Benefits Briefing:
Ask the Experts - Coronavirus, Health Plans and Paid Leave Programs

Friday, April 17, 2020
2 p.m. ET
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COVID & Health Plans
COVID & Health Plans

• On March 18, the President signed into law the Families First Coronavirus Response Act (H.R. 6201, the Families First Act)

• On March 27, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (H.R. 748, the “CARES Act”), which amended the COVID-19 testing provision in the Families First Act
COVID & Health Plans

• Group health plans and health insurance issuers must cover COVID-19 diagnostic testing products without cost-sharing:
  • FDA-approved
  • Manufacturer intends to seek or is seeking Emergency Use Authorization
  • Developed by a State
  • HHS-approved
• If test is ordered or administered, no cost-share applies to related items and services furnished during a provider visit
• No prior authorization or other medical management
COVID & Health Plans

• Plans and issuers are required to reimburse providers of COVID-19 testing:
  • In-network: reimburse at contracted rate
  • Out-of-network: reimburse based on cash price
• Providers are required to post the cash price of the test on their website
COVID & Health Plans

• Tri-Agency issued FAQ guidance on April 11
  • 14 FAQs
  • Departments anticipate issuing additional guidance on FFCRA and CARES Act and COVID-19
COVID & Health Plans – Top Questions

• Serological Tests

Q: Do “in vitro diagnostic tests” include serological tests for COVID-19?
A: Yes. See Q&A 4

Yes. Serological tests for COVID-19 are used to detect antibodies against the SARS-CoV-2 virus, and are intended for use in the diagnosis of the disease or condition of having current or past infection with SARS-CoV-2, the virus which causes COVID-19. The Food and Drug Administration (FDA) currently believes such tests should not be used as the sole basis for diagnosis. FDA has advised the Departments that serological tests for COVID-19 meet the definition of an in vitro diagnostic product for the detection of SARS-CoV-2 or the diagnosis of COVID-19. Therefore, plans and issuers must provide coverage for a serological test for COVID-19 that otherwise meets the requirements of section 6001(a)(1) of the FFCRA, as amended by section 3201 of the CARES Act.
COVID & Health Plans – Top Questions

• “Items and services”

Q: What types of “items and services” must be covered without cost-sharing?
A: See Q&A 5

The Centers for Disease Control and Prevention (CDC) advises that clinicians should use their judgment to determine if a patient has signs and symptoms compatible with COVID-19 and whether the patient should be tested. In addition, the CDC strongly encourages clinicians to test for other causes of respiratory illness. Therefore, for example, if the individual’s attending provider determines that other tests (e.g., influenza tests, blood tests, etc.) should be performed during a visit (which term here includes in-person visits and telehealth visits) to determine the need of such individual for COVID-19 diagnostic testing, and the visit results in an order for, or administration of, COVID-19 diagnostic testing, the plan or issuer must provide coverage for the related tests under section 6001(a) of the FFCRA. This coverage must be provided without cost sharing, when medically appropriate for the individual, as determined by the individual’s attending healthcare provider in accordance with accepted standards of current medical practice. This coverage must also be provided without imposing prior authorization or other medical management requirements.
Q: Are plans required to provide coverage for items and services that are furnished by OON providers?

A: Yes. See Q&A 7
COVID & Health Plans – Top Questions

“Visit”

Q: Under what circumstances are items or services considered to be furnished during a visit?

A: See Q&A 8

The Departments construe the term “visit” in section 6001(a)(2) of the FFCRA broadly to include both traditional and non-traditional care settings in which a COVID-19 diagnostic test described in section 6001(a)(1) of the FFCRA is ordered or administered, including COVID-19 drive-through screening and testing sites where licensed healthcare providers are administering COVID-19 diagnostic testing. Therefore, the items and services described in section 6001(a) of the FFCRA, as amended by section 3201 of the CARES Act, must be covered when furnished in non-traditional settings, as well as when provided in traditional settings.
COVID & Health Plans – Top Questions

• SBC and plan document changes

Q: Will the Departments allow employers to amend their plans to make benefit enhancements without satisfying notice of modification requirements?

A: Yes. See Q&A 9

• Q&A 14 extends the same relief to telehealth changes

Yes. Section 2715(d)(4) of the PHS Act and final rules issued by the Departments regarding the Summary of Benefits and Coverage (SBC) provide that if a plan or issuer makes a material modification (as defined under section 102 of ERISA) in any of the terms of the plan or coverage that would affect the content of the SBC that is not reflected in the most recently provided SBC, and that occurs other than in connection with a renewal or reissuance of coverage, the plan or issuer must provide notice of the modification to enrollees not later than 60 days prior to the date on which the modification will become effective.19 However, to help facilitate the nation’s response to COVID-19, the Departments will not take enforcement action against any plan or issuer that makes such modification to provide greater coverage related to the diagnosis and/or treatment of COVID-19, without providing at least 60 days advance notice. Plans and issuers must provide notice of the changes as soon as reasonably practicable.20 HHS encourages states to take a similar approach and will not consider a state to have failed to substantially enforce section 2715(d)(4) of the PHS Act if it takes such an approach.
COVID & Health Plans – Top Questions

• Employee Assistance Programs (“EAP”)

Q: May an employer offer benefits for diagnosis and testing for COVID-19 under an EAP that constitutes an excepted benefit?

A: Yes. See Q&A 11

Yes. The Departments’ final regulations provide that for the purpose of determining whether an EAP provides benefits that are significant in the nature of medical care, the amount, scope, and duration of covered services are taken into account. An EAP will not be considered to provide benefits that are significant in the nature of medical care solely because it offers benefits for diagnosis and testing for COVID-19 while a public health emergency declaration under section 319 of the PHS Act related to COVID-19 or a national emergency declaration under the National Emergencies Act, related to COVID-19 is in effect.

• See also Q&A 12 for Guidance for on-site clinics
COVID & Health Plans

• Good faith compliance
  • Importantly, the Departments note that their approach to implementation is to assist (rather than impose penalties on) group health plans, health insurance issuers and others that are working diligently and in *good faith* to understand and come into compliance with the new law

• Future guidance?
IRS & Treasury COVID-Related Guidance
IRS issued Notice 2020-23
  • Extends certain payment and filing deadlines
  • Availability of relief may turn on your specific plan year
  • Notable: Limited Form 5500 relief; some cafeteria plan and HSA relief
• The Council submitted letter to IRS/Treasury requesting relief and/or clarifying guidance on host of issues
• Additional IRS/Treasury guidance expected in the near-term
FFCRA Paid Leave
Q: If an employee used all of his or her regular FMLA leave prior to April 1st, is the employee still entitled to eFMLA?

A: See Q/A #44
FFCRA Paid Leave – “Top 5” Questions

Q: Can an employer require an employee use ePSL or other paid leave prior to utilizing paid eFMLA? Relatedly, can an employer at least require that other paid leave entitlements be taken concurrently?

A: See Q/A #32 and #33

32. If I am an employer, may I use the paid sick leave mandated under the EPSLA to satisfy paid leave entitlements that an employee may have under my paid leave policy?
No, unless your employee agrees. Paid sick leave under the EPSLA is in addition to your employee’s (including Federal Employees) other leave entitlements. You may not require your employee to use provided or accrued paid vacation, personal, medical, or sick leave before the paid sick leave. You also may not require your employee to use such existing leave concurrently with the paid sick leave under the EPSLA. But if you and your employee agree, your employee may use preexisting leave entitlements to supplement the amount he or she receives from paid sick leave, up to the employee’s normal earnings. Note, however, that you are not entitled to a tax credit for any paid sick leave that is not required to be paid or exceeds the limits set forth under the EPSLA. You are free to amend your own policies to the extent consistent with applicable law.

33. If I am an employer, may I require my employee to take paid leave he or she may have under my existing paid leave policy concurrently with expanded family and medical leave under the FMLEA?
Yes. After the first two workweeks (usually 10 workdays) of expanded family and medical leave under the FMLA, you may require that your employee take concurrently for the same hours expanded family and medical leave and existing leave that, under your policies, would be available to the employee in that circumstance. This would likely include personal leave or paid time off, but not medical or sick leave if your employee (or a covered family member) is not ill.

If you do so, you must pay your employee the full amount to which he or she is entitled under your existing paid leave policy for the period of leave taken. You must pay your employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to $200 per workday and $10,000 in the aggregate, for expanded family and medical leave. If your employee exhausts all preexisting paid vacation, personal, medical, or sick leave, you would need to pay your employee at least 2/3 of his or her pay for subsequent periods of expanded family and medical leave taken, up to $200 per day and $10,000 in the aggregate. You are free to amend your own policies to the extent consistent with applicable law.
FFCRA Paid Leave – “Top 5” Questions

Q: The existing guidance clarifies that an employee is generally not eligible for eFMLA or ePSL where there is no work for the employee to perform, even if as a result of COVID-19. How does this analysis apply to an employer where some, but not all, operations have been closed due to COVID-19?

A: See Q/A #18; also see discussion of “coffee shop” in the preamble language to the DOL regulations.

18. What does it mean to be unable to work, including telework for COVID-19 related reasons?

You are unable to work if your employer has work for you and one of the COVID-19 qualifying reasons set forth in the FFCRA prevents you from being able to perform that work, either under normal circumstances at your normal worksite or by means of telework.

For example, if a coffee shop closes temporarily or indefinitely due to a downturn in business related to COVID-19, it would no longer have any work for its employees. A cashier previously employed at the coffee shop who is subject to a stay-at-home order would not be able to work even if he were not required to stay at home. As such, he may not take paid sick leave because his inability to work is not due to his need to comply with the stay-at-home order, but rather due to the closure of his place of employment. That said, he may be eligible for state unemployment insurance and should contact his State workforce agency or State unemployment insurance office for specific questions about his eligibility.
FFCRA Paid Leave – “Top 5” Questions

Q: Whether an employer must provide leave to an employee to care for a child whose school or daycare has been closed if the employee’s spouse or another individual is at home and able to care for the child?

A: See Q/A #69

69. Can more than one guardian take paid sick leave or expanded family and medical leave simultaneously to care for my child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons?

You may take paid sick leave or expanded family and medical leave to care for your child only when you need to, and actually are, caring for your child if you are unable to work or telework as a result of providing care. Generally, you do not need to take such leave if a co-parent, co-guardian, or your usual child care provider is available to provide the care your child needs. See Question 20 for more details.
Q: What records must or should an employer keep when an employee takes ePSL or eFMLA leave, including where an employee takes leave to care for a child whose school or child care facility is closed because of COVID-19?

A: See Q/A #15

15. What records do I need to keep when my employee takes paid sick leave or expanded family and medical leave?

Regardless of whether you grant or deny a request for paid sick leave or expanded family and medical leave, you must document the following:

- The name of your employee requesting leave;
- The date(s) for which leave is requested;
- The reason for leave; and
- A statement from the employee that he or she is unable to work because of the reason.

If your employee requests leave because he or she is subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally document the name of the government entity that issued the order. If your employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you should additionally document the name of the health care provider who gave advice.

If your employee requests leave to care for his or her child whose school or place of care is closed, or child care provider is unavailable, you must also document:

- The name of the child being cared for;
- The name of the school, place of care, or child care provider that has closed or become unavailable; and
- A statement from the employee that no other suitable person is available to care for the child.

Private sector employers that provide paid sick leave and expanded family and medical leave required by the FFCRA are eligible for reimbursement of the costs of that leave through refundable tax credits. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave or expanded family and medical leave wages, you should retain appropriate documentation in your records. You should consult Internal Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. You are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.
Q: If the employer offers the ability to telework, does this mean that an employer never has to worry about providing ePSL or eFMLA leave related to the closure of an employee’s child’s school or day care facility?

A: See Q/A #19
Q: If an employee has an older teenage child—specifically age 14 through 17—must an employer provide ePSL or eFMLA if the child’s school is closed as a result of COVID-19? Relatedly, if such leave is required, can the employer receive a corresponding paid leave tax credit?

A: See Q/A #66 (but see IRS Q&A, which states: “[i]n the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include ... with respect to the employee’s inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care”.

66. May I take paid sick leave or expanded family and medical leave to care for my child who is 18 years old or older?
It depends. Under the FFCRA, paid sick leave and expanded family and medical leave include leave to care for one (or more) of your children when his or her school or place of care is closed or child care provider is unavailable, due to COVID-19 related reasons. This leave may only be taken to care for your non-disabled child if he or she is under the age of 18. If your child is 18 years of age or older with a disability and cannot care for him or herself due to that disability, you may take paid sick leave and expanded family and medical leave to care for him or her if his or her school or place of care is closed or his or her child care provider is unavailable, due to COVID-19 related reasons, and you are unable to work or telework as a result.
FFCRA Paid Leave – “Top 5” Questions

Q: If an employer has 500 or more employees as of April 1, but later goes below the 500-employee mark, can the employer get any credit for any paid leave provided between April 1 and that date? Must the employer provide the Notice on the date it dips below 500 or does it have a grace period of a few days?

A: ?
Q: Can an employer with employees who are health care providers or emergency responders only provide leave to some (but perhaps not all) employees who are health care providers/emergency responders?

A: See DOL reg § 826.30(c)

(c) Exclusion of Employees who are health care providers and emergency responders. An Employer whose Employee is a health care provider or an emergency responder may exclude such Employee from the EPSLA’s Paid Sick Leave requirements and/or the EFMLEA’s Expanded Family and Medical Leave requirements.