


COVID-19 Related Benefits Issues

March 2020

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The Families First Coronavirus Response Act

Agenda

- Background
- COVID-19 Testing Coverage Requirement
- Emergency Sick Leave
- Emergency Expanded FMLA Protections
- Benefit Eligibility Issues
- Other Issues
 - HIPAA, §125 Election Changes, Exchange Coverage
- Note - Elements of the Act We Are Not Covering
 - Food assistance focusing on children of families, additional Federal unemployment insurance assistance to states, increased Medicaid funding, etc.

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The Families First Coronavirus Response Act

Effective Date

- Coverage for COVID Testing – April 2 until further notice
- Emergency sick leave and expanded FMLA – April 2 through end of 2020

Additional Guidance Needed

- There are still many unanswered questions, but regulatory agencies are expected to begin issuing guidance this week
 - DOL to provide model notice
 - How does the employer determine the 500-employee threshold?
 - What if employers start offering these benefits prior to the effective date?
 - Can someone qualify for multiple instances of paid sick leave?
 - Are employees who can work from home still eligible for expanded FMLA?
 - Which health care provider and emergency personnel employees are exempt?

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The Families First Coronavirus Response Act

Employers Covered

- COVID-19 Testing Coverage Requirement
 - All employer-sponsored health plans, fully-insured and self-insured
- Emergency Sick Leave and Expanded FMLA
 - Any size public employer and private employers (including not-for-profits) with fewer than 500 employees
 - Determination of employee count is not based solely on ownership or the §414 controlled group or affiliated service group rules – we think it will be based on “integrated employer” criteria similar to FMLA
 - Employers with <50 employees may be exempt from providing paid leave due to school closings or childcare unavailability if it would jeopardize the viability of the business as a going concern
 - We need additional guidance
 - When do you measure the 500?, Exactly what rules apply?, What if employer increases or decreases employment?

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COVID-19 Diagnostic Testing Coverage

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COVID-19 Diagnostic Testing Coverage


Health Plans Must Cover COVID-19 Testing

- Most health plans must cover costs associated with COVID-19 diagnostic testing with no cost-sharing
 - Includes any costs related to taking the test (e.g. the office visit, lab costs, etc.), but does not apply to medical care to treat someone sick from COVID-19
 - Applies to employer sponsored group health plans (both fully-insured and self-funded), government-sponsored coverage, and individual health plans
 - It appears these requirements do not apply to excepted benefits, short-term health plans, or healthcare sharing ministries

HSA-Eligibility

- IRS already issued guidance in Notice 2020-15 - Coverage of COVID-19 related testing or treatment prior to meeting an HDHP's plan deductible will not interfere with an individual's HSA eligibility


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The Emergency Paid Sick Leave Act

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The Emergency Paid Sick Leave Act


Qualifying Reasons for Emergency Paid Sick Leave	
Directly Related to the Employee	Related to Employee Needs to Care for Others
Employee is subject to a federal, state or local quarantine or isolation order related to COVID-19	Employee is caring for another individual who: (i) is subject to a federal, state, or local quarantine or isolation order related to COVID-19; or (ii) has been advised by a healthcare provider to self-quarantine due to COVID-19
Employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19	Employee is caring for a son or daughter where the school or place of care of the son or daughter has been closed, or the childcare provider is unavailable, due to COVID-19 precautions (Note: may also qualify for expanded FMLA).
Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis	

• Note – the Act also states upcoming guidance and regulations may specify additional reasons

Existing Employer Provided Paid Time

- Employer may not require an employee to use other paid leave provided by the employer before using the new emergency paid sick leave

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The Emergency Paid Sick Leave Act

Eligible Employees

- All employees are eligible (FT and PT) regardless of length of employment
- An employer of an employee who is a healthcare provider or an emergency responder is not required to provide the paid sick leave to such employee

How Much Paid Leave?

- Full-time employees – Up to 80 hours (2 weeks for exempt)
- Part-time employees – 2 weeks equal to the number of hours generally worked in a 2-week period

How Much Pay?

- If the employee is sick or subject to quarantine
 - 100% of pay up to \$511 per day and \$5,110 in the aggregate
- If the employee is absent to care for another individual
 - 2/3 of pay up to \$200 per day and \$2,000 in the aggregate
- Pay is based on the greater of employee's regular rate of pay or minimum wage

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The Emergency Family and Medical Leave Expansion Act

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Expanded FMLA

The Basics

- New paid FMLA leave for employees who cannot work because they need to stay home with children due to school or daycare closure
 - Does not extend pay to other traditional FMLA leave events (e.g. serious health condition, serious health condition of a family member, maternity leave)
 - May apply to small employers not subject to traditional FMLA

Employers Subject to Expanded FMLA

- Private employers with <500 employees and public employers of any size
 - These special FMLA rules will generally apply even to small private employers with fewer than 50 employees
 - DOL guidance indicates employers with <50 employees may be exempt if it would jeopardize the viability of the business as a going concern

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Expanded FMLA

Eligible Employees

- Employee (FT or PT) who has been employed for at least 30 calendar days
- Employee cannot work because employee needs to stay home to care for child due to school or daycare closure
 - Due to *“an emergency with respect to COVID-19 declared by a Federal, State, or local authority”*
 - No employee or child illness or symptoms required to qualify for the leave
- Expanded protected leave is designed for employees who are unable to work (or telework) due to a child being at home
 - Further guidance needed to understand whether employees qualify who have the ability to work remotely

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Expanded FMLA

How Much Paid Leave?

- Up to 12 weeks in a 12-month period as determined by existing FMLA rules
- Does not add additional time to traditional FMLA eligibility
 - For example – If the employee has already used 5 weeks of FMLA earlier in 12-month period, the employee is only eligible for 7 weeks of expanded FMLA leave and pay

How Much Pay?

- First 10 days of leave may be unpaid
 - Employees can use any accrued vacation, personal, or sick leave even if it would not normally qualify under employer policy (including emergency sick paid leave)
 - Most employees will also qualify for Emergency Paid Sick Leave, which would provide pay for the first 10 days
- The remainder of the leave (up to 12 weeks) must be paid at no less than 2/3 of the employee's regular rate of pay up to \$200 per day (\$10,000 in the aggregate per employee)

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Expanded FMLA

Other FMLA Rules Assumed to Apply to Emergency FMLA Leave

- Group health plan requirements
 - Employer must continue offering group health benefits under the same terms as if the employee was actively at work
 - Same employer contributions for as long as the employee is eligible for FMLA-protected leave
- Employers must generally reinstate employees after their FMLA leave period ends
 - There is an exception to the reinstatement requirement for small employers with <25 employees experiencing significant economic hardship – additional guidance needed

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Emergency Paid Sick Leave and Expanded FMLA Interaction

For ALL (PT and FT) Employees:

- Two weeks (up to 80 hours) of paid leave at 100% regular pay (or minimum wage, if higher) if employee is unable to work because the employee is quarantined and/or experiencing COVID-19 symptoms & seeking a medical diagnosis
- Two weeks (up to 80 hours) of paid leave at 2/3 the employee's regular rate of pay (or minimum wage, if higher) if employee is unable to work because of a need to care for an individual subject to quarantine, or care for a child whose school or daycare is closed related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor

For Employees (PT and FT) Who Have Worked At Least 30 Days:

- Up to an additional 10 weeks of paid leave at 2/3 regular rate of pay if employee is unable to work because of a need to care for a child whose school or daycare is closed related to COVID-19

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Emergency Paid Sick Leave and Expanded FMLA Interaction

- **Example 1 - Employee cannot work to stay home with child – No one is ill or quarantined**
 - First 2 weeks count as Emergency Paid Sick Leave and Expanded FMLA – 2/3 of the regular rate of pay up to \$200 per day (\$2,000 in the aggregate per employee)
 - After 10 days, employee paid at 2/3 of the employee's regular rate of pay up to \$200 per day (\$10,000 in the aggregate per employee)
- **Example 2 – Employee is quarantined due to symptoms AND the employee cannot work due to need to care for child for to 12 weeks**
 - First 2 weeks count as Emergency Paid Sick Leave and Expanded FMLA – 100% of employee's regular rate of pay up to \$511 per day (\$5,110 in the aggregate per employee)
 - After 10 days, employee paid at 2/3 of the employee's regular rate of pay up to \$200 per day (\$10,000 in the aggregate per employee)

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Employer Tax Credits

Tax Credits to Offset Employer Costs

- Impacted employers will receive refundable tax credits applied against the employer quarterly payroll tax returns (Form 941s)
 - Eligible employers may retain an amount of the payroll taxes equal to the amount of paid leave plus related group health plans costs rather than deposit them with the IRS
 - Payroll taxes available for retention include withheld federal income taxes, as well as employee and employer share of Social Security and Medicare taxes
 - If there are insufficient payroll, employers may file a request for an accelerated payment from the IRS (IRS expects to process requests in 2 weeks or less)

No Employer “Stimulus” Money

- Tax credit will only reimburse employers for costs associated with Emergency Paid Sick Leave and Expanded FMLA Leave

Additional Guidance Needed

- Additional IRS guidance expected soon

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Plan Eligibility Issues

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Determining Applicable Leave Requirements

Determine What Leave Rules Apply to Benefit Eligibility

Qualifying Reason for Leave	Applicable Federal Leave Requirements
Time off needed due to employee or family member illness	Employee may qualify for Emergency Paid Sick Leave and traditional FMLA Leave
Time off needed due to quarantine	Employee may qualify for Emergency Paid Sick Leave
Employee cannot work because of need to care for a child	Employee may qualify for Emergency Paid Sick Leave and Expanded FMLA Leave

Other Considerations

- Is the employee eligible for other employer provided time off or leave benefits?
- What are the existing plan eligibility rules relative to any of the above situations?
 - What will the carrier (or stop-loss carrier) provide if employer wants to expand eligibility beyond current rules?

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FMLA and Other Medical Leave

Traditional FMLA Rules – Not Altered by New Legislation

- All public entities regardless of size and private employers with 50 or more employees must still comply with traditional FMLA
- Eligible employees:
 - (i) work for a covered employer;
 - (ii) worked for the employer for at least 12 months
 - (iii) have at least 1,250 hours of service during the previous 12-month period; and
 - (iv) work at a location where the employer employs at least 50 employees within 75 miles of that worksite
- Traditional FMLA Events
 - Employee's serious health condition
 - Care for a spouse, child, or parent with a serious health condition
 - Newborn or adopted child
 - Certain military events

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FMLA and Other Medical Leave

Traditional FMLA Rules – Not Altered by New Legislation

- FMLA-protected leave for “Serious Health Condition”
 - Any hospitalization
 - Missed at least three days of work and under the continuous treatment of a health provider
 - Continuous treatment means multiple visits to provider (could be a tele-visit) or at least one visit and continuing treatment such as Rx
- Benefits during FMLA-protected leave
 - Must continue group health plan benefits under the same terms as if the employee was actively at work, including the same employer and employee contributions

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Furloughs and Termination/Lay-Off Issues

If Furloughed, Employees Remain Employed

- If there is a reduction in hours/leave of absence, it's necessary to consider plan eligibility rules and any applicable leave policies in order to properly administer benefits
 - An employer may already have a leave of absence policy for specified circumstances which extend benefit eligibility for a period of time
- ALE eligibility considerations (“employer mandate”)
 - If an employer is using the look-back measurement method, employees may remain eligible for benefits for the duration of the current stability period, unless employment is terminated
 - If an employer is using the monthly measurement method, employees may not meet current plan eligibility requirements during a period of reduced hours

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Furloughs and Termination/Lay-Off Issues

Termination of Employment

- If employment is terminated, employees will typically no longer be eligible for benefits
- COBRA (applicable to leaves, furloughs and terminations)
 - Loss of eligibility due to leave, furlough and terminations is a COBRA event
 - Employer could choose to subsidize COBRA for a period of time
 - If employee elects COBRA, they may be ineligible to enroll in individual coverage through the exchange until next open enrollment period

Employers wishing to expand eligibility related to COVID-19

- Employers have flexibility to amend current leave and eligibility issues
- IMPORTANT NOTE – Carriers and stop-loss carriers are not automatically obligated to honor expanded eligibility rules. Employers must coordinate with carriers to expand eligibility
- Some state unemployment benefits may be impacted by ongoing benefit eligibility

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Other Issues

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Other Issues

§125 (Cafeteria) Plan Election Changes

- Elections irrevocable unless employee has election change event specified in §125
 - Permitted election changes related to COVID-19 situation
 - A termination of benefit eligibility due to an employment status change (leave or termination)
 - A change in the cost of coverage initiated by the employer
 - Other Changes
 - Existing §125 rules do not permit an election change due to a reduction in pay or hours with no loss of benefit eligibility or change in the cost of coverage – IRS unlikely to enforce

HIPAA Privacy

- Learning about an employee or family medical condition directly from the employee or family member is not subject to HIPAA rules
 - HIPAA PHI protections for employer plans is for health plan related individual identifiable information, not all employee medical information
 - Other employment law and general employee privacy rules may apply

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Public Exchange Coverage & Subsidy Eligibility

Employer Communication of Exchange Coverage Options

- Employers may want to be more involved in communicating individual health insurance options to employees losing plan eligibility
 - Employees who lose eligibility for group medical coverage, or for whom coverage becomes unaffordable due to a decrease in employer contributions, will likely qualify for a special enrollment through a public Exchange
 - Some states have opened up a special open enrollment period due to the COVID-19 crisis allowing enrollments even when individual do not meet special enrollment requirements
 - Subsidy eligibility toward coverage purchased through a public Exchange:
 - Not enrolled in any minimum essential coverage;
 - Not eligible for minimum value, affordable coverage offered through an employer; and
 - Household income of 100-400% of the federal poverty level.

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Health Savings Accounts (HSAs) - FAQs

How does eligibility for HDHP coverage differ from eligibility to Contribute to an HSA?

- Eligibility HDHP coverage is based upon plan eligibility rules set by the employer or insurance carrier (e.g., averaging 30 or more hours of service per week)
- Eligibility to contribute to an HSA is determined by federal laws and regulations, as follows:
 - Must be enrolled in a qualifying high-deductible health plan (HDHP);
 - May not have any other "disqualifying coverage", including Medicare; and
 - Cannot be claimed as a tax dependent by another individual

Whose Qualifying Medical Expenses are Eligible to be Reimbursed by the HSA?

- Reimbursement is allowed on a tax-favored basis for qualified medical expenses for the HSA account holder, as well as for the account holder's spouse and tax dependents, even if the spouse or other tax dependents are not enrolled in HDHP coverage or have other disqualifying coverage (e.g. Medicare)

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