

Answering Employer Questions about COVID-19 and Employer Impact

March 30, 2020

Presented By | Bob Radecki
Senior Public Policy and Regulatory Analyst

Amanda Olimb J.D.
Senior Compliance Consultant

AGENDA

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

The Families First Coronavirus Response Act

- Background
- COVID-19 Testing Coverage Requirement
- The Emergency Paid Sick Leave Act (Paid Sick Leave)
- The Emergency Family and Medical Leave Expansion Act (Expanded FMLA)
- Employer Tax Credits

Benefit Issues

- Plan Eligibility
- §125 Election Changes and Enrollment Rules

CARES ACT

CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES ACT)

CARES ACT

- \$2.2 Trillion Economic Stimulus Bill - Signed into law Friday, March 27th
- Referred to as "Phase 3" of Congress's coronavirus response
 - The first phase was the Coronavirus Preparedness and Response Supplemental Appropriations Act - \$8.3 billion bill supporting coronavirus vaccine research signed into law 03/06/2020
 - The second phase was the Families First Coronavirus Response Act (FFCRA) - \$104 billion package focused on paid sick leave, expanded paid FMLA leave, and unemployment benefits signed into law on 03/18/2020

CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES ACT)

Employee Benefits Provisions in CARES Act

- HDHPs Can Provide First Dollar Coverage for Telehealth Services
 - Effective immediately HDHPs can cover telemedicine services before participants have met the applicable minimum deductible, without jeopardizing the employee's HSA eligibility
 - This HSA safe harbor expires for plan years beginning 1/1/2022
- Health FSAs, HRAs, and HSAs can reimburse OTC Medicine
 - Reverses prohibition passed as part of the ACA
 - Also allows menstrual care products to be treated as medical expense that can be reimbursed on a tax-free basis
- COVID-19 Coverage Mandate Expanded
 - Requires plans to cover preventive services or vaccines for COVID-19 on an expedited schedule if and when they become available.
- DOL Can Delay ERISA Filing Requirements
 - Gives the DOL authority to delay ERISA related filing requirements, such as the Form 5500 and Form M-1
- Employer can pay for employee student loans
 - Employers can provide up to \$5,250 tax-free to employees to pay for student loans through the end of 2020

The Families First Coronavirus Response Act (FFCRA)

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT BASICS

Coverage of COVID-19 Testing

- Health plans required to cover COVID-19 testing related expenses with no cost sharing

Two weeks of emergency paid sick for all employees if cannot work due to:

- Need to stay home for quarantine or isolation of employee or care for others
- Need to stay home to care for child due to closure of school or daycare

Up to 12 weeks of partially paid emergency Family and Medical Leave

- To stay home to care for child due to closure of school or daycare

Emergency leave applies to private employers <500 and all public employers

Business Tax Credits

- Employer tax credits designed to cover employer costs of paying for emergency leave and cost of benefits provided to employees on emergency leave

THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT BASICS

Effective Date

- Coverage for COVID-19 Testing – March 18 until further notice
- Emergency Paid Sick leave and Expanded FMLA – April 1 through end of 2020
- DOL non-enforcement through April 17 with employer good faith effort

Employers Subject to Emergency Leave Requirements

- Any size public employer and private employers (including not-for-profits) with <500 employees
 - Count all employees (FT and PT) in the U.S. at the time leave is requested
 - Based on FLSA and FMLA “joint employer” and “integrated employer” rules – not solely on ownership
- Very limited exception for companies with fewer than 50 employee

Notice Requirement

- Model notice is available on DOL’s website – Post at worksite, company intranet, website, or email

Additional Regulatory Guidance

- DOL - <https://www.dol.gov/agencies/whd/pandemic>
- IRS - <https://www.irs.gov/coronavirus>

THE BASICS – COMMON EMPLOYER QUESTIONS

Q: Two companies that that have common ownership and are part of a controlled group based on the IRS §414 rules. Each has under 500 employees but combined they have over 500 employees. They are in different industries and have nothing in common, no common management or operations. Are they subject to the FFCRA emergency leave requirements?

A: Likely yes – With no common operations or management they probably would not be considered an “integrated employer so each employer would be measured on its own.

Q: A company has fewer than 50 employees. Granting emergency leave would be a hardship & difficult administratively, but the business would continue to operate. Can the employer deny leave to an eligible employee?

A: Probably not. The employer would need to demonstrate that granting the leave would “*jeopardize the viability of the business as a going concern.*”

The Emergency Paid Sick Leave Act

PAID SICK LEAVE

Purpose of the Emergency Paid Leave Act – To Help Stop The Spread of the Virus

- So employee stays home when they are experiencing symptoms or subject to COVID-19 related isolation or when the employee is needed to care for someone who is quarantined

Reasons an Employee Qualifies for Emergency Leave

- Employee cannot work because:

Reasons Directly Related to the Employee

- 1 - Employee is subject to a federal, state or local quarantine or isolation order
- 2 - Employee has been advised by a healthcare provider to self-quarantine
- 3 - Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis

Reasons Related to Employee Needs to Care for Others

- 4 - Employee is caring for another **individual** who: (i) is subject to a federal, state, or local quarantine or isolation order or (ii) has been advised by a healthcare provider to self-quarantine
- 5 - Employee is caring for a child under age 18 where school has been closed, or childcare provider is unavailable, due to COVID-19 precautions (Note: This may also qualify for expanded FMLA)

PAID SICK LEAVE

Which Employees are Eligible?

- All employees are eligible (FT and PT) regardless of length of employment
 - Not required to provide paid sick leave to employees who are health care providers or emergency responders

How Much Paid Leave?

- Full-time employees – Up to 80 hours (2 weeks for exempt)
- Part-time employees – 2 weeks equal to the number of hours generally worked in a 2-week period
 - For variable hour employees, use a 6-month average

How Much Pay?

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

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

PAID SICK LEAVE – COMMON EMPLOYER QUESTIONS

Q: Would statewide “shelter-at-home” orders qualify as a “quarantine or isolation order” triggering broad employee eligibility for emergency leave?

A: No – the leave requirement is designed to address individual employees need to stay home due to a qualifying reason.

Q: Can an employee qualify for more than one occurrence of emergency sick leave?

A: No – employees are eligible for only one instance of emergency sick leave.

Q: Can the emergency sick leave be taken intermittently?

A: No for employees working at their normal worksite - the leave must be taken in its entirety. Employees teleworking can take intermittent emergency sick leave if employer allows it.

Q: Can leave taken prior to April 1st qualify as emergency sick leave?

A: No – leave taken prior to April 1st cannot be counted against an employee 2 weeks of eligible emergency leave, and the employer is not eligible for a tax credit to cover the cost of such leave.

PAID SICK LEAVE – COMMON EMPLOYER QUESTIONS

Q: What provider and first responder employees can be excluded from eligibility for emergency sick leave?

A: Provider: anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity

First Responder: military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility

Q: If an employer places employees on furlough, or closes due to a federal, state, or local directive, are employees eligible for paid leave?

A: No – if your employer furloughs you or closes (either due to a directive or lack of business), you are not eligible for paid leave.

The Emergency Family and Medical Leave Expansion Act

EXPANDED FMLA

New partially paid FMLA-protected leave for employees who cannot work because they need to stay home with children due to school or daycare closure

- Children under age 18

Which Employees are Eligible?

- Employee (FT or PT) who has been employed for at least 30 calendar days
- Designed for employees who are unable to work (or telework) due to a child being at home

How Much Paid Leave?

- Up to 12 weeks in a 12-month period as by existing FMLA rules

How Much Pay?

- First 10 days of leave unpaid
- The remainder of the leave (up to 12 weeks) 2/3 of pay up to \$200 per day (\$10,000 in the aggregate)
 - Pay is based on the greater of employee's regular rate of pay or minimum wage (federal, state or local)

Does **not** extend pay or add additional time beyond 12 total weeks in a 12-month period to traditional FMLA events

EXPANDED FMLA

Employee Could Qualify for both Emergency Sick Leave and Expanded FMLA

- Employee cannot work to stay home with child – No one is ill or quarantined
 - First 2 weeks qualify as Paid Sick Leave and Expanded FMLA – 2/3 of regular rate of pay up to \$200 per day (\$2,000 in the aggregate)
 - After 10 days (and up to an additional 10 weeks), 2/3 of regular rate of pay up to \$200 per day (\$10,000 in the aggregate) under Expanded FMLA

Other FMLA Rules Apply to Expanded FMLA

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

EXPANDED FMLA– COMMON EMPLOYER QUESTIONS

Q: How does an employee's ability to telework affect eligibility for expanded FMLA (and/ or paid sick leave)?

A: To the extent you are able to telework while caring for your child, paid sick leave and expanded family and medical leave is not available.

Q: How does an employer collect employee contributions for benefit premiums while an employee is covered under expanded FMLA?

A: Since this is paid leave, employer can deduct from pay on a pre-tax basis. If pay is not enough to cover employee contribution employee could pay with after-tax payment, or employer could arrange to collect balance due after employee returns.

Q: Can an employer require employees to supplement pay under expanded family and medical leave with existing paid leave policies?

A: No, only the employee can decide to supplement pay under expanded FMLA with existing paid leave policies.

Employer Tax Credits

EMPLOYER TAX CREDITS

Tax Credits to Designed to Offset Employer Costs

- Employers will apply credits against balance due when filing quarterly payroll taxes
 - Eligible employers may retain an amount of the payroll taxes due equal to the amount of paid leave plus related group health plans costs rather than deposit them with the IRS
 - Include employee and employer share of Social Security and Medicare taxes AND federal income taxes withheld from employee pay
- Credit available only to employers subject to emergency leave and emergency FMLA
 - Private employer, not-for-profits, and public employers
- No stimulus money - tax credit will only reimburse employers for costs associated with Emergency Paid Sick Leave and Expanded FMLA Leave

TAX CREDITS– COMMON EMPLOYER QUESTIONS

Q: What documentation should I keep in order to claim the employer tax credits for providing paid leave/ expanded FMLA?

A: The Department of Labor has issued basic documentation guidance, but additional detailed guidance is expected from the IRS. The DOL lists information such as employee's name, qualifying reason for requesting leave (and supporting documentation such as the source of any quarantine or isolation order, school closing announcement, name of the health care provider who has advised self-quarantine, etc.), a statement that the employee is unable to work, including telework, and the date(s) for which leave is requested.

Q: Can an employer receive the tax credit for leave provided to health care providers?

A: No – an employer is not entitled to a tax credit for any paid sick leave or expanded family and medical leave that is not required to be paid.

Q: Can an employer layoff employees in order to be eligible for the tax credit?

A: Large employers are not required to grant the leave, so are not eligible for the tax credit. Eligibility is determined on date leave is requested. Recent layoffs can affect eligibility for tax credit.

Benefit Plan Issues

BENEFIT CONSIDERATIONS FOR LEAVE, FURLOUGHES, & TERMINATIONS

Leave

- What is the reason for the time off, and is the employee eligible for FMLA leave (traditional or emergency)?
 - Yes - Employer must continue employee's health coverage as if actively employed – including contributions
- Leave for employees not eligible for FMLA (traditional sick leave for employee who has not worked for company for 12 months)
 - Is the employee eligible for other employer provided time off or leave benefits?
 - What are the existing plan eligibility rules relative to any of the above situations?

Furloughs – employment not terminated

- Furlough for business reasons – not employee-specific reasons that qualify under leave policies
 - Refer to existing plan eligibility – Is employee losing eligibility under the terms of the plan

ALE eligibility considerations (“employer mandate”) – Leave and Furloughs

- Using the look-back measurement method, employees may remain eligible for benefits for duration of current stability period, unless employment is terminated
- Using the monthly measurement method, employees may not meet current plan eligibility requirements during a period of reduced hours

BENEFIT CONSIDERATIONS FOR LEAVE, FURLOUGHES, & TERMINATIONS

Termination of Employment

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

Employers wishing to expand eligibility related to COVID-19

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

OTHER BENEFITS ISSUES

§125 (Cafeteria) Plan Election Changes

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

Changing or Delaying Open Enrollment Period

- Under Section 125 rules an employer may implement a roll-over or “evergreen” enrollment
 - Employee election stays the same as last year unless they ask for it to be changed
- ACA Applicable Large Employer (ALE) “employer mandate” rules
 - Must offer an enrollment opportunity to eligible employees at least once every 12 months to qualify as “offer of coverage”

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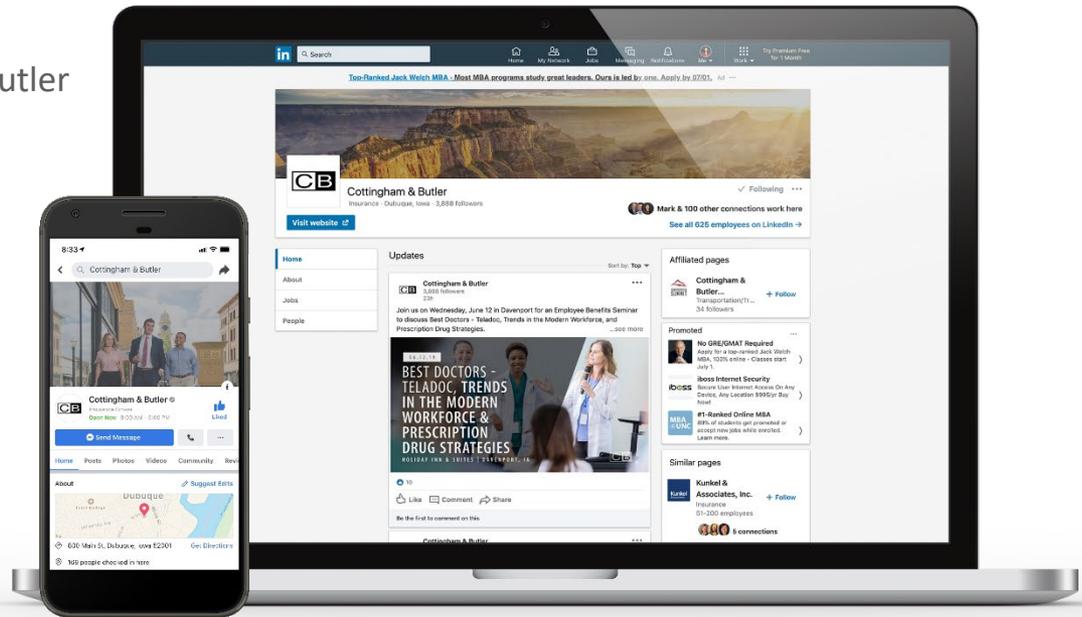
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