health Plan Coverage During Paid Sick Leave or Expanded FMLA?

Employers must continue employees' health coverage during their paid sick leave and/or expanded FMLA on the same conditions as coverage would have been provided if the employees had continued to work.[42] Employees generally must continue to pay their portion of the premiums.

Must Employers Post a Notice?

All covered employers were required to post a notice provided by the DOL by April 1, 2020.[43] The notice must be posted in a conspicuous place on the employer's premises or on an employee information internal or external website, or it may be sent to employees via mail or email.[44] If a covered employer hires an employee, the employer must also provide him or her with the notice by mail, by email, or by posting the notice on the premises or an employee website.[45]

What If an Employer Closes, Needs to Lay Off or Furlough Employees, or Needs to Reduce Employees' Hours?

If an employer sends employees home and stops paying them because it does not have work, the employees are not entitled to paid sick leave or expanded FMLA.[46] For example, the employer might have closed the employees' worksite because of a lack of business or because it was required to close pursuant to a federal, state or local directive. This is true whether the employer closed before or after April 1, 2020, even if the employee requested leave before the closure.

In addition, employees taking paid sick leave or expanded FMLA are still subject to employment actions, such as layoffs, that would have affected them regardless of whether they took leave.[47] The employer must be able to show that the employees would have been laid off even if they had not taken leave.[48] Employers are not required to pay paid

sick leave or expanded FMLA for employees they furlough because they do not have enough work or business.[49] If an employer closes an employee's worksite while he or she is on paid sick leave or expanded FMLA, the employer must pay for any leave the employee used before the closure, but the obligation ceases as of the date of the closure.[50]

Employees with reduced hours because the employer does not have work cannot use paid sick leave or expanded FMLA for the hours they are no longer scheduled to work.[51] However, employees may use paid sick leave or expanded FMLA if they cannot work their full schedule. In this case, the leave is calculated based on the employee's work schedule before it was reduced.[52]

Employees who lose group health plan coverage because their hours are reduced, or they are laid off or furloughed, may be eligible to continue their coverage under COBRA.[53] Employees also may be able to continue their coverage under state continuation-of-coverage laws.

In general, COBRA applies to an employer's group health plans if the employer had at least 20 employees on more than 50% of its typical business days in the prior calendar year. Employees are entitled to COBRA if they lose coverage due to a termination of employment or reduction in hours, among other reasons. Accordingly, employers that are subject to COBRA must offer COBRA continuation coverage for their group health plans to employees (and dependent spouses and children) who lose coverage due to a reduction in hours, layoff or furlough. Employees and dependents who lose coverage and are entitled to COBRA may decide to wait until the end of the 60-day COBRA election period to determine whether they will elect coverage.

Other Issues

Can Employees Affected by COVID-19 Change Their Cafeteria Plan Elections?

Employees can change their cafeteria plan elections under the same circumstances as they could previously. The employer's cafeteria plan document will list the events, commonly called *life events,* that allow a midyear change to an employee's cafeteria plan elections. Because the expanded FMLA provisions in FFCRA are incorporated into the rest of FMLA, employees can take the same actions with respect to their cafeteria plan elections as they would for another type of FMLA leave, including revoking existing elections.[54]

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Employees may be particularly interested in changing their dependent care flexible spending account (DCAP) elections. Provided an employer's cafeteria plan allows, employees may change their DCAP election if there is a change in the cost of a care provider, if the employee changes care providers or if an employee's work schedule changes.[55]

How Does FFCRA Affect an Applicable Large Employer's Obligations Under ACA?

Applicable large employer (ALE) status is determined as of the prior calendar year.[56] Accordingly, an employer that must furlough employees due to the COVID-19 pandemic and, as a result, has fewer than 50 employees will remain an ALE for 2020. Employers that qualify as ALEs must continue to offer minimum essential coverage that is affordable and provides minimum value to full-time employees and their dependent children during a full-time employee's paid sick leave and expanded FMLA or risk ACA penalties.[57]

Further, ALEs that utilize the lookback measurement method of determining full-time employee status must credit hours of service for the period of paid sick leave and expanded FMLA for the current measurement period.[58] For ALEs that are not subject to FFCRA, any unpaid FMLA qualifies as special unpaid leave, and the period of special unpaid leave must be either removed from the measurement period calculation or hours must be credited to the employee.[59]

Conclusion

Employers and plan sponsors are feeling the far-reaching effects of COVID-19, not least among them trying to understand and comply with FFCRA requirements. Employers and plan sponsors should continue to monitor developments since new regulations may be issued surrounding FFCRA and other laws passed in the wake of the COVID-19 pandemic.

bios

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Endnotes

1. This article does not discuss the Coronavirus Aid, Relief and Economic Security (CARES) Act generally; only those provisions directly impacting the Families First Coronavirus Relief Act (FFCRA) are included. For more information on the CARES Act and its impact on plan sponsors and employers, please visit https://blog.ifebp.org/index.php/cares-act-coronavirus-aid-relief-and-economic-security-act.
2. FFCRA §6001.
3. FFCRA §5101 et seq.
4. FFCRA §3101 et seq.
5. FFCRA §7001 et seq.
6. FFCRA §6001(a); Departments of Health and Human Services (HHS), Labor and Treasury, "FAQs About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 42" (hereinafter FAQs Part 42), Q&A: 2, Footnote 10, available at www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/aca-implementation-faqs.
7. FFCRA §§3102(a)(1), 5109; Department of Labor (DOL), "Families First Coronavirus Response Act: Questions and Answers" (hereinafter DOL FFCRA Questions), Q&A: 1, available at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.
8. FFCRA §6001(a); CARES Act §3201. The Departments have clarified that "in vitro diagnostic tests" includes serological tests. FAQs Part 42, Q&A: 4.
9. FFCRA §6001(a). The Departments have clarified that tests for other respiratory illnesses (e.g., influenza tests) must be covered as part of this requirement when an individual's attending provider determines they are medically necessary. FAQs Part 42, Q&A: 5.
10. FAQs Part 42, Q&A: 7.
11. Internal Revenue Service (IRS) Notice 2020-15; CARES Act §3701(a).
12. See CARES Act §3701(a).
13. See generally ERISA §733, Internal Revenue Code § 9832.
14. FAQs Part 42, Q&A: 1.
15. FFCRA §3102(b); 29 CFR 826.24.
16. FFCRA §3102(b); 29 CFR 826.24, 826.60; see also DOL FFCRA FAQs, Q&A: 10, 45.
17. FFCRA §§5102(a), 5110(4); see also FMLA §101(6); 29 CFR § 825.125; DOL FFCRA Questions, Q&A: 56, 57.
18. A child, for this purpose, is an employee's biological, adopted or foster child; stepchild; legal ward; or a child of a person standing in loco parentis; who is under 18 years of age, or 18 years of age or older and incapable of self-care because of a mental or physical disability. FFCRA §5110(4); FMLA § 101(12); 29 CFR 826.10.
19. FFCRA §5102(a); for details on teleworking and intermittent leave, see DOL FFCRA Questions, Q&A: 17-22.
20. FFCRA §3102(b); 29 CFR 826.20(b).
21. FFCRA §§3102(b), 5110(2); 29 CFR 826.40(a).
22. FFCRA §5111(2); 29 CFR 826.40(b).
23. 29 CFR 826.40(b)(1).
24. 29 CFR 826.40(b)(2).
25. FFCRA §§3102(b), 5110(1)(a)(i); 29 CFR 826.40(a).
26. 29 CFR 826.40(a)(2).
27. 29 CFR 826.40(a)(2).
28. 29 CFR 826.40(a)(2).
29. FFCRA §5110(5)(a)(ii), as amended by CARES Act §3602; 29 CFR 826.22.
30. FFCRA §5110(5)(a)(ii), as amended by CARES Act §3602; 29 CFR 826.24.
31. FFCRA §3102(b), as amended by CARES Act §3601; 29 CFR 826.24.
32. FFCRA §3102(b); 29 CFR 826.130(a).
33. FFCRA §3102(b); 29 CFR 826.130(b).
34. 29 CFR 826.140; DOL FFCRA Questions, Q&A: 15, 16.
35. 29 CFR 826.100; DOL FFCRA Questions, Q&A: 15.
36. 29 CFR 826.100; DOL FFCRA Questions, Q&A: 15.
37. 29 CFR 826.100; DOL FFCRA Questions, Q&A: 15.
38. 29 CFR 826.140(a); DOL FFCRA Questions, Q&A: 15.
39. 29 CFR 826.140(a).
40. 29 CFR 826.100(f); DOL FFCRA Questions, Q&A: 15.
41. DOL FFCRA Questions, Q&A: 16.
42. 29 CFR 826.110.
43. FFCRA §5103; 29 CFR 826.80; "DOL Families First Coronavirus Response Act Notice – Frequently Asked Questions" (hereinafter "DOL FFCRA Notice FAQs"), Q&A: 7, 14, www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions. Notices are available at www.dol.gov/agencies/whd/pandemic/.
44. 29 CFR 826.80; DOL FFCRA Notice FAQs, Q&A: 1.
45. 29 CFR 826.80; DOL FFCRA Notice FAQs, Q&A: 5.
46. DOL FFCRA Questions, Q&A: 23, 24.
47. 29 CFR 826.130(b); DOL FFCRA Questions, Q&A: 43.
48. 29 CFR 826.130(b); DOL FFCRA Questions, Q&A: 43.
49. 29 CFR 826.130(b); DOL FFCRA Questions, Q&A: 26.
50. DOL FFCRA Questions, Q&A: 25.
51. DOL FFCRA Questions, Q&A: 28.
52. DOL FFCRA Questions, Q&A: 28.
53. See DOL FFCRA Questions, Q&A: 30.
54. Treas. Reg. §1.125-4(g).
55. Treas. Reg. §1.1225-4(f); see also Treas. Reg. §1.1225-4(f)(6), Examples 5 and 6.
56. Treas. Reg. §54.4980H-2(b). Generally, an applicable large employer is an employer that, in the prior calendar year, employed 50 or more full-time employees and full-time employee equivalents. 26 USC §4980H(c).
57. See Treas. Reg. §54.4980H-1(a)(24), defining *hours of service* to include hours an employee is entitled to pay due to disability or leave of absence.
58. Treas. Reg. §54.4980H-3(d).
59. Treas. Reg. §54.4980H-3(d)(6).

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