



# Arrow COVID-19 Communication

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## IMPACT ON EMPLOYEE BENEFITS

With the Families First Coronavirus Response Act signed into law, the biggest headlines for employers are the new Emergency Paid Sick Leave and the Emergency Family and Medical Leave Expansion. The FFCRA also affects employee benefits in multiple ways, including coverage requirements and tax credits related to the employer's costs to maintain a group health plan. The FFCRA's provisions are to take effect no later than 15 days after enactment on April 1, 2020.

This Client Alert details the various employee benefits considerations for employers with respect to the ongoing COVID-19 pandemic and the FFCRA.

### **Emergency Paid Sick Leave and the Emergency Family and Medical Leave Expansion**

The FFCRA requires employers with fewer than 500 employees to provide employees with up to 80 hours of paid sick leave when the employee is unable to work (or telework) due to the following COVID-19 related reasons:

- The employee is subject to a government quarantine/isolation order related to COVID-19;
- The employee has been advised by a health care provider to quarantine for COVID-19 concerns;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- The employee is caring for an individual who is subject to an order as described above or has been advised by a health care provider as described above;
- The employee is caring for a son or daughter if the child's school or place of care has been closed or the child's childcare provider is unavailable due to COVID-19 precautions; or
- 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.

The FFCRA also requires employers with fewer than 500 employees to provide up to 12 weeks of expanded family and medical leave if an employee is unable to work (or telework) to care for the employee's child (under 18 years old) if the child's school or place of care is closed, or the child's childcare provider is unavailable, due to COVID-19. The first two weeks may be unpaid, but the remaining ten weeks must be paid at 2/3 the employee's regular rate of pay.

### Benefit Continuation During Expanded Leave

Under the FMLA, employers must continue group health plan benefits during FMLA leave. Nothing in the FFCRA indicates that this requirement does not apply under the Emergency Family and Medical Leave Expansion. For non-group health plan benefits, as with normal FMLA leave, employers should follow the same approach they use for other types of paid leave.

### Existing Employer-Provided Paid Leave

Importantly, employers must provide the Emergency Paid Sick Leave benefits in addition to any existing paid leave benefits provided by the employer or mandated by state or local law. In other words, employees are entitled to exhaust all available emergency paid leave (under both the Emergency Paid Sick Leave and the Emergency Family and Medical Leave Expansion) provided by the FFCRA before the employer may require the employee to use any otherwise available leave benefits their employer may offer. Note, however, that nothing in the new law indicates that employers may not require employees to use other paid leave prior to the effective date of the FFCRA.

### Immediate Employer Tax Credits to Reimburse Employers for Required Paid Leave

The FFCRA establishes employer tax credits designed to reimburse eligible employers for 100% of the paid leave provided pursuant to the FFCRA. Eligible employers are businesses and tax-exempt organizations with fewer than 500 employees that are required to provide emergency paid sick leave and emergency paid family and medical leave under the FFCRA.

To take immediate advantage of the paid leave credits, eligible employers can retain and access funds that they would otherwise pay to the IRS in payroll taxes. According to the IRS, the payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees. Eligible employers will be able to claim these credits based on qualifying leave they provide between the effective date and December 31, 2020.

If there are not sufficient payroll taxes to cover the cost of qualified sick and childcare leave paid, employers will be able to file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less. The IRS intends to announce details of this new, expedited procedure this week.

### Tax Credits Include Employer's Cost to Maintain Group Health Plan

In addition to an employer's costs of providing the new mandatory paid leave to an employee, the above tax credits are also available to reimburse certain amounts the employer pays to maintain health insurance coverage for eligible employees during the leave period. Although it is not entirely clear what group health plan costs will be considered for the additional tax credit, we expect that it will include at least the employer's contributions towards employee premiums.

### Non-Enforcement Period for Good Faith Compliance

The DOL has indicated that it will issue a temporary non-enforcement policy that provides 30 days for employers to come into compliance with the FFCRA. Under this policy, the DOL will not bring an enforcement action against any employer for violations of the FFCRA so long as the employer has acted reasonably and in good faith to comply with the FFCRA. The DOL will instead focus on compliance assistance during the 30-day period.

## Expansion of Coverage Required Under Group Health Plans

The FFCRA requires all group health plans and group health insurance issuers to cover FDA-approved COVID-19 diagnostic testing products without any cost sharing requirements (including deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements.

Costs covered include the items and services furnished during a provider visit (office, telehealth, urgent care, and emergency room) 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 IRS had previously announced that medical care services received and items purchased in connection with testing for and treatment of COVID-19 that are provided by a group health plan without a deductible, or with a deductible below the minimum annual deductible for a high deductible health plan (HDHP), will be disregarded for purposes of determining the status of the plan as a HDHP. In other words, a HDHP will not fail to be a HDHP solely because it provides coverage for COVID-19 testing and treatment prior to the individual satisfying the deductible. [See IRS Notice 2020-15.](#)

## COBRA Coverage

For employers facing termination and layoff decisions, remember that a loss of coverage due to termination or a reduction in hours is a COBRA qualifying event. As a result, employees and dependents enrolled in the employer's group health plan coverage on the day prior to the qualifying event are entitled to receive a COBRA general notice and to elect COBRA continuation coverage under the group health plan.

## State Law Requirements

In addition to the FFCRA's new federal paid leave requirements, many employers will be subject to state legislation enacted in response to COVID-19. For example, New York has enacted a paid sick leave law similar to the FFCRA's paid sick leave requirement; however, the New York law varies benefits depending on employer size and the reason the employee cannot work. Ohio has enacted a law applicable to insurance carriers that requires carriers to permit employers to continue covering employees under a group health plan even if the employees would be otherwise ineligible due to a decrease in hours worked or an applicable 'actively at work' clause. Employers should work with legal counsel to determine the requirements under applicable state or local laws, including whether such laws may be preempted by ERISA.

## Additional Considerations

Additional employee benefits considerations for employers include:

- Potential impact on ACA employer shared responsibility requirements of certain employer actions, including dropping employees off coverage, terminating and returning employees to work, and full-time employee determinations.
- HIPAA and other privacy concerns with regard to health information obtained in connection with the employer's health plan and/or as part of leave administration or other employer functions.