COVID-19 Compliance Guidebook

Employer Guide to Compliance Concerns Associated with COVID-19

April 1, 2020

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Now more than ever, employers need comprehensive support as you try to navigate the multitude of issues arising from the COVID-19 pandemic. Employers are faced with issues related to employee benefits, applicable leave laws, what constitutes a qualifying leave, reductions in hours, furloughs and layoffs, as well as many more. Some of the issues you may have already considered, others you may not, given the fast changing landscape. To help you get through this challenging time, the Gallagher Compliance Consulting team has put together this guidebook. If you have questions, please reach out to your Gallagher Consultant for assistance.

About Gallagher Compliance Consulting

Gallagher's Compliance Consulting practice, which consists of more than 30 attorneys and consultants, averaging over 20 years of experience, partners with employers to deliver the strategy, deep expertise and holistic approach that allows our clients to differentiate their organization and build a workplace culture centered on organizational wellbeing at sustainable cost structures. Gallagher understands that employers are faced with numerous challenges when they are crafting benefits programs that meet their operational goals while still complying with all relevant mandates. Those same employers are now faced with additional unique challenges as a result of the COVID-19 pandemic. However, during this tumultuous time, Gallagher's compliance experts have continued to help employers stay on top of the many challenges they are confronting. Our team is immersed in the details and legal issues surrounding all aspects of employer-provided benefits during the COVID-19 pandemic, and together with our clients we work on crafting proactive plans that protect workforce and organizational wellbeing, reduce risk, take into consideration employers' strategic goals and address employers' unique compliance challenges as they work toward a better response to COVID-19.

Contents

Employer Preparation for COVID-19 2

COVID-19 and Employee Benefits Action Items 6

Top 10 Employer FAQs 9

Families First Coronavirus Response Act Becomes Law 12

COVID-19 and Qualifying Leave 16

COVID-19 and Reductions in Hours, Furloughs, and Layoffs 20

Additional Resources 25

The information in this article is current through April 1, 2020. However, given the fast changing nature of the nation's response to the COVID-19 pandemic, we acknowledge that facts will change and invite you to visit our pandemic **site** where we maintain up-to-date information.

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Employer Preparation for COVID-19

As employers prepare for the potential impact of the global spread of the coronavirus (COVID-19), it will be important that they consider not only how their employees are impacted, but also how they can be supported by their employee benefits during this time of uncertainty. Below, we outline some important considerations as your organization tackles this worldwide phenomenon.

Global Impact

On March 11, 2020, the World Health Organization (WHO) declared COVID-19 to be a pandemic. Here in the U.S., with the number of states reporting cases growing daily, the CDC has provided guidance to help employers respond to COVID-19. The CDC reminds employers to respond with flexibility to varying levels of severity and to be prepared to refine their business response plans as needed.

Employee Benefits

In addition, the WHO and the CDC encourage employers to proactively educate employees on precautionary steps while working to strategically plan for business continuity and protect employees. An important message for employers to communicate is that, outside of healthcare workers, the risk of contracting COVID-19 remains low. Employers may also wish to communicate steps to proactively counter the spread of COVID-19, such as:

- disinfecting workspaces and common areas frequently
- promoting hand washing and personal hygiene
- encouraging trusted education and avoiding misinformation
- encouraging the use of telework opportunities and flexible work hours
- quarantining employees who may be showing flu-like symptoms

The last suggestion may raise concerns under federal employment laws, such as the Americans with Disabilities Act (ADA); however, employers may nonetheless ask employees who display flu-like symptoms to go home. Specifically, ADA guidance provides that:

Employers may nonetheless ask employees who display flu-like symptoms to go home.

The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat.

Employers sponsoring health plans should also be mindful of privacy concerns under the Health Insurance Portability and Accountability Act (HIPAA). The Department of Health and Human Services (HHS) released a bulletin to remind covered entities and business associates that the HIPAA privacy requirements continue to apply during crises. HHS' bulletin emphasizes that HIPAA does not preclude the use and disclosure of the minimum amount of protected health information (PHI) necessary to treat a patient (i.e., an employee or dependent), to protect the nation's public health, or to prevent a serious and imminent threat to the health and safety of a person or the public. As employers are likely aware, HIPAA privacy rules contain limitations on a covered entity's ability to release information from a health plan for employment purposes.

When determining whether HIPAA applies, employers should be mindful of the source of the information about an employee's or dependent's infection. If the source of the information is from a claim under, diagnosis from, or some other connection to an employer-sponsored health plan, then the HIPAA privacy rules will apply, and the plan cannot release the information without authorization from the individual for employment-related purposes. If an employer

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learns that an employee or an employee's dependent has the virus from the employee or a supervisor in connection with sick leave, for example, then the employer should look to employment-related laws, such as the ADA or FMLA, on how to communicate with fellow employees. For example, you may wish to send employees home who worked closely with an infected employee for a period of at least 14 days (or longer if governmental authorities determine a longer period is merited), but you should not identify the employee by name due to privacy concerns.

While employers are contemplating steps, as noted above, on how to address a localized outbreak, employers should also consider how their employee benefit programs may support employees due to the uncertainty surrounding the potential spread and impact of COVID-19. It will not surprise anyone that employees may feel additional concerns about their wellbeing, their family member's wellbeing, their jobs, and more. Employees may worry about interacting with individuals who have recently been exposed, but remain asymptomatic, or may worry about how the scope and course of the virus spread may impact their ability to work if workplace or school closures occur. So, employers should consider how their existing benefits programs can support employees. For example, employers may wish to circulate contact information about their employee assistance program (EAP) benefits when providing general information on how to protect against contracting the virus. EAPs are generally resource programs that can help employees through stressful situations and events.

Employers should also consider how their employee benefit programs may support employees in these uncertain times.

Additionally, employers may wish to consider how their telehealth benefits, if any, can assist with employees concerned about possible exposure to the virus. For example, if employees are self-quarantining, then access to telehealth services to confer with healthcare providers may be an appreciated benefit and helpful to reduce others to potential exposure.

Insurer and Potential Health Plan Responses

State insurance commissions have also responded. In New York, Governor Cuomo announced that New York health insurers must waive any cost sharing associated with COVID-19 testing. Under a directive issued by the Governor on March 2, the New York Department of Financial Services must issue an emergency regulation that will prohibit health insurers from imposing cost-sharing on in-network provider office, urgent care center, or emergency room visits when the purpose of a visit is to be tested for COVID-19.

Similarly, the Washington State Insurance Commissioner issued an order to health insurers in Washington stating that insurers must waive copays and deductibles for any consumer requiring testing for COVID-19. Insurers must permit a one-time early refill for prescription drugs, and insurers must suspend any prior authorization requirement for testing or treatment of COVID-19. In addition, if an insurer does not have a sufficient number of in-network providers to perform testing or provide treatment for COVID-19, it must allow covered individuals to be treated by another provider within a reasonable distance at no additional cost. California has also directed insurers to waive all health plan cost-sharing associated with COVID-19 testing, and other states are anticipated to follow.

The Massachusetts Division of Insurance released a bulletin, which provides information about the Division of Insurance's expectations regarding insurers' appropriate coverage of testing and treatment for COVID-19. The Division expects Massachusetts insurers to take all necessary steps to enable their covered members to obtain medically necessary and appropriate testing and treatment that will help fight the spread of disease while, at the same time, preventing the cost of these health care services from being a barrier to care for state residents.

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It is likely that other states have, or will, issue directives similar to the ones issued by the States of New York and Washington or bulletins similar to the one issued by the Commonwealth of Massachusetts. Employers may want to check with their state insurance departments to determine what actions their state has taken, or expects to take, in the near future.

Insurers have also begun to respond. For example, American's Health Insurance Plans (AHIP) – a national health insurance trade group – has recommended that its members cover diagnostic testing when ordered by a physician. It has also recommended that its members ease network, referral and prior authorization requirements, and/or waive patient cost sharing for treatment. Most large health insurers have confirmed that they will cover COVID-19 testing similar to a preventive benefit by waiving copays, deductibles, and coinsurance under their insured plans and are likely to offer to do the same for self-insured plans for whom they adjudicate medical claims. In addition, several insurers have webpages with additional information including FAQs that employers can share with employees. AHIP has a list of responses from member insurers (click here).

Sick Leave

In addition to benefit considerations, many employers have made announcements on paid sick leave. For example, Uber said it will offer drivers and delivery people 14 days of paid sick leave if they fall ill with COVID-19 or are placed in quarantine. Other employers may have employees eligible for state or local paid sick leave. For example, the California Department of Industrial Relations issued FAQs on paid sick leave and COVID-19, which affirm the use of leave under California paid sick leave laws. Although several states and cities around the country have passed laws mandating that employers provide workers with paid sick leave, there is no federal law requiring companies to provide paid sick leave, but employers should be mindful that unpaid leave under the Family and Medical Leave Act (FMLA) is likely to be available. Given the patchwork nature of laws, all employers, irrespective of location, should evaluate which, if any employees, are entitle to mandated state or local sick leave or unpaid leave under FMLA.

At the federal level, President Trump signed the Families First Coronavirus Response Act into law, which provides two weeks of paid sick leave to eligible employees.

Employer Coverage Action Items

Employers may wish to contact their insurers to determine what actions their insurers are or will be taking. Insurance directives requiring coverage of COVID-19 testing will not apply to self-insured plans subject to ERISA. Employers should contact their insurers or Third Party Administrators to find out what options are available. Questions to ask could include:

Employers should stay in contact with their insurers to fully understand the steps those carriers are undertaking in response to the crisis.

- Will COVID-19 preauthorization requirements be waived?
- What information do you have on coverage of COVID-19 testing and treatment that we can share with our employees?
- What coverage and rules will apply to treatment if a covered individual tests positive for COVID-19?

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COVID-19 and Employee Benefits Action Items

As employers respond to concerns arising from the 2019 Novel Coronavirus (COVID-19), many questions may arise regarding how you can support employees. Below, we outline some important considerations as your organization tackles this pandemic.

Health Plan Coverage

Issues to discuss with your third-party administrator or insurer for your medical benefits:

- ☐ **What changes to cost-sharing for COVID-19 testing do we need to make in light of the Families First Coronavirus Response Act?**
- ☐ **Will cost-sharing be waived for COVID-19 treatment?**
- ☐ **What role can telemedicine services play?**
- ☐ **What role can our onsite clinic play?**
- ☐ **What role can our nurse hotline play?**
- ☐ **Do we need to request that our TPAs or insurers suspend "too soon to fill" limitations on prescription drug medication to accommodate employees who may be quarantined or self-quarantining?**

Other coverage issues to consider:

- ☐ **What impact, if any, will providing coverage before deductibles are met have upon our HSA?**

  IRS Guidance states that a high deductible health plan may provide coverage for COVID-19 testing and treatment before a deductible is met without disqualifying the plan.

- ☐ **Do we have to amend our plan documents to permit coverage of COVID-19-related testing and treatment without cost-sharing?**

  In particular, self-insured plan sponsors and fiduciaries should verify that appropriate plan language is adopted and that stop loss insurers will agree to cover associated costs. Without appropriate language and coverage confirmation from stop loss insurers, plan sponsors may find themselves self-insuring related costs. Note that such a change will trigger requirements for Summaries of Material Modification for employers subject to ERISA.

- ☐ **What role can our EAP play to reduce stress associated with the widespread response to COVID-19?**

Continuation of coverage issues:

- ☐ **If our employees are placed on furlough or unpaid leave, will that impact eligibility for continuation of coverage as active employees on our plan?**
- ☐ **If we intend to continue coverage for employees on furlough or unpaid leave, do we need to amend our eligibility, continuation of coverage, and/or termination of coverage provisions in our plan documents?**

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- ☐ **How will placing employees on furloughs or unpaid leaves of absence impact our use of measurement and stability periods for purposes of plan eligibility?**

  Note that the use of measurement and stability periods may also impact an employee's status for purposes of the Patient Protection and Affordable Care Act (ACA).

Preventive Measures

- ☐ **Should we restrict visitors from entering our premises?**
- ☐ **If we wish to permit visitors, should we ask them to complete a COVID-19 health check questionnaire prior to entering our premises?**
- ☐ **If we collect information on visitors, what privacy laws impact the receipt and retention of that information?**
- ☐ **What questions will we ask our employees about their health status with regard to COVID-19?**

  The EEOC has a resource to aid employers.

- ☐ **If an employee has tested positive for COVID-19 or has a known exposure, what can we tell other employees?**

  The EEOC has a resource to aid employers.

Leaves of Absence

- ☐ **How do we address time off for employees diagnosed with the virus?**
- ☐ **How do we address time off for employees who were exposed to, but not diagnosed with the virus?**
- ☐ **How do we address employees who are visibly ill or say that they are ill?**
- ☐ **How do we address time off for employees who self-quarantine?**
- ☐ **How do we address time off for employees who live with or are caregivers for high risk individuals (e.g., individuals over the age of 60 or who have underlying chronic conditions)?**
- ☐ **How do we address time off for parents with children in schools that have canceled classes for an extended period of time?**
- ☐ **How do we address employees who cannot work remotely, but have been instructed not to report to a physical facility?**
- ☐ **Do we need to waive waiting periods for short-term disability?**

  Some programs have three- or five-day waiting periods before benefits become available.

- ☐ **How does the Family First Coronavirus Response Act impact our employees who need to take time off to care for a child whose school is closed or caregiver is unavailable due to COVID-19?**

  Note that the new law does not apply to employers with more than 500 employees.

- ☐ **How do we coordinate the additional emergency paid sick leave required by the Families First Coronavirus Response Act with our existing sick leave policy?**

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Note that the new law does not apply to employers with more than 500 employees.

- ☐ **How will FMLA leave impact an individual who needs time off from work either due to a diagnosis of COVID-19 or to care for someone with the virus?**

  The Department of Labor issued FAQs to assist employers with FMLA questions.

- ☐ **Are there any state disability laws that will apply?**

  Employers should check applicable state websites for more information.

- ☐ **Are there any state family or medical leave laws that will apply?**

  Employers should check applicable state websites for more information.

- ☐ **Should we establish a pandemic leave of absence policy?**

  For example, an organization may provide 10 days of pandemic leave in addition to any other leave policy.

- ☐ **What information do we need to provide to our supervisors about employees returning from leave due to COVID-19?**

  The Centers for Disease Control (CDC) recommends that employers do not ask for return to work or fitness for duty reports.

Other Considerations

- ☐ **Should we establish a deep cleaning process for our facilities to sanitize or disinfect work areas?**

- ☐ **Should we ban employee travel?**

- ☐ **Should we ban use of public transport?**

- ☐ **Should we stagger our start and end times to reduce large gatherings of individuals at one time?**

- ☐ **Are there any filing deadlines for our plans that we need to consider in the near future?**

  For example, responding to IRS ESRP letters, providing COBRA notices, responding to QMCSOs and NMSNs, electronic filing of Forms 1094-C and 1095-C, filing Forms 5500, providing dependent health benefits reporting to states, and sending state individual mandate reporting Forms 1095-C (e.g., New Jersey).

- ☐ **How does HIPAA impact collection of information regarding whether our employees or service providers have been infected with or exposed to COVID-19?**

  First consider the source of the information. If the information comes from your health plan, then HIPAA is involved. If, however, the information arises from employee or vendor self-reporting or some other mechanism other than the health plan, then HIPAA is not involved. One of the best guides on information sharing under these circumstances is EEOC guidance.

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Top 10 Employer FAQs

Is our plan required to cover testing for COVID-19?

Yes. The Families First Coronavirus Response Act, passed by the Senate on March 18, 2020, requires private health plans to cover testing for COVID-19 without cost sharing. In addition, some states have announced that insured health plans in their states are required to waive cost-sharing for costs related to the testing and treatment of COVID-19; some states have strongly recommended carriers and plans waive all cost-sharing, and many national and local carriers have chosen to comply voluntarily.

For Gallagher's comprehensive FAQ in response to the COVID-19 pandemic, please click here.

Is our plan required to cover treatment for COVID-19?

Maybe. Some states have announced that insured health plans in their states are required to waive cost-sharing for costs related to the treatment of COVID-19; additionally, some states have strongly recommended carriers and plans waive all cost-sharing, and many national and local carriers have chosen to comply voluntarily.

Can we exclude employees from the workplace if they are sick and we suspect they have COVID-19? Can we take their temperatures or ask them to take a physical exam? How much can we ask?

The EEOC has confirmed that the guidance it issued for the Americans with Disabilities Act (ADA) in connection with pandemic influenza applies to the COVID-19 pandemic. This guidance is designed to help employers implement strategies to navigate the impact a pandemic in the workplace.

Under EEOC Guidance, if an employee becomes ill with symptoms of a current pandemic disease, an employer can ask the employee not to come to work or to leave the workplace. More generally, the ADA permits an employer to ask an employee to leave a workplace if the employee's illness is serious enough to pose a direct threat to the workplace and its employees.

The EEOC guidance provides that you may ask employees if they are experiencing symptoms associated with COVID-19, such as sore throat, coughing, or shortness of breath, in order to determine whether you can exclude them from the workplace.

Measuring an employee's body temperature is considered to be a medical examination (that is generally prohibited under EEOC rules). If pandemic COVID-19 becomes widespread in your community (as assessed by state or local health authorities or the CDC), you may be permitted to take employees' body temperature, but you should check with your legal counsel before you take that step.

What guidelines should employers follow regarding asking employees to stay home due to COVID-19?

The CDC has published guidelines on when sick employees should be encouraged to stay home, separating sick employees, and general planning considerations to reduce transmission among staff.

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If we become aware that an employee is ill with or has been exposed to COVID-19, what are our privacy responsibilities?

The first concern is often whether the information is subject to the HIPAA Privacy Rule. Whether something is protected health information (PHI) and thus protected by the HIPAA Privacy Rule depends on the source of the information. If you as an employer receive health-related information from a covered entity (for example, your health plan or your insurer), then it is PHI, and the rules governing use or disclosure of that information will apply. For example, if you receive information about a claim for COVID-19 testing under your health plan, then that is PHI. On the other hand, if an employee discloses information about his or her health – including being sick or having been exposed to COVID-19 – to you, then that information is not PHI, but may be protected under the confidentiality provisions of FMLA and/or the ADA.

It is important for you to work with your privacy officer or legal counsel when making decisions about using or disclosing information about the health of your employees in a manner that is different than what you normally do in the typical course of your plan's healthcare operations (as specified by your plan's own HIPAA Privacy and Security policies and procedures and any other privacy policies you may have in place).

Can we continue active employee medical benefits for individuals we put on temporary layoff or furlough?

Plan eligibility language will govern whether you can continue coverage for active employees on temporary layoff or furlough. However, as an employer, you have a lot of flexibility in how you define eligibility, and you can be more generous than what the law requires. If you want to continue active employee benefits for those on a temporary layoff or furlough, you will want to make sure that your carrier or stop loss carrier has agreed to this before making any changes. In addition, you will need to amend plan documents and issue a summary of material modification (SMM) reflecting the change in eligibility.

If an employee is not credited with enough hours of service to maintain eligibility for benefits due to COVID-19 closures, can we terminate coverage for that employee from the plan and offer COBRA?

How a reduction in hours will affect an employee's benefits under your plan depends on the written terms of your plan document. Private sector employers should continue to administer their plan in accordance with its terms to avoid any fiduciary problems under ERISA.

If you are an applicable large employer and use the look-back measurement period to count hours under the ACA, you should generally continue offering coverage to any full-time employees who are currently in a stability period for the remainder of that period to avoid potential penalties. (A reduction in hours or furlough will generally be reflected in an employee's current measurement period, which will dictate whether coverage should be offered for the next stability period.) If you use the monthly measurement method to count hours under the ACA, and an employee experiences a reduction in hours, an offer of coverage could be terminated so long as that reduction in hours triggers a loss of coverage under your plan terms, but you may be required to offer COBRA or other continuation coverage.

Are employees entitled to paid leave due to COVID-19?

Under the Families First Coronavirus Response Act, employers with fewer than 500 employees and government employers to provide employees who are unable to work or telework with two weeks of paid sick leave, paid at the employee's regular rate, due to one of the following reasons:

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

(4) The employee is caring for an individual who is subject to a quarantine or isolation order as described in (1), above, or has been advised as described in (2), above.

(5) The employee is caring for a son or daughter whose school or place of care has been closed, or the child care provider is unavailable, due to COVID-19 precautions.

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Under the Act, an employer's obligations are limited to paid leave of $511 per day ($5,110 in the aggregate) where leave is taken for reasons (1), (2), and (3) above (i.e., an employee's own illness or quarantine), and $200 per day ($2,000 in the aggregate) where leave is taken for reasons (4), (5), or (6) (i.e., care for others or school closures).

Full-time employees are entitled to two weeks (80 hours) of leave and part-time employees are entitled to the typical number of hours that they work in a typical two-week period. The Act allows employers to exclude employees who are health care providers or emergency responders from this coverage.

Under the Act, Emergency Paid Sick Leave expires on December 31, 2020 and any unused paid leave granted by the Act does not carry over into 2021.

Returning Employees to Work

Can we require a doctor's note or physical exam before allowing an employee to return to work after recovering from COVID-19?

Under both the ADA and Family and Medical Leave Act (FMLA), an employer generally may require an employee to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work, if the employer has a reasonable belief that the employee's present medical condition would impair the employee's ability to perform essential job functions. EEOC guidance may permit you to take employees' temperatures during a pandemic as an exception to the regular rules prohibiting workplace medical exams. However, the CDC discourages employers from requiring return-to-work notices from their doctors. See also Q&A 30.

Again, you should work with your legal counsel if you are considering requiring physical exams or taking employees' temperatures before returning to work after leave associated with COVID-19.

Employment Considerations

How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

According to recently releases FAQs from the EEOC, during a pandemic, ADA-covered employers may ask such employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

For Gallagher's comprehensive FAQ in response to the COVID-19 pandemic, please click here.

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Families First Coronavirus Response Act Becomes Law

The House and Senate have passed and President Trump has signed the Families First Coronavirus Response Act (the Act) into law. The Act, which passed with bipartisan support, seeks to ensure the safety of Americans and ease the economic toll of the 2019 Novel Coronavirus (COVID-19) by strengthening the social safety net. A summary of the most important provision for employers follows.

Emergency Paid Sick Leave

For many employers and their employees, the most significant provision is the introduction of Emergency Paid Sick Leave. This Act requires employers with fewer than 500 employees and government employers to provide employees who are unable to work or telework with two weeks of paid sick leave, calculated using the employee's regular rate of pay, due to one of the following reasons:

Eligible employees are entitled to two weeks of paid sick leave.

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

(3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

(4) The employee is caring for an individual who is subject to a quarantine or isolation order as described in (1), above, or has been advised as described in (2), above.

(5) The employee is caring for a son or daughter whose school or place of care has been closed, or the child care provider is unavailable, due to COVID-19 precautions.

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Under the Act, an employer's obligations are limited to paid leave of $511 per day ($5,110 in the aggregate) where leave is taken for reasons (1), (2), and (3) above (i.e., an employee's own illness or quarantine) calculated using 100% of an employee's regular rate of pay, and $200 per day ($2,000 in the aggregate) where leave is taken for reasons (4), (5), or (6) (i.e., care for others or school closures) calculated using two-thirds an the employee's regular rate of pay.

Paid sick leave for part-time employees is based on their typical two-week periods.

Full-time employees are entitled to two weeks (80 hours) of leave and part-time employees are entitled to the typical number of hours that they work in a typical two-week period. The Act allows employers to exclude employees who are health care providers or emergency responders from this coverage.

Under the Act, Emergency Paid Sick Leave expires on December 31, 2020 and any unused paid leave granted by the Act does not carry over into 2021.

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Emergency Family and Medical Leave Expansion Act

The Act also temporarily amends the Family and Medical Leave Act (FMLA) to provide employees of employers with fewer than 500 employees and government employers who have been on the job for at least 30 days with the right take up to 12 weeks of job-protected leave for Public Health Emergency Leave.

To qualify for Public Health Emergency Leave, an employee must be unable to work or telework due to a need to care for the son or daughter under 18 years of age because the child's school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency. A "public health emergency" is defined to mean "an emergency with respect to COVID-19 declared by a Federal, State, or local authority." Note that an employee must provide advance notice as soon as practicable of a need for leave under this temporary provision when the need for leave is foreseeable.

The first two weeks of leave may be in the form of Emergency Paid Sick Leave (described above) or an employee may choose to substitute accrued vacation leave, personal leave, or other medical leave during this period, but an employer may not require an employee to do so. An employee may also take unpaid leave for the first two weeks. After two weeks of leave, employers must continue paid Public Health Emergency Leave at a rate of no less than two-thirds of the employee's usual rate of pay. The Act limits the amount of required paid leave to no more than $200 per day and $10,000 in total.

As with Emergency Paid Sick Leave, the Act provides that an employer may exclude employees who are health care providers or emergency responders from Public Health Emergency Leave coverage.

As with traditional FMLA leave, this leave is job-protected, which means that an employer must return the employee to the same or equivalent position upon his or her return to work. However, there is an exception to the job protection provisions for employers with fewer than 25 employees if the employee's position does not exist after FMLA leave due to an economic downturn or other operating conditions that affect employment caused by the COVID-19 pandemic.

Emergency Family and Medical Leave is effective April 1, 2020 through December 31, 2020.

The Secretary of the Department of Labor has the authority to issue regulations to: (a) exclude certain health care providers and emergency responders from the list of those employees eligible for leave; and (b) exempt small businesses with fewer than 50 employees where the imposition of these requirements would jeopardize the viability of the business as a going concern. An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the organization as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

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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 employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

Tax Credits for Paid Sick and Paid Family and Medical Leave

Payroll Credit for Required Paid Sick Leave. To assist employers who need to fund emergency paid sick leave, the Act provides a refundable tax credit equal to 100 percent of qualified paid sick leave wages paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by Internal Revenue Code section 3111(a) (the employer portion of Social Security taxes).

The Act provides refundable tax credits to fund the leave programs it mandates.

For tax purposes, the Act distinguishes among reasons an employee is paid qualified sick leave wages. For employees who are subject to a quarantine or are seeking diagnosis or treatment with respect to COVID-19, the amount of qualified sick leave wages taken into account for each employee is capped at $511 per day. For amounts paid to employees for the other qualifying reasons for paid sick leave (e.g., to take care of a child whose school had been closed), the amount of qualified sick leave wages taken into account for each employee is capped at $200 per day. The aggregate number of days taken into account per employee may not exceed the excess of ten over the aggregate number of days taken into account for all preceding calendar quarters.

If the credit exceeds the employer's total tax liability under section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer. To prevent a double benefit, no deduction is allowed for the amount of the credit. In addition, no credit is allowed with respect to wages for which a credit is allowed under Code section 45S. Employers may also elect to not have the credit apply.

Payroll Credit for Required Paid Family Leave. To assist employers who need to fund paid Public Health Emergency Leave, the Act also provides a refundable tax credit equal to 100 percent of qualified Public Health Emergency Leave wages paid by an employer for each calendar quarter. The tax credit is allowed against the tax imposed by Code section 3111(a) (the employer portion of Social Security taxes). Qualified wages are wages required to be paid by the Emergency Family and Medical Leave Expansion Act.

The amount of qualified family leave wages taken into account for each employee is capped at $200 per day and $10,000 for all calendar quarters. If the credit exceeds the employer's total liability under Code section 3111(a) for all employees for any calendar quarter, the excess credit is refundable to the employer.

To prevent a double benefit, no deduction is allowed for the amount of the credit. In addition, no credit is allowed with respect to wages for which a credit is allowed under Code section 45S. Employers may again elect to not have the credit apply

Any wages paid for emergency paid sick or emergency family and medical leave under the Act are not considered wages for purposes of Code section 3111(a).

The tax credits for emergency paid sick leave and emergency paid family leave will be available for eligible leaves taken between April 1, 2020 and December 31, 2020.

Other Relevant Provisions

Coverage of Testing for COVID-19. Private health plans must provide coverage for COVID-19 diagnostic testing, including the cost of a provider, urgent care center and emergency room visits in order to receive testing, at no cost to the consumer and without prior authorization or other medical management requirements.

TRICARE, Coverage for Veterans, Coverage for Federal Workers and Native Americans. The Act also ensures that individuals enrolled in TRICARE, covered veterans, and federal workers have coverage for COVID-19 diagnostic testing without cost-sharing.

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COVID-19 and Qualifying Leave

After the passage of the Family First Coronavirus Response Act (the Act), many employers are faced with questions about whether their employees will qualify for either leave under the Act or "traditional" leave under the Family and Medical Leave Act (FMLA). "Traditional" FMLA leave includes leave for an eligible employee's own serious health condition that makes the employee unable to perform the functions of his or her job.

- An employee is "unable to perform the functions of the position" when a health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position, within the meaning of the Americans with Disabilities Act (ADA), as amended.
- An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of his or her position during the absence for treatment.

"Traditional" FMLA leave also allows leave for an eligible employee when the employee is needed to care for certain qualifying family members (child, spouse or parent) with a serious health condition. (The definition of son or daughter includes individuals for whom the employee stood or is standing "in loco parentis". The definition of parent includes individuals who stood "in loco parentis" to the employee.)

"Needed to care for" encompasses both physical and psychological care. It includes, for example:

- Providing care for a qualifying family member who, because of a serious health condition, is unable to care for his or her own basic medical, hygienic, nutritional or safety needs, or is unable to transport himself or herself to the doctor, etc.;
- Providing psychological comfort and reassurance that would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care; or
- Filling in for others who normally care for the family member or to make arrangements for changes in care (transfer to a nursing home, for example).

The employee need not be the only individual or family member available to care for the qualifying family member.

In addition to "traditional" FMLA leave, Congress introduced two types of leave through the Family First Coronavirus Response Act – Public Health Emergency Leave and Emergency Paid Sick Leave. To qualify for Public Health Emergency Leave, an individual must require time off to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.

In contrast, to qualify for Emergency Paid Sick Leave, the employee must establish a need because of one of the following:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- The employee is caring for an individual who is subject to a quarantine or isolation order as described in (1), above, or has been advised as described in (2), above.
- The employee is caring for a son or daughter whose school or place of care has been closed, or the child care provider is unavailable, due to COVID-19 precautions.
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

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Below, we highlight some frequently asked questions about which type of leave may apply in the context of COVID-19. Note that for purposes of these examples, we have assumed that both the employer and the employee are covered for purposes of the applicable leave with regard to employer size and employment history. For more information about the leave applicability for Public Health Emergency Leave and Emergency Paid Sick Leave, please see our article, Family First Response Act Becomes Law.

	"Traditional FMLA"	Public Health Emergency Leave	Emergency Paid Sick Leave
I have a cough and fever and I'm self-isolating, do I qualify for leave?	No. Unless you receive inpatient care (i.e., you're hospitalized) or are under continuing care (i.e., you visited a doctor AND received prescription treatment OR you have visited a doctor two or more times for the same cough and fever) for more than three days, then even if you have a cough and fever for more than three days, it does not qualify for "traditional" FMLA leave.	No.	No. Unless you are advised by a health care provider to self-quarantine due to concerns about COVID-19 or are seeking a medical diagnosis due to COVID-19 symptoms.
I've been diagnosed with COVID—19 and my doctor told me to remain in self-isolation for 14 days, do I qualify for leave?	No. Unless you receive inpatient care (i.e., you're hospitalized) or are under continuing care (i.e., you visited a doctor AND received prescription treatment OR you have visited a doctor two or more times for the cough and fever) for more than three days, then even if you are ill with COVID-19 for more than three days, it does not qualify for "traditional" FMLA leave.	No.	Yes. You qualify because you have been diagnosed with COVID-19 and are quarantined or isolated under a doctor's recommendation.
I've been diagnosed with COVID-19 and my doctor told me to remain in self-isolation for 14 days, do I qualify for PAID leave?	No.	No.	Yes. You qualify because you are experiencing symptoms associated with COVID-19 and are self-isolated on a health care provider's advice.

	"Traditional FMLA"	Public Health Emergency Leave	Emergency Paid Sick Leave
My child's middle school has suspended classes for an indefinite period because of COVID-19, do I qualify	No.	Yes. You qualify because the leave is to care for a son or daughter under 18 years of age of because the child's school or place of care has been closed due to a public health emergency so long as a co-parent, co-guardian or your normal caregiver is not available to care for the child. However, the first two weeks are unpaid unless you are able to substitute some other form of paid leave or Emergency Paid Sick Leave.	Yes. You qualify because the leave is to care for your child because the child's school or place of care has been closed due to the coronavirus so long as a co-parent, co-guardian or your normal caregiver is not available to care for the child.
My mother-in-law has been hospitalized with COVID-19, do I qualify for leave?	No. "Traditional" FMLA leave does not extend to in-laws.	No.	Probably not. Although you could obtain leave to care for her if your mother-in-law was self-isolated due to her diagnosis with COVID-19, this scenario involves hospitalization rather than a doctor's recommendation for self-isolation, so you would not be needed to care for your mother-in-law.
My employer has ordered me to work from home for the next 30 days, do I qualify for leave?	No. Unless you or a family member has a "serious health condition," you do not qualify for "traditional" FMLA leave.	No.	Maybe. If you are ordered to stay home by your employer due to a Federal, State, or local quarantine or isolation order related to COVID-19 or a quarantine or isolation recommendation by a health care provider due to COVID-19 concerns, you qualify if you are unable to work or telework.
I have been furloughed by my employer, do I qualify for leave?	No. A furlough, unfortunate as it is, is not a serious health condition.	No. A furlough, unfortunate as it is, is not a qualifying reason for Public Health Emergency Leave.	No. A furlough, unfortunate as it is, is not a qualifying reason for Emergency Paid Sick Leave.
I've been diagnosed with COVID-19 and hospitalized, do I qualify for leave?	Yes. Your own inpatient care in a hospital, hospice, or residential medical care facility is considered to qualify you as	No.	Presumably yes. Emergency Paid Sick leave applies to individuals who seek a diagnosis after experiencing symptoms associated with COVID-19.

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	"Traditional FMLA"	Public Health Emergency Leave	Emergency Paid Sick Leave
	having a serious health condition.		
My father was diagnosed with COVID-19 and hospitalized, do I qualify for leave?	Maybe. You may qualify for "traditional" FMLA leave in order to care for certain family members, such as a spouse, a child, or a parent, but you must establish that you are needed to care for that family member. Since your father would be hospitalized, it is not likely that a healthcare provider would certify that you are needed to care for your father. However, you may be able to qualify after your father is released in order to help him recover.	No.	Probably not. Although you could obtain leave to care for him if your father was self-isolated due to his diagnosis with COVID-19, this scenario involves hospitalization rather than self-isolation, so you would not be needed to care for your father.
My spouse was exposed to COVID-19 as part of his job and has been ordered by his doctor to self-isolate because he poses a threat to the community, do I qualify for leave?	No. Unless your spouse has a "serious health condition" as defined by FMLA, you do not qualify for leave.	No.	Probably, if you've been advised by a health care provider to self-quarantine and are unable to work or telework. If your spouse has COVID-19, but is still asymptomatic, you may also have been exposed to the virus through him, and a healthcare provider may also order you to self-isolate.
I have flu-like symptoms and I think I may have COVID-19 and am waiting on test results, do I qualify for leave?	No. Unless you have a serious health condition that lasts more than three days, you do not qualify. However, you may become qualified if you are under continuing treatment or inpatient care.	No.	Yes. If you self-isolate while waiting for a diagnosis, you qualify for Emergency Paid Sick Leave, even if it is later determined that you do not have COVID-19.

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COVID-19 and Reductions in Hours, Furloughs, and Layoffs

As the nation responds to the multi-faceted effects of the 2019 Novel Coronavirus (COVID-19), many employers face temporary closures and the grim decision of reducing employee hours, introducing furloughs, or laying off employees. Employers have a number of issues to consider when deciding to reduce the size of their workforce, such as application of the WARN Act or the size of severance packages to offer. Also important to understand and consider is the impact that these decisions will have on health and welfare benefits. This article from Gallagher discusses some of the significant employee benefit considerations associated with staffing reductions faced by employers and their employees in the midst of this pandemic.

Reductions in Hours, Furloughs, and Layoffs: A Menu of Terms

Employers have options when facing work stoppage.

Although each employer in a given industry may be faced with the same future – a temporary work stoppage or reduction due to COVID-19 – the path chosen in furtherance of that necessity may differ based on the individual employer. Employers have a number of options available to them when it comes to work stoppages or reductions in workforce. An employer may choose to reduce the hours of service for some or all of its employees. An employer can also downsize its workforce by laying off employees, resulting in a permanent reduction in its workforce through terminations. Employers looking for a solution that does not permanently terminate employment relationships can turn to furloughs, which allow employees to return after a temporary unpaid leave, generally lasting a few weeks to a few months.

Counting Hours for Furloughed Employees or Employees with Reduced Hours

Employers considering furloughs or reducing employees' work hours must consider how that decision will impact their employees' status as full-time or not full-time for purposes of the Patient Protection and Affordable Care Act (ACA). Under the ACA's Employer Mandate, employers of a certain size must offer affordable, minimum value coverage to their full-time employees to avoid Employer Shared Responsibility penalties. In the case of a reduction in hours or a furlough, it would seem that an employee whose hours are reduced such that he or she is no longer considered to be a full-time employee would no longer be offered health coverage. However, depending on the method used to determine full-time status (monthly measurement method or look-back method), an employee's status as full-time (or not) may be locked in for a period of time.

Employers must consider how their decisions will impact their employees' status for purposes of the ACA.

With the monthly measurement method, an employee's hours of service are calculated for a given month and an offer of coverage must be made for any month in which the employee has at least 130 hours of service to avoid an ACA Employer Shared Responsibility penalty associated with that employee. For example, an employee has at least at least 130 hours of service from January through March, but is furloughed for two weeks in April, and then resumes normal working hours for May through December. To avoid a penalty, the employer must offer coverage for January through March and May through December, but does not have to offer coverage for April.

In contrast, an employer using the look-back measurement method may find an employee's full-time status is protected. Using the look-back measurement method, an employee's full-time status is determined during a measurement period for a corresponding stability period (following the measurement period). Therefore, when an employee has been determined to be a full-time employee during the measurement period, his or her full-time status during the corresponding stability period is protected. This means an employee who originally met the full-time employee threshold under the look-back measurement period will continue to be considered a full-time employee for

the corresponding stability period even if his or her hours are reduced or he or she is furloughed and no longer meets the full-time hours of service threshold.

Eligibility for Benefits Where there is a Reduction in Hours or Furlough

Employers planning to reduce employees' hours or to implement furloughs in response to COVID-19 should consider how that will affect employees' eligibility for benefits. Plan terms govern plan eligibility. For example, a plan may have an "actively at work" requirement or may require full-time status (as defined in the plan) for an employee to be eligible for coverage. An employee who has a reduction in hours or is furloughed may cease to satisfy the eligibility definition and consequently no longer be eligible for coverage.

Employers should consider the impact on benefits eligibility.

Depending on the terms of the plan, the carrier or stop-loss carrier may take the position that employees lose their eligibility for coverage during a work stoppage. Alternatively, a plan could include a provision that permits continued eligibility in the event of a temporary layoff. In either case, the determination is governed by plan terms. Further, in the absence of such a provision, it is possible that the carrier would agree to continue coverage during a COVID-19-related temporary work stoppage. Similarly, a carrier may be willing to allow continued coverage for employees whose hours are temporarily reduced to the extent that they no longer satisfy the plan's hours worked requirement. In that case, the plan may need to be amended and a summary of material modification delivered to participants to explain the change.

Note that for an employer who uses the look-back measurement method, as noted above, employees who remain employed during a stability period (notwithstanding a temporary period of low or no hours) if determined to be full-time during a measurement period would still be considered full-time during the subsequent stability period. In that case, removing such individuals from coverage during a furlough or reduction in hours would not be optimal and could result in ACA penalties. To protect against that possibility, the employer may be able to arrange continued coverage with the carrier for the temporary period of absence.

Employers should review their plan documents for each benefit offered to determine employees' eligibility for coverage and should discuss with their carriers the implications of a reduction in hours or furlough in response to COVID-19. Employers have flexibility to determine eligibility for their plans and may choose to be more generous than the law requires in this unique situation, but should do so with agreement from their carriers.

Cafeteria Plan Elections

If a furlough or reduction in hours causes an employee to lose eligibility for a benefit under a plan, that constitutes a change in election event allowing that individual to change his or her salary reduction election. If the furlough or reduction in hours does not impact eligibility, there is no change in election event and, therefore, no change in election or coverage may be permitted. An employer may want employees to be able to drop health flexible spending account (health FSA) coverage during a furlough. In that case, the plan's eligibility provisions must state that coverage under the health FSA ends when an employee is no longer actively working.

Applicable Large Employers Must Include Laid Off Employees in Their IRS Reporting

Applicable Large Employers must include laid off employees in IRS reporting.

Section 6056 of the ACA requires every applicable large employer (ALE) to file a form (i.e., a Form 1095) with the IRS to report information about its full-time employees and to furnish each full-time employee with a statement containing similar information. These forms must be filed regardless of whether the ALE offers coverage or whether the employee enrolls in any coverage offered.

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In completing a Form 1095-C, an employer must indicate on Part II of the form whether it offered coverage for all days of the calendar month to a particular individual (and any dependents). However, if an employee terminates employment with the ALE before the last day of a month and the coverage (or offer of coverage) expires upon termination of employment, but the coverage would have otherwise continued until the end of the month, then the ALE should report that month as an offer of coverage using code 2B. If the coverage (or offer of coverage) would have continued had the employee not terminated employment during the month, then the ALE will be eligible for relief under the Employer Mandate for that employee's last month of employment.

COBRA Notices for Employees No Longer Covered

For some employees, coverage will end as employers make tough decisions to terminate employment or cut employees' hours to handle the COVID-19 crisis. The requirements under COBRA are clear– continuation coverage must be offered when qualified beneficiaries (certain employees, terminated employees, retirees, spouses, former spouses, and dependent children) lose coverage due to a triggering event (called a "qualifying event"), such as a termination of employment or a reduction in hours worked. Plan sponsors and plan administrators are required to provide qualified beneficiaries with COBRA election notices upon the loss of coverage triggered by qualifying events. The election notice describes the ensuing COBRA rights and obligations to which a qualified beneficiary is entitled, as well as the procedures necessary to make an election of COBRA coverage. COBRA coverage is not automatic; it must be affirmatively elected. Without a timely provided notice, the employer is exposed to lawsuits and fines. When instituting large scale layoffs or terminations, human resources departments may be increasingly prone to costly failures to timely provide the COBRA election notice.

Furloughs or reductions in hours may trigger COBRA continuation obligations.

The election notice must be furnished by the plan administrator to qualified beneficiaries within 14 days after the plan administrator receives the notice of a qualifying event (from either the employer or the qualified beneficiary). If the qualifying event is one where the employer has the obligation to notify the plan administrator of the event (such as a termination of employment or a reduction in hours) and the employer is the plan administrator, then the election notice must be provided to the qualified beneficiaries within 44 days from the date that the qualifying event occurs.

Although compliance may be difficult for employers with employees spread across multiple locations, the alternative may prove to be immensely costly. Employers who violate COBRA requirements could face penalties under the Internal Revenue Code and ERISA. Further, employers are at risk of lawsuits filed by the Department of Labor and/or qualified beneficiaries. The compounding effect of COBRA penalties creates an environment that strongly encourages compliance.

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Employees Who Cannot Cover Salary Reduction Elections During the COVID-19 Pandemic

With the rapidly changing business environment in the midst of the 2019 Novel Coronavirus (COVID-19) pandemic, many employers are faced with having to furlough employees or otherwise reduce employee hours. One issue that may arise as a result of those actions is that some employees may not earn enough compensation to cover a salary reduction election for benefits. This article from Gallagher discusses issues to consider in addressing potential pay shortages.

Options for Funding Benefits during a Pay Shortage

As employers consider the economic implications of COVID-19 for their employees, they might consider paying the employee's portion of benefits premiums if an employee has a pay shortage due to reduced hours or a furlough. An employer can pay the employee's portion of the premium, but should consult with its tax advisor about any potential tax implications.

Employers have options on handling employee premiums during furloughs or leaves.

Other options exist if paying the employee's portion of the premium is not feasible. While the IRS has not provided specific guidance regarding situations where, due to a furlough or a reduction in employee hours, there is a pay shortage without loss of benefit eligibility, it has issued regulations that address how an employee may pay for benefits during an FMLA leave. Those regulations provide three options for handling the contribution obligations of employees who continue group health coverage during an unpaid FMLA leave: (1) prepayment with a special salary reduction; (2) pay-as-you-go on an after-tax basis; or (3) catch-up salary reductions (or after-tax payment) upon return from the leave. Thus, the IRS has indicated that salary reduction elections for group health coverage, at least in the context of FMLA leave, can be accelerated, deferred, or paid on an after-tax basis when there is no pay. It seems reasonable to apply similar concepts in the non-FMLA context as well. Moreover, no requirement exists that salary reduction contributions be made on a ratable basis in equal amounts every pay period. Of course, the plan document should contain language flexible enough to accommodate the employer's method for handling pay shortages.

The first option under the FMLA regulations – prepayment by acceleration of the salary reduction – is not likely to be useful in this COVID-19 situation because the pay shortage is not necessarily anticipated in advance. It's more helpful in situations where the pay shortage is predicted, as in the event of a planned leave. It is worth noting, though, that the FMLA regulations do not allow prepayment to be the sole option made available to employees on unpaid FMLA leave. Further, the prepayment option cannot be used to pay for benefits in a subsequent plan year. The second option – pay-as-you-go on an after-tax basis – will only be useful for participants with additional resources to pay the amount out-of-pocket. Thus, the third option – catch-up salary reductions – is most likely to work when the pay shortage is unexpected or occurs suddenly, such as in response to COVID-19. Note that if an employer allows catch-up contributions upon an employee returning to work, those can be made on a pre-tax basis under a Section 125 cafeteria plan.

The risk in allowing catch-up salary reductions is that the employer may not be able to recoup the deferred salary reductions if the employee does not return to work or is unable to make a payment. An employer permitting this option might consider establishing an outside limit for the deferral (e.g., 30 or 60 days) and then stopping or reducing coverage at the end of the time period if the catch-up salary reduction is not made or is insufficient to cover the amount due.

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Order of Funding Benefits during a Pay Shortage

In situations where the pay shortage is enough to cover some, but not all, of an employee's salary reduction elections, the employer will be confronted with the issue of the order in which the elected benefits should be funded. Should cafeteria plan benefits or retirement benefits be funded first? The plan sponsor should address the issue by establishing a uniform administrative practice. Even though no guidance exists, it seems reasonable, based on the fact that a lapse in payment could cause a cancellation of coverage, that the plan sponsor should first take salary reductions for health, disability, and life insurance benefits. But other ordering rules may be reasonable, too. Irrespective of what ordering rules are adopted, the relevant cafeteria plan documents must be amended and the adopted policy must be communicated to employees.

Plan sponsors should determine in what order benefit premiums should be funded during a shortfall period.

Cafeteria Plan Considerations

In general, once an employee elects coverage offered through a Section 125 plan, the employee may not drop or change such coverage until the next open enrollment. This general rule could be problematic for employees whose full-time status, and corresponding benefits eligibility, is based on a stability period under the Patient Protection and Affordable Care Act (ACA) Employer Shared Responsibility rules. For example, consider an employee who achieves full-time employee status during a measurement period and elects benefits for the corresponding stability period (e.g., plan year). However, during the stability period, the employee's hours are reduced so that he is no longer full-time. Assume that the employee does not lose eligibility for the group health plan because he is in a stability period and is thus locked into the coverage for the remainder of the stability period. With the employee's reduced hours, he may no longer earn enough money to cover the salary reduction contributions for his coverage. To address such situations, the IRS rules include a permitted election change that would allow affected employees (i.e., employees who worked more than 30 hours per week and drop below 30 hours per week) to drop the employer-sponsored coverage elected, provided they intend to immediately enroll in other "minimum essential coverage." As with any Section 125 plan permitted election change, this permitted election change must be reflected in the Section 125 plan document.

If a furlough or reduction in hours does not impact eligibility, there's no change in election event.

Additionally, if a furlough or reduction in hours causes an employee to lose eligibility for a benefit under a plan, that constitutes a change in election event allowing that individual to change his or her salary reduction election. If the furlough or reduction in hours does not impact eligibility, there is no change in election event and, therefore, no change in election or coverage may be permitted. Further, an employer may want employees to be able to drop health flexible spending account (health FSA) coverage during a furlough. In that case, the plan's eligibility provisions must state that coverage under the health FSA ends when an employee is no longer actively working.

Implications for the ACA Employer Mandate

Employers who are faced with employees who cannot cover their salary reduction elections will not be subject to a penalty under the ACA Employer Mandate. IRS guidance indicates that employers will not be penalized for employees whose coverage is canceled because they cannot cover their salary reduction elections as long as certain requirements are met, including the mandatory "grace period," which allows employees additional time to make premium payments.

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Additional Resources

DOL, Families First Coronavirus Response Act: Questions and Answers:
https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

IRS, COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQs:
https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs

WHO, Coronavirus Disease (COVID-19) Advice for the Public: https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public

WHO, Q&A on Corona Viruses: https://www.who.int/news-room/q-a-detail/q-a-coronaviruses

CDC, Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19): https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fguidance-business-response.html

OSHA, Guidance on Preparing Workplaces for an Influenza Pandemic:
https://www.osha.gov/Publications/influenza_pandemic.html

EEOC, What You Should Know About the ADA, the Rehabilitation Act and the Coronavirus:
https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm

HHS, Bulletin: HIPAA Privacy and Novel Coronavirus: https://list.nih.gov/cgi-bin/wa.exe?A2=ind2002&L=OCR-PRIVACY-LIST&P=69

IRS, Notice 2020-15, High Deductible Health Plans and Expenses Related to COVID-19: https://www.irs.gov/pub/irs-drop/n-20-15.pdf

Department of Labor, COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers: https://www.dol.gov/agencies/whd/fmla/pandemic

For further information on organizational responses to COVID-19, please see Gallagher News & Insights:
https://www.ajg.com/us/news-and-insights/2020/mar/gallagher-report--responding-to-the-coronavirus/

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