



COVID-19: FFCRA, CARES Act and Employee Benefits

National Association of Health Underwriters

April 16, 2020

Stacy Barrow

sbarrow@marbarlaw.com

(617) 830-5457

Agenda



- Federal Government Responses to COVID-19
- Coronavirus Aid, Relief, and Economic Security (CARES) Act
- COVID-19 and Employee Benefits / Employment Issues
- Families First Coronavirus Response Act (FFCRA)
 - Emergency Paid Sick Leave
 - Emergency FMLA
 - Tax Credits

COVID-19 Background



- Virus is “SARS-CoV-2”
- Disease it causes is “coronavirus disease 2019” or “COVID-19”
- Timeline:
 - Jan. 30: World Health Organization (WHO) declared the outbreak a “public health emergency of international concern”
 - Jan. 31, U.S. Health and Human Services declared a public health emergency to aid the nation’s healthcare community in responding to COVID-19
 - Mar. 11, WHO publicly characterized COVID-19 as a pandemic (a global outbreak of disease)
 - Mar. 13, President Trump declared the COVID-19 outbreak a national emergency
 - Mar. 14, CDC has reported more than 2,000 cases from 49 states and Washington, DC

Federal Government Responses



- Federal government has issued guidance for employers
- Agency guidance includes the following:
 - IRS: [COVID-19 Related Tax Credits for FFCRA Required Paid Leave](#)
 - DOL: [COVID-19 and the American Workplace](#)
 - DOL: [Temporary Regulations on FFCRA Leave](#)
 - DOL: [Correction to Temporary Regulations](#)
 - DOL: [FAQ on CARES Act and FFCRA Implementation](#)
- [Letter](#) from Congress to DOL re: its implementation of the FFCRA
 - From Patty Murray (Ranking Member, Senate Committee on Health, Education, Labor, and Pensions) and Rosa DeLauro (Chair, House Appropriations Subcommittee on Labor, Health and Human Services, Education, and Related Agencies)

Families First Coronavirus Response Act



- On March 18, the President signed the Families First Coronavirus Response Act (FFCRA)
- FFCRA includes Emergency FMLA and Emergency Paid Sick Leave provisions, free testing for coronavirus, increased funding for unemployment assistance, food aid, and Medicaid
- FFCRA is the second coronavirus relief bill
 - First relief bill was signed March 6 and was largely dedicated to funding healthcare preparation to fight the virus, as well as vaccine research

Families First Coronavirus Response Act



- Coronavirus Testing: All group health plans (including self-insured plans and grandfathered plans) and health insurance issuers in the individual and group markets must provide COVID-19 testing with no cost-sharing or prior authorization requirements
 - Effective now through end of public health emergency as declared by HHS
 - Includes services for urgent care, emergency room, or provider visits that result in an order for or administration of a test for COVID-19
 - Under the CARES Act, if participants receive COVID-19 testing out-of-network, the plan must reimburse the provider based on their published cash rate

Coronavirus Aid, Relief, and Economic Security (CARES) Act



- Vaccine for COVID-19 not expected until 2021 at the earliest
- Once a vaccine is developed, current ACA rules require it to be covered without cost-sharing, when recommended by the federal government
- Under CARES Act, no-cost coverage must be available within 15 days after a coronavirus vaccine or preventive service receives an “A” or “B” recommendation from the USPSTF or is recommended by the CDC
 - Shorter timeframe than usual to adopt a new recommended vaccine or preventive service

Coronavirus Aid, Relief, and Economic Security (CARES) Act



- **HSA and Telehealth Expansion**
- CARES Act was signed into law on March 27, 2020 and includes a new safe harbor under which HDHPs can cover telehealth and other remote care before participants meet their deductibles (i.e., without cost-sharing)
- This safe harbor applies for plan years beginning on or before December 31, 2021, unless extended

Coronavirus Aid, Relief, and Economic Security (CARES) Act



- **Over-The-Counter Medication Reimbursement under FSA/HRA/HSA**
- The CARES Act allows health flexible spending accounts (FSAs), Health Reimbursement Arrangements (HRAs), and Health Savings Accounts (HSAs) to pay for or reimburse over-the-counter medication and menstrual products without a prescription
- This is a *permanent* repeal of the ACA's prohibition on reimbursements under such plans for over-the-counter medication obtained without a prescription
- This change is effective January 1, 2020

COVID-19 and Common Benefits Questions



- If employees are furloughed, review plan documents to determine if COBRA applies or if an extension of coverage is available
- Furloughs and layoffs: What are they?
 - Furlough is short of a layoff; benefits usually continue
 - Layoff is a job termination; any accrued leave is paid out
- When should COBRA be offered?
 - Will the next COVID-19 relief bill contain a COBRA subsidy?
- How should employee contributions be handled during leave?

COVID-19 and Employment Issues



- The federal WARN Act applies to:
 - Employers with 100 or more full-time employees **-or-**
 - Employers with 100 or more employees who work at least a combined 4,000 hours per week.
- Requires 60 calendar days' written notice for certain plant closings/layoffs
- **Exception** to the notice requirement for “**unforeseen business circumstances**”

COVID-19 and Employment Issues



- Are we required to pay employees out on leave?
- What should we do if an employee informs us that they've been exposed or tested positive for COVID-19?
 - Shut down office/area and clean/sanitize
 - Identify coworkers who may have been exposed
 - Inform affected coworkers—without identifying the employee—and recommend they speak to a health care provider
 - Encourage employees to contact HR with questions and advise the further communication will be forthcoming

Families First Coronavirus Response Act



- Provisions include **Emergency Paid Sick Leave** and **Emergency FMLA**
 - These provisions apply to employers with fewer than 500 employees and public employers of any size
 - Effective for leave taken between 4/1/20 and 12/31/20, unless extended
- Assistance for employers available via a refundable payroll tax credit
 - Good news for non-profits, as they wouldn't benefit from an income tax credit
 - Tax credit available for health insurance premiums allocable to qualified sick leave payments

Emergency FMLA and Emergency Paid Sick Leave



- 500-employee threshold determined at the time leave is to be taken
- Count includes all full-time and part-time employees in US or any territory
 - *Include* employees on leave and employees from a temp agency, *exclude* 1099's and employees on furlough or who are laid-off and have not returned
- Typically, a corporation (including its separate divisions) is considered a single employer and all employees are counted
- Where a corporation has an ownership interest in another corporation, they are separate unless they are joint employers under the FLSA
 - If two entities are joint employers, all include all employees
- In general, two or more entities are separate unless they meet the integrated employer test under the FMLA
 - If two entities are an integrated employer, include all employees

Emergency Paid Sick Leave



- Employees may be entitled to 80 hours of paid sick time (pro-rated for part-time employees)
 - All employees are immediately eligible for this leave
- Leave is paid at the employee's regular rate, up to \$511 per day (\$5,110 in the aggregate) when leave is taken due to an employee's own illness or quarantine, and paid at two-thirds of the regular rate, up to \$200 per day (\$2,000 in the aggregate) when leave is taken to care for others
- Emergency paid sick leave is in addition to other leave provided under state or federal law or the employer's existing company policy

Emergency Paid Sick Leave



- Provides paid sick time to an employee who is unable to work (or telework) because the employee:
 1. is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 2. has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 3. has COVID-19 symptoms and is seeking medical diagnosis;
 4. is caring for an individual who is subject to a quarantine or isolation order;
 5. is caring for a child if the school or day care center has been closed, or the child care provider is unavailable, due to COVID-19 precautions; or
 6. is experiencing any other similar condition specified by the federal agencies

Emergency Family and Medical Leave Act



- Amends FMLA to provides up to 12 weeks of job-protected leave for “a qualifying need related to a public health emergency” to employees who have been employed for at least 30 days
- A “qualifying need” is when an employee is unable to work (or telework) due to a need to care for a child if the child’s school or place of care has been closed or is unavailable due to a public health emergency
 - Minor child: under age 15 unless special circumstances exist requiring a need to care for child during daylight hours

Emergency Family and Medical Leave Act



- After a 10-day elimination period, the rest of FMLA leave is paid at two-thirds of the employee's regular rate based on normally scheduled hours, capped at \$200 per day and \$10,000 in total
 - Basically, a 10-week continuation of #5 under Emergency Paid Sick Leave
 - Employees may, but cannot be required to, use paid leave during elimination period
 - After elimination period, employer may require use of paid leave to supplement

Emergency FMLA and Emergency Paid Sick Leave



- Exceptions may apply for small employers (under 50 EEs) if the required leave would jeopardize the viability of their business
 - Exception for EPSL applies only when an employee takes leave under reason #5 – care for a child whose school or place of care is closed due to COVID-19
 - Small employers not exempt from paying under reasons #1-4 of EPSL
- Employers may exclude health care providers and emergency responders from E-FMLA and EPSL
 - Includes anyone employed at any doctor's office, hospital, clinic, medical school, retirement facility, nursing home, home health care provider, any lab or medical testing, pharmacy, or any similar entity
 - Determination should be made on a case-by-case basis

Emergency FMLA and Emergency Paid Sick Leave



- Unless teleworking, EPSL must be taken in full-day increments
 - It cannot be taken intermittently if the leave is being taken for any qualifying reason other than to care for a child whose school or day care provider is unavailable due to COVID-19 concerns
- Unless teleworking, once an employee begins taking EPSL (other than to care for a child whose provider is unavailable), they must continue to take EPSL each day until they either (1) use the full amount of EPSL or (2) no longer have a qualifying reason for taking EPSL

Emergency FMLA and Emergency Paid Sick Leave



- Employees are not eligible for E-FMLA or EPSL if:
 - their employer closes the worksite, even for a short period of time;
 - they are furloughed (but the company remains open); or
 - their hours are reduced
- This is true whether the employer closes the worksite for lack of business or because it was required to close pursuant to a Federal, State, or local directive
 - They may be eligible for unemployment

Emergency FMLA and Emergency Paid Sick Leave



- **Substantiation Requirements**
- An employer substantiates eligibility for tax credits if they receive a written request from the employee that provides:
 - The employee's name;
 - The date or dates for which leave is requested;
 - A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
 - A statement that the employee is unable to work, including by means of telework, for such reason

Emergency FMLA and Emergency Paid Sick Leave



- **Substantiation Requirements**
- If leave is based on a quarantine order or self-quarantine advice, include:
 - name of the governmental entity ordering quarantine, or
 - the name of the health care professional advising self-quarantine, and
 - if individual is not the employee, that person's name and relation to the employee

Emergency FMLA and Emergency Paid Sick Leave



- **Substantiation Requirements**
- If leave is based on a school closing or provider unavailability, include:
 - name and age of the child (or children) to be cared for
 - name of the school that has closed or place of care that is unavailable, and
 - a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, if employee cannot work or telework because of a need to provide care for a child older than 14 during daylight hours, a statement that special circumstances exist

Emergency FMLA and Emergency Paid Sick Leave



- **Additional documentation to maintain**
- Documentation showing how payments to employees qualify for the credit, including work (or telework) records
- Documentation showing how the employer determined the amount of health plan expenses that the employer allocated to wages
- Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19
- Copies of Forms 941, Employer's Quarterly Federal Tax Return
 - Form 941 is used to report income tax and social security and Medicare taxes withheld from employee wages, as well as the employer's own share of social security and Medicare taxes

Tax Credits for FFCRA Leave



- Employers may receive a credit for qualified leave payments, plus allocable health plan expenses and the employer's share of the 1.45% Medicare tax
 - Employer not subject to its portion of Social Security tax (6.2%) on those wages
 - Credit is allowed against the employer portion of Social Security taxes on all wages and compensation paid to all employees
 - If the amount of the credit exceeds those taxes, the excess is treated as a refundable overpayment
- The federal employment taxes that may be retained include federal income taxes withheld from employees, the employee's share of Social Security and Medicare taxes, and the employer's share of Social Security and Medicare taxes with respect to all employees

Tax Credits for FFCRA Leave



- **Qualified Health Plan Expenses**
- Group Health Plans as defined under Code Section 5000(b)(1)
- Generally includes medical, dental, vision, EAPs, FSAs, HRAs (including ICHRAs), and on-site clinics
 - To allocate contributions to an HRA or a health FSA, employers should use the amount of contributions made on behalf of the particular employee
- Does not include QSEHRAs or HSA contributions

Tax Credits for FFCRA Leave



- **Qualified Health Plan Expenses**
- Fully insured plans may use any reasonable method to determine and allocate plan expenses, including the COBRA premium, an average premium rate for all employees, or a method that considers the average premium rate separately for employees with self-only vs. family coverage
- Self-insured plans may use the applicable COBRA premium or any reasonable actuarial method to determine the estimated annual expenses of the plan

Tax Credits for FFCRA Leave



- **Qualified Health Plan Expenses**
- If an employer chooses to use the average premium rate, the allocable amount for each day an enrolled employee is entitled to qualified leave wages could be determined as follows:
 - Employer's overall annual premium divided by number of covered employees
 - Divide result by the avg. number of work days during the year
 - For example, an employee working five days per week may be treated as working 52 weeks x 5 days or 260 days
 - Employers may use any reasonable method for calculating part-time employee work days

Tax Credits for FFCRA Leave



- **Qualified Health Plan Expenses**
- Example (average premium rate): An employer has a fully insured plan that covers 400 employees, with different pre-tax contributions for self-only and family coverage
- Each employee is expected to have 260 work days per year
- Total annual premium is \$5.2 million, $\text{avg} = \$13,000$ ($\$5.2\text{M}/400$)
- Average daily premium is \$50 ($\$13,000/260$ work days), which is the amount of qualified health expenses allocated to each day of paid sick or family leave per employee

Tax Credits for FFCRA Leave



- Employers must include the full amount of the credits for qualified leave wages (and any qualified health plan expenses and the employer's share of the Medicare tax) in their gross income; however, an employer's payments of qualified leave wages (and any qualified health plan expenses and the employer's share of the Medicare tax) are deductible by the employer as a business expenses

Tax Credits for FFCRA Leave



- Wages paid under EPSL and E-FMLA are subject to withholding of federal income tax and the employee's share of social security and Medicare taxes
 - Qualified leave wages are also considered wages for purposes of other benefits that the employer provides, such as contributions to 401(k) plans
 - Employers may continue to take salary reduction contributions for any plan from qualified sick leave wages or qualified family leave wage

FFCRA and CARES Act Tax Credits



- Employers may receive credits for both FFCRA leave and CARES Act's employee retention credit, but not for the same wage payments
- Employers may also receive credits for FFCRA leave and a Small Business Interruption Loan under CARES, although qualified leave wages for which an employer receives a tax credit are not “payroll costs” for purposes of receiving loan forgiveness



Questions?

Stacy H. Barrow

sbarrow@marbarlaw.com

(617) 830-5457

The information provided in this slide presentation is not, is not intended to be, and shall not be construed to be, either the provision of legal advice or an offer to provide legal services, nor does it necessarily reflect the opinions of the firm, our lawyers or our clients. No client-lawyer relationship between you and the firm is or may be created by your access to or use of this presentation or any information contained on them. Rather, the content is intended as a general overview of the subject matter covered. Marathas Barrow Weatherhead Lent LLP is not obligated to provide updates on the information presented herein. Those viewing this presentation are encouraged to seek direct counsel on legal questions. © Marathas Barrow Weatherhead Lent LLP. All Rights Reserved.