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a detailed analysis of emerging employee benefits developments

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SUMMARY OF HEALTH CARE AND LEAVE-RELATED PROVISIONS IN CORONAVIRUS RESPONSE LEGISLATION

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On March 18, the president signed into law the Families First Coronavirus Response Act (FFCRA) and on March 27, President Trump signed into law the Coronavirus Aid, Relief and Economic Security (CARES) Act (H.R. 748).

Among the numerous provisions regarding the coronavirus pandemic, the FFCRA:

- requires group health plans, health insurers and government programs to provide free coronavirus testing.
- requires employers with fewer than 500 employees to provide up to 12 weeks of job-protected leave related to caring for a child via an expansion of the Family and Medical Leave Act (FMLA) (with the first 10 days unpaid).
- requires employers with fewer than 500 employees to provide up to 80 hours (generally two weeks) of emergency paid “sick” leave to full-time employees (with special rules for part-time employees).
- provides tax credits for required paid sick leave, paid family and medical leave, and certain health plan expenses.
- appropriates \$1 billion to states for unemployment insurance expansion.

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- increases Medicaid funding.
- provides additional nutritional services for low-income Americans, particularly students who ordinarily receive subsidized meals at school.

The CARES Act also includes health care provisions, provisions related to the coronavirus testing provision in the FFCRA and amendments to the leave requirements in the FFCRA. (For a more general summary of the employee benefits provisions in the CARES Act, see the Council's [March 26 Benefits Byte](#)). This Blueprint is focused on the group health plan requirements and paid leave provisions in the FFCRA and the CARES Act.

The American Benefits Council and Groom Law Group will be working together to provide additional updates on this and other developments related to the government's response to the coronavirus pandemic.

RELATED GUIDANCE

Since March 18, the U.S. Department of Labor (DOL) has issued subregulatory guidance on the paid leave-related provisions under the FFCRA, including:

- [Families First Coronavirus Response Act: Questions and Answers](#) ("DOL Q&As")
- [Families First Coronavirus Response Act: Employee Paid Leave Rights](#)
- [Families First Coronavirus Response Act: Employer Paid Leave Requirements](#)

The Internal Revenue Service (IRS), jointly with the DOL, issued [news release IR-2020-57](#) regarding the tax credits under the FFCRA, along with [FAB 2020-1](#).

On April 1, DOL issued [a temporary rule implementing the paid leave requirements](#). The IRS also released [Notice 2020-21](#) regarding the effective date of the tax credit related to the paid leave provisions of the FFCRA. This Blueprint has been revised to reflect this guidance.

With regard to the group health plan requirements in the FFCRA and the CARES Act, on April 11, the Departments of Labor, the Treasury and Health and Human Services (the tri-agencies) issued [guidance](#) in the form of frequently asked questions (Tri-Agency FAQs), in which the tri-agencies note they intend to provide additional guidance in the future as well. This Blueprint has been revised to reflect this guidance.

Additional guidance is expected on an ongoing basis and readers should be careful to check for additional guidance issued following this publication.

KEY PROVISIONS

The FFCRA mandates the provision of coronavirus testing without cost-sharing.

In General

The FFCRA requires that group health plans and health insurance issuers of group or individual health insurance coverage (including grandfathered plans) cover FDA-approved COVID-19 diagnostic testing products (see below), including the items and services furnished during a provider visit (office, telehealth, urgent care and emergency room) that result in an order for or administration of a testing product, to the extent those items and services relate to the furnishing or administration of the testing product or the evaluation of the individual's need for the testing product.

The mandated coverage must be provided without any cost sharing (including deductibles, copayments and coinsurance) requirements.

Comment: Under IRS Notice 2020-15, plan sponsors are *permitted* to offer COVID-19 testing and treatment without cost-sharing and on a pre-deductible basis without adversely affecting an individual's eligibility to make health savings account (HSA) contributions. The practical effect of the FFCRA is to compel all plans and issuers to at least cover COVID-19 testing (and related provider visit) without cost-sharing. However, the FFCRA does not mandate that any resulting *treatment* be provided without cost-sharing.

Comment: In response to the Council's, and others', requests for clarification, the Tri-Agency FAQs confirm that the no cost-sharing rule only applies where a COVID-19 test has been "order[ed]" or "administer[ed]." As such, the no cost-sharing rule would not apply in instances where an individual does not end up being administered a COVID-19 test and/or no such test is ordered (for example, where a presumptive positive diagnosis is made).

Also, the Tri-Agency FAQs clarify the extent to which the no cost-sharing rule applies to other items and services received during the visit in which an individual is seeking a COVID-19 test or diagnosis. The Tri-Agency FAQs note that the Centers for Disease Control and Prevention (CDC) advises that clinicians should use their judgment to determine whether a patient should be tested and that the CDC strongly encourages clinicians to test for other causes of respiratory illness. As such, if, for example, the individual's attending provider determines that other tests (e.g., influenza tests, blood tests, etc.) should be performed during a visit to determine the need for COVID-19 diagnostic testing, and the visit results in an order for, or administration of, COVID-19

diagnostic testing, the plan must provide coverage for the related tests.

Further, the Tri-Agency FAQs note that the tri-agencies construe the term “visit” in FFCRA section 6001 broadly for in-person, telehealth visits, urgent care centers, and emergency rooms, to include both traditional and non-traditional care settings in which COVID-19 tests are ordered or administered including drive-through screening and testing sites where licensed health care providers are administering COVID-19 diagnostic testing.

Medical Management Techniques

Under the FFCRA, the mandated coverage must also be provided without prior authorization or other medical management requirements.

Comment: Some had questioned the extent to which plans or issuers can apply medical necessity requirements or use other medical management techniques in determining when individuals may be eligible to access coronavirus testing. The Tri-Agency FAQs confirm that plans may not impose prior authorization or other medical management requirements under this provision of the FFCRA. These items and services must be covered without cost sharing when medically appropriate for the individual, as determined by the individual’s attending health care provider in accordance with accepted standards of current medical practice.

Definition of Diagnostic Tests under the CARES Act and Tri-Agency FAQs

The CARES Act expands the definition of required COVID-10 diagnostic tests (which already included FDA-approved tests under the FFCRA) to additionally include tests:

- for which “the developer has requested or intends to request emergency use authorization” from the U.S. Food and Drug Administration (FDA) (until the request is denied or the developer does not submit the request within a reasonable time);
- that are “developed in or authorized by a State”; or
- that are deemed appropriate by the Secretary of Health and Human Services (HHS).

Comment: The Tri-Agency FAQs provide that the COVID-19 tests covered by FFCRA section 6001 include serological tests used to detect COVID-19 antibodies, although the FAQs note that the Food and Drug Administration (FDA) “currently believe such tests should not be used as the sole basis of diagnosis.” The Tri-Agency FAQs state that plans must provide coverage for serological COVID-19 tests that otherwise meet the requirements of section 6001(a)(1) of the FFCRA, as amended by section 3201 of the CARES Act.

Plan Reimbursement Rates and Out of Network Providers

The CARES Act requires that, during the period in which there is a COVID-19-related emergency declaration by HHS, all providers of COVID-19 diagnostic tests must publish the cash price for the test on the provider’s public website. Under the CARES Act, plans and issuers must reimburse providers for the COVID-19 diagnostic test at the same rate as previously negotiated before the emergency declaration by HHS, if applicable. If a plan or issuer did not have an existing negotiated rate with the provider before the emergency declaration, it must pay the provider’s cash price, as listed by the provider on the public website, or can negotiate a lower rate.

Comment: The Tri-Agency FAQs confirmed that the no cost-share requirement for COVID-19 testing and the related office visit and items and services applies not only to in-network services, but also to testing and the related items and services obtained from out-of-network providers. However, additional clarifying guidance is needed with regard to how much plans must pay out-of-network providers for these items and services under the CARES Act. Questions remain as to whether the requirement for a plan to pay an out-of-network provider the “cash” price applies only to the COVID-19 test or also the related items and services. The Council has asked the tri-agencies for clarification on these issues and the Tri-Agency FAQs did not clearly address this question.

We also note that [the U.S. Department of Health and Human Services has released guidelines](#) that relate to surprise billing with respect to the CARES Act’s Provider Relief Fund, which earmarks \$100 billion for hospitals and other health care providers to support healthcare-related expenses or lost revenue attributable to COVID-19 and to ensure uninsured Americans receive testing and treatment for COVID-19. In keeping with the Council’s recommendation to protect patients from surprise billing, as a condition to receiving these funds, providers must agree not to seek collection of out-of-pocket payments from a COVID-19 patient that are greater than what the patient would have otherwise been required to pay if the care had been provided by an in-network provider.

Tri-agency Guidance and Other Government Programs

The requirement to cover testing is “off-Code” – *i.e.*, it does not directly amend the Public Health Service Act, Employee Retirement Income Security Act or the Internal Revenue Code. However, the secretaries of HHS, Labor and the Treasury are specifically authorized to implement these requirements through sub-regulatory guidance, program instruction, or otherwise.

Comment: In general, both self-insured and insured group health plans must comply with the coverage requirements, regardless of whether they are grandfathered. The application of these provisions as though they were incorporated into the text of the applicable statutes, however, means that excepted benefit group health plans and retiree-only health plans are not subject to the new requirements. The Tri-Agency FAQs confirm the scope of plans to which the provision applies and further note that compliance with the FFCRA will not cause a plan to lose its grandfathered status, that non-federal governmental plans and church plans are subject to the requirement, in addition to private employment-based group health plans, and that so-called “grandmothered plans” are also subject to the requirement.

The FFCRA also requires that government programs – such as Medicare, Medicare Advantage, Medicaid, CHIP, the Indian Health Services, Tricare, the Federal Employees Health Benefit Program and the U.S. Department of Veterans’ Affairs – provide coverage for testing for COVID-19 without cost-sharing. States may also provide coverage under Medicaid for testing without cost-sharing for uninsured persons and the federal government will match 100-percent of the costs.

Effective Dates

The requirement under the FFCRA to cover COVID-19 testing costs starts from the date of enactment of the FFCRA (March 18) until the Secretary of HHS determines that the public health emergency has expired. The related provisions in the CARES Act (the expansion of the definition of testing products and the requirement that plans pay out-of-network providers the testing cash price) are effective upon the date of enactment of the CARES Act (March 27).

Comment: In light of the immediate applicability of the group health plan provisions in the FFCRA and the CARES Act, employers are making changes to their health plans very quickly. At the same time, the law and regulations regarding summaries of benefits and coverage (SBCs) require that plans, which make a material modification to the plan terms that would affect the content of the SBC mid-year, provide notice of the modification to enrollees not later than 60 days *prior to* the date on which the

modification will be effective and update the SBC.

Relief, which the Council had requested, was provided in the Tri-Agency FAQs, which provides that during the COVID-19 public health emergency or national emergency, the tri-agencies will not take enforcement action against a plan that makes modifications to provide greater coverage related to the diagnosis and/or treatment of COVID-19, without providing the required advance notice of at least 60 days, as long as plan provides a notice of the change as soon as reasonably practicable (which includes in the form of an updated SBC or a separate notice). This relief does not apply if a plan attempts to limit or eliminate other benefits, or increase cost-sharing, to offset the costs of increasing the generosity of benefits related to the diagnosis and/or treatment of COVID-19. To the extent the plan maintains the changes beyond the emergency period, plans must comply with all applicable requirements to update plan documents or terms of coverage. This relief also applies to changes plans make to expand telehealth coverage.

The CARES Act requires group health plans to rapidly cover COVID-19 preventive services.

The CARES Act requires that group health plans and health insurance issuers cover without cost-sharing any “qualifying coronavirus preventive service.” A “qualifying coronavirus preventive service” is “an item, service, or immunization that is intended to prevent or mitigate coronavirus disease 2019” and has a rating of “A” or “B” in the United States Preventive Services Task Force recommendations or is recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.

This requirement takes effect 15 business days after the date the recommendation is made.

Comment: Normally, under Public Health Service Act section 2713, which is the applicable provision here, there is at least a one-year lag between when preventive services are recommended by the applicable agency and when those services are required to be covered by plans without cost-sharing. This speeds up that time frame for a COVID-19 vaccine.

The CARES Act allows for first dollar coverage of telehealth and reimbursement of over-the-counter medications from account-based plans.

The CARES Act allows an HSA eligible high-deductible health plan (HDHP) to cover telehealth services without cost-sharing prior to a patient reaching the deductible, without regard to whether the telehealth services relate to COVID-19. This rule is effective upon enactment and lasts through plan years beginning in 2021.

Comment: The Council strongly advocated for this provision. The Council continues to advocate for the tri-agencies to take action to ensure that an employer's offer of robust telehealth services to employees who aren't benefits eligible or who opted out of the employer's traditional group health plan does not result in a violation of the Affordable Care Act's market reforms to the extent the benefits provided give rise to an ongoing administrative scheme (i.e., an ERISA plan) and provide significant benefits in the nature of medical care.

The CARES Act also amends the Internal Revenue Code to allow account-based plans, including HSAs, flexible spending arrangements and health reimbursement arrangements, to reimburse individuals for the purchase of over-the-counter medical products without a prescription from a physician. This reverses a restriction imposed by the Affordable Care Act. This provision also provides that account-based plans can reimburse menstrual product expenses. These changes are effective for amounts paid/expenses incurred after 2019 and apply indefinitely.

Comment: Although the statutory language of the CARES Act indicates that these changes in law are effective beginning on January 1, 2020, clarification is needed with regard to health FSAs. Specifically, a cafeteria plan generally can only be amended prospectively. Prop. Treas. Reg. § 1.125-1(c)(5). Thus, it is unclear whether an employer can amend its cafeteria plan to allow a health FSA to reimburse medicine/drugs without a prescription and/or menstrual care products that were incurred between January 1, 2020 and the date of the cafeteria plan amendment. The Council has requested that the Treasury Department and the IRS confirm that, notwithstanding Proposed Treasury Regulation § 1.125-1(c)(5), employers can (but are not required to) amend their cafeteria plans retroactively back to January 1, 2020 so that their health FSAs can reimburse medicine/drugs and/or menstrual care expenses incurred on or after January 1, 2020.

The FFCRA requires certain employers to provide paid leave for qualifying coronavirus-related events.

Through an expansion of the FMLA, the FFCRA requires subject employers (generally those with fewer than 500 employees) to provide up to 12 weeks of job-protected leave, 10 weeks of which is paid. The FFCRA also requires subject employers to provide full-time employees (those normally scheduled to work 40 or more hours per

week) with 80 hours (generally 2 weeks) of certain emergency paid “sick” leave related to the coronavirus (with special rules for part-time employees). The expanded FMLA leave and the emergency paid sick leave requirements are effective April 1, 2020 and extend through December 31, 2020. In FAB 2020-1, the DOL issued a non-enforcement period regarding the new leave requirements through April 17, 2020. The non-enforcement period only applies where the employer has made “reasonable” and “good faith efforts” to comply with the FFCRA. DOL Q&As make it clear that an employer cannot satisfy its requirements to provide the new types of paid leave prior to the April 1 effective date – in other words, the employer will not get credit for any paid leave provided prior to April 1.

We address each of the new types of paid leave in turn below.

Comment: Employers should take due care when implementing the new leave requirements, especially to the extent an employer has sought to provide for expanded paid leave related to the coronavirus via changes to their short-term disability (STD) plans. For example, consideration will need to be given to how the new federally-mandated leave dovetails with the employer’s STD plan’s waiting/elimination periods and whether and how any offsets are applied to STD benefits once such benefits commence (e.g., where the paid leave is continuing).

Expanded FMLA Leave

The FFCRA amends the FMLA to require employers with fewer than 500 employees to allow employees to take up to 12 weeks of job-protected leave if an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to the coronavirus. As described below, the first 10 days of leave can be unpaid, with the remainder having to be paid.

Comment: The FFCRA itself does not provide express rules on how the 500 employee threshold is determined. However, the DOL Q&As provide some helpful clarity on how to determine employer size for purposes of these new leave requirements. As described in detail in our related Benefits Blueprint, [Determining Employer Size under the Families First Coronavirus Response Act](#), the new leave requirements generally apply to each employer and not on a controlled group basis. However, the DOL Q&As also make clear that the Fair Labor Standards Act (FLSA) test for determining “joint employment” applies for purposes of both new leave requirements, and the FMLA’s “integrated employer” test applies for purposes of the expanded FMLA leave requirement. For more information, please refer to the related Blueprint.

While the DOL Q&As provide a great detail of helpful guidance for purposes of

counting employees and determining employer size, numerous questions remain, such as whether the 500 employee threshold is applied by using a “snapshot” method (i.e., by looking at a specific date, such as January 1 of each year) or by applying an averaging concept.

Per the FFCRA, subject employers need to provide up to 12-weeks of job-protected leave for “qualifying need related to a public health emergency.” Such qualifying need is defined in the FFCRA to mean “the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school [meaning a primary or secondary school only] 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 then defined to mean “an emergency with respect to COVID-19 declared by a Federal, State, or local authority.”

Comment: DOL Q&As state that “telework” is work for which normal wages “must be paid” and is not compensated under the paid leave provisions of the FFCRA. The DOL Q&As provide guidance on when an employee is able to telework and/or work intermittently.

The DOL Q&As address how employers can/must administer the new expanded FMLA leave requirement for employees who have already used up some or all of their FMLA leave.

The FFCRA applies to employees who have been employed for at least 30 calendar days, rather than the 12-month period under the current FMLA. The CARES Act amends this rule to extend paid leave to employees who (1) were laid off on or after March 1, 2020, (2) had worked for the employer for at least 30 of the last 60 days prior to their layoff, and (3) were rehired by the employer.

An employer of an employee who is a health care provider or an emergency responder is not required to provide this FMLA leave to such employee. The DOL Q&As set forth a (fairly lengthy and) enumerated list of who qualifies as a “health care provider” and “emergency responder” for this purpose. The Secretary of Labor has the regulatory authority to exempt employers with fewer than 50 employees (employers that, under normal circumstances, are not subject to the FMLA) if the provision of paid FMLA leave “would jeopardize the viability of the business as a going concern.”

Employers are generally required to reinstate employees after their FMLA leave period ends, although the FFCRA has exceptions for employers with fewer than 25 employees experiencing significant economic hardship. The DOL Q&As also address

whether employers are required to provide the leave in situations such as the employer shutting down its worksite or putting employees on furlough.

The first 10 days for which an employee takes leave can be unpaid leave, or the employee can choose to substitute any accrued vacation, personal or sick leave (including in certain instances the emergency paid “sick” leave described below). After the initial 10 days, the employer is required to provide paid leave based on an amount that is not less than two-thirds of an employee’s regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work. For employees whose schedule varies from week to week, special rules apply to calculate the average number of hours. Very significantly, the FFCRA imposes a maximum on the amount of the paid leave, to no more than \$200 per day or \$10,000 in the aggregate. The CARES Act clarifies that this limit applies per employee.

The wages paid during the leave are not subject to the employer portion of Social Security tax, but appear to be subject to the employer portion of Medicare tax.

Comment: The initial version of the FFCRA as passed by the House would not have imposed a cap on the amount of the expanded paid FMLA leave; however, the FFCRA did impose a cap on the amount of the tax credit that could be received by a subject employer with respect to the paid leave. The FFCRA caps the amount of the paid leave at the amount eligible for tax credits, thus ensuring that employers do not have a paid leave obligation that cannot be recouped by a tax credit (as discussed in greater detail below).

The DOL Q&As state that the employer must require its employee to provide appropriate documentation in support of the leave, just as the employer would for conventional FMLA leave requests. For example, this could include a notice that has been posted on a government, school, or day care website, or published in a newspaper, or an email from an employee or official of the school, place of care, or child care provider. This requirement also applies when the first portion of the unpaid expanded FMLA leave runs concurrently with paid “sick” leave taken for the same reason. If the employer intends to claim a tax credit for the expanded family and medical leave (explained below), it should retain this documentation in its records.

Comment: This documentation requirement appears intended to prevent employers from otherwise seeking tax credits for which they are not otherwise eligible. Accordingly, employers should be careful to take heed of this requirement and to preserve the documentation for use in any governmental audit that could result. It is important to keep in mind that the base FMLA rules regarding eligibility, documentation, etc., would seem to apply to the expanded FMLA leave requirement. In this regard, we note that the leave event is limited to situations where the employee

needs to stay at home to “care for” a son or daughter as a result of a school or child care center closure related to COVID-19. While the FMLA rules generally allow employers to seek confirmation from employees that the leave is needed to provide “care,” existing FMLA guidance indicates that employers generally should be cautious if they seek to limit access to the paid leave based on these criteria. (For example, existing DOL guidance indicates that an employer cannot deny access to leave because the employee’s spouse may be a stay-at-home parent and/or because the employee’s spouse has himself or herself taken FMLA leave).

Employers that are signatories to a multiemployer collective bargaining agreement could fulfill their obligations under the FFCRA by making contributions to a multiemployer fund, plan or program that provides paid leave based on hours worked under the agreement. The DOL Q&As clarify that such employers may also provide the paid leave directly.

The DOL Q&As make it clear that an employee is entitled to continue group health plan coverage during the expanded FMLA leave on the same terms as if he/she continued to work.

Emergency Paid “Sick” Leave

In addition to the expanded FMLA leave outlined above, the FFCRA also requires employers with fewer than 500 employees to provide 80 hours (generally 2 weeks) of emergency paid “sick” leave for full-time employees related to certain qualifying coronavirus events. (As noted below, special rules apply to part-time employees.) This aspect of the FFCRA is set forth in Division E, titled, “Emergency Paid Sick Leave Act.”

The paid sick leave can be used if the employee is unable to work (or telework) due to any of the following circumstances:

- 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 (1) is subject to a federal, state or local quarantine or isolation order related to COVID-19, or (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

- The employee is caring for a son or daughter where the school or place of care of the son or daughter has been closed or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions.
- The employee is experiencing any other substantially similar condition specified by the Secretary of HHS in consultation with the Secretary of the Treasury and the Secretary of Labor.

Comment: As with the expanded FMLA leave requirement, DOL Q&As state that “telework” is work for which normal wages “must be paid” and is not compensated under the paid leave provisions of the FFCRA. The DOL Q&As provide guidance on when an employee is able to telework and/or work intermittently.

The DOL FAQs also define “health care provider” for purposes of the above as a “licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA.”

An employer of an employee who is a health care provider or an emergency responder is not required to provide the paid sick leave to such employee. The DOL Q&As define “health care provider” and “emergency responder” for this purpose.

Full-time employees are entitled to 80 hours of paid leave and part-time employees are entitled to “a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.” The required paid leave ends with the employee’s next scheduled work shift following the end of the qualifying need. The DOL Q&As clarify that this total maximum hour applies with respect to any combination of the above circumstances and not each circumstance separately.

In general, the required sick pay is calculated based on the employee’s regular rate of pay or, if higher, the applicable minimum wage rate. In the case of leaves to care for a family member or a child whose school is closed, however, the required sick pay is based on 2/3 of the regular rate of pay. For part-time employees whose schedule varies from week to week, special rules apply to calculate the average number of hours. The maximum amount of required sick pay is \$511 per day and \$5,110 in the aggregate. In the case of leaves to care for a family member of child, however, the maximum amount of required sick pay is \$200 per day and \$2,000 in the aggregate. The CARES Act clarifies that these limits apply per employee.

The wages paid during the leave are not subject to the employer portion of Social Security tax, but appear to be subject to the employer portion of Medicare tax.

Comment: The initial version of the FFCRA as passed by the House would not have

imposed a cap on the amount of the required sick leave. However, the FFCRA did impose a cap on the amount of the tax credit that could be received by a subject employer with respect to the paid leave. The FFCRA now caps the amount of the paid sick leave at the amount eligible for tax credits, thus ensuring that employers do not have a paid leave obligation that cannot be recouped by a tax credit (as discussed in greater detail below).

While the formula to determine the required sick pay uses concepts that are generally only applicable to certain types of hourly/non-exempt workers under the Fair Labor Standards Act (FLSA), such as “regular rate of pay,” the FFCRA defines “employee” for purposes of the required sick pay provisions generally to include all employees, even exempt workers.

The FFCRA provides that it shall be an unlawful act for an employer to “discharge, discipline, or in any other manner discriminate against” any employee who (1) takes the leave or (2) has instituted a complaint regarding the employer’s failure to provide the requisite leave. The employer may not require an employee to use other paid leave provided by the employer before using the new emergency paid sick leave.

The DOL Q&As state that an employer must require its employee to provide appropriate documentation in support of the reason for the leave, including: the employee’s name, qualifying reason for requesting leave, statement that the employee is unable to work (including telework) for that reason, and the date(s) for which leave is requested. The employee must also provide documentation of the reason for the leave, such as the source of any quarantine or isolation order or the name of the health care provider who has advised the employee to self-quarantine. If the employer intends to claim a tax credit for the paid leave (discussed below), it should retain this documentation in its records.

Comment: The initial version of the FFCRA as passed by the U.S. House of Representatives would have required that the emergency paid sick leave be in addition to any existing paid leave as of the date of the FFCRA’s enactment. The initial version also would have prohibited an employer from making any “change[s]” to its existing leave policy, thus suggesting that any employer would have been prohibited from materially reducing its existing leave programs (including as to eligibility, paid leave accrual rates, amounts of leave, etc.). The final version of the FFCRA removed this restriction. Therefore, it appears employers are free to make changes to their leave policies at their discretion.

An employer is also prohibited from requiring employees to look for or find replacement employees to cover the hours during which the employee is using the paid sick time. Violations are punishable under the FLSA.

Employers that are signatories to a multiemployer collective bargaining agreement can fulfill their obligations under the FFCRA by making contributions to a multiemployer fund, plan or program that provides paid leave based on hours worked under the agreement. The DOL Q&As clarify that an employer can also provide the paid leave directly.

The DOL Q&As make it clear that an employee is entitled to continue group health plan coverage during the emergency paid sick leave.

Regarding Both Types of New Paid Leave

Notably, the DOL Q&As provide a number of scenarios in which an employee is *not* entitled to take either types of new paid leave where the employer reduces the employee's scheduled work hours because it does not have enough work for him/her to perform and/or the employer's worksite is closed (either because of lack of business or because it is required to close pursuant to a federal, state, or local directive).

The DOL's reasoning is that, in these cases, the employee is not prevented from working due to one of the qualifying reasons under the FFCRA, even though the reduction in hours is nonetheless related to COVID-19. The DOL Q&As provide that the employee is not entitled to either types of paid leave in the following scenarios (but note that he/she could be entitled to unemployment benefits):

- Employer reduces the employee's scheduled work hours because it does not have work for him/her to perform.
- Employer closed the worksite prior to 4/1 (and employee is not being paid while worksite is closed).
- Employer closes the worksite on or after 4/1 and before employee goes on leave (even if the leave was requested before the closure).
- Employer closes the worksite after 4/1 while the employee is on one of the new types of paid leave (but the employer must pay for the leave taken before the closure date).
- Employer is open, but furloughs the employee on or after 4/1 because of lack of business.

- Employer closes the worksite on or after April 1, 2020, but informs the employee the worksite will reopen in the future.

Comment: These Q&As are noteworthy as many employers may have been operating under the belief that they would otherwise be required to offer paid leave in one or more of the above scenarios. While nothing prevents an employer from being more generous than required by the FFCRA and providing paid leave, it appears to be the case that an employer will not be able to receive a tax credit for paid leave that the employer is not required by the FFCRA to provide.

Additionally, it will be important to focus on these Q&As and, specifically, how DOL is defining a “Federal, State or local quarantine or isolation order related to COVID-19” for purposes of the new expanded emergency paid sick leave because, if the employer’s worksite is closed due to such order, any employees who cannot work (or telework) may not be entitled to paid leave based on the examples above.

The FFCRA prohibits employers from discharging, disciplining or discriminating against employees who take leave under the FFCRA. The DOL Q&As state that an employee generally has a right to return to work in the same or an equivalent position after the leave is over. However, the employee is not protected from employment actions, such as layoffs or a worksite closure, that would have affected the employee regardless of whether he/she took leave.

The DOL Q&As provide that an employee may supplement the leave under the FFCRA with other paid leave (e.g., existing vacation, personal, medical, or sick leave), but the employer cannot require that the employee do so. The employer can also pay employees more than they are entitled to receive under the FFCRA. However, the employer cannot receive a tax credit for any amounts above what the FFCRA requires.

The FFCRA also imposes notice requirements and provides that the employer must post the notice in “conspicuous places on the premises of the employer where notices to employees are customarily posted.” DOL issued [Federal Employee Rights](#) and [\(non-federal\) Employee Rights](#) model notices on March 25. DOL also issued [frequently asked questions on the notice requirement](#) (“Notice FAQs”).

Comment: Recognizing that many employers and employees are not on the premises of the employer right now, the Notice FAQs state that the employer may satisfy the notice requirement by emailing or direct mailing the notice to employees or posting the notice on an employee information internal or external website.

To assist subject employers in meeting their paid leave obligations, the FFCRA provides certain related refundable tax credits.

To assist employers in paying for the costs of the new mandated paid leave requirements, the FFCRA provide a series of tax credits to most employers subject to the FFCRA's expanded FMLA and emergency paid "sick" leave requirements. The employer-related credits, which are refundable, can be applied against the employer portion of Social Security taxes for each quarter equal to the "qualifying" paid leave wages paid by the employer. The tax credits apply with respect to both the FMLA-expanded paid leave as well as the emergency paid "sick" leave. Significantly, the amount of the tax credits varies based on the type of leave.

Comment: Although the leave requirements apply to government employers, the tax credit does not appear to be available to governmental employers.

The CARES Act expands the tax credit provisions by:

- providing for an advance of the credits, subject to the limits imposed by the FFCRA, and calculated through the end of the most recent payroll period in the quarter;
- requiring the Secretary of the Treasury to prescribe regulations necessary to permit the advancement of the credit; and
- requiring the Secretary of Treasury to waive penalties associated with the failure to deposit certain taxes required under Code if the failure was due to an employer's anticipation of the credit provided by the FFCRA.

The IRS news release provides information on how any employer can offset the income tax withholding and payroll taxes that it would otherwise pay during the year to the IRS by the amount of expanded FMLA and emergency paid "sick" leave that it provides.

We address each of the tax credits below.

Comment: As noted above, it is important that employers review the DOL Q&As (as well as the discussion above) and understand whether a paid leave obligation applies to a given employee. While employers are always permitted to offer voluntary paid leave benefits to their employees, it appears to be the case that the tax credits described below will only be available to recompense employers for paid leave required to be provided by the FFCRA.

Tax Credit for Expanded FMLA Leave

The FFCRA generally provides employers a refundable tax credit equal to 100 percent of the “qualified family leave wages” that the employer is required to pay for a given quarter under the expanded FMLA leave. (Thus, if the employer is not subject to the expanded FMLA leave requirement, the employer is not eligible for the tax credit.)

The amount of the qualified family leave wages that can be taken into account for purposes of the credit per employee is \$200 for any day (or portion thereof) for which the employer pays the employee qualified family leave wages, up to a maximum aggregate amount for all calendar quarters of \$10,000 per employee.

Tax Credit for Emergency Paid “Sick” Leave

The FFCRA provides employers a refundable tax credit equal to 100 percent of “qualified sick leave wages” that the employer is required to pay for a given quarter under the emergency paid sick leave requirement (As above, if the employer is not subject to the requirement, the employer is not eligible for the tax credit.)

The amount of qualified sick leave wages that can be taken into account for purposes of the credit varies depending upon the reason for the leave.

- For employees who must self-isolate, obtain a coronavirus diagnosis or comply with a self-isolation recommendation from a public official or health care provider, the amount of qualified sick leave wages taken into account is capped at \$511 per day.
- For employees caring for a family member or for a child whose school or place of care has been closed, the amount of qualified sick leave wages taken into account is capped at \$200 per day.

In either of the above instances, the aggregate number of days that an employer may take into account in calculating the tax credit is capped at 10 days per employee.

In addition to the above, the FFCRA allows for an increase in the amount of the tax credit equal to the amount “of the employer’s qualified health plan expenses as are properly allocable to the qualified family [or sick] leave wages for which such credit is allowed.” The FFCRA defines a “qualified health plan expense” as amounts “paid or incurred by the employer to provide and maintain a group health plan ..., but only to the extent that such amounts are excluded from the gross income of the employees by reason of section 106 [of the Code].”

The FFCRA goes on to provide that “qualified health plan expenses shall be allocated to qualified family [or sick] leave wages in such manner as the Secretary of the

Treasury ... may prescribe,” and that “[e]xcept as otherwise provided by the Secretary, such allocation shall be treated as properly made if made on the basis of being pro rata among covered employees and pro rata on the basis of periods of coverage (relative to the time periods of leave to which such wages relate).”

Comment: This aspect of the FFCRA is interesting in that it appears clearly intended to allow employers to recoup certain of the health plan costs related to the provision of the paid qualified family or sick leave. It is hard to understand exactly how it will work, but based on the reference to Code section 106, it appears to pick up a portion of the premium/premium equivalent attributable to the period of paid leave. Because it does not reference Code section 105(b), it does not appear to pick up actual medical expenses the employer/plan pays and/or reimburses. Per the above, it appears the details of what constitutes a qualified health plan expense will be set forth in implementing Treasury guidance.

The FFCRA disallows a deduction by the recipient employer for the amount of the tax credit. Additionally, the tax credit is not allowed with respect to wages for which a tax credit is allowed under the existing employer credit for paid family and medical leave under Code Section 45S. Employers can elect to have the new tax credit not apply.

The FFCRA makes a general fund appropriation to the Social Security OASDI and Federal Disability Insurance trust funds to offset the resulting lost revenue to the funds.

Notably, the FFCRA includes similar rules for self-employed individuals.

The tax credit would apply to wages the employer pays between April 1, 2020 and December 31, 2020.