MARSH & McLENNAN AGENCY

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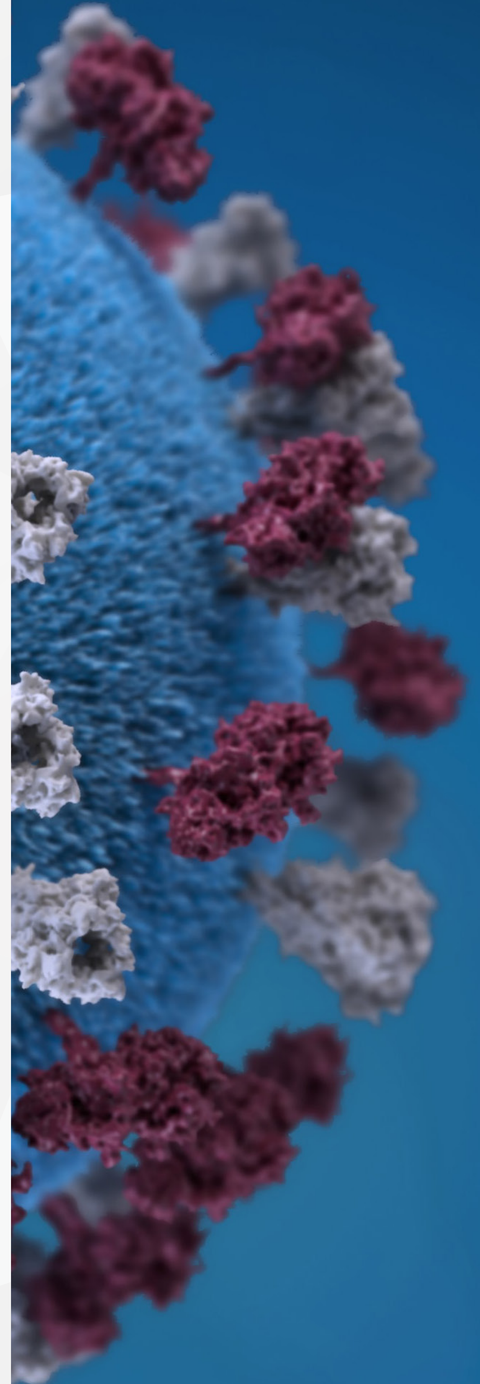
An Employer's Guide to Addressing COVID-19

Second Edition



It's our business to be there for you in the

MOMENTS THAT MATTER.

MARSH & McLENNAN AGENCY

ABOUT THIS GUIDE

Marsh & McLennan Agency (MMA) understands there are many unknowns surrounding the COVID-19 virus and it can be difficult to sift through the information to determine action steps.

MMA has consolidated several decision points that you should consider as you and your organization develop your own business resiliency plan regarding your benefit program.

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This guide is an update from our **first edition** on March 24, 2020. As legislation releases and as new information is available we will continue to provide timely and thoughtful updates to this document.

- Your Team at Marsh & McLennan Agency

FEDERAL AND STATE GOVERNMENT RESPONSE TO COVID-19

The President signed the Families First Coronavirus Response Act (FFCRA) into law on March 18, 2020. The FFCRA includes the below provisions related to health and welfare benefits.

Mandate to Cover COVID-19 Testing

All fully insured and self-insured group health plans[1], as well as individual health insurance policies, must provide coverage for COVID-19 diagnosis and testing without cost sharing or prior authorization when performed during a health care provider office visit, telehealth visit, urgent care center visit, or emergency room visit regardless of network status[2]. This mandate does not require plans to cover the actual treatment of COVID-19 without cost sharing, but employers should be aware of separate state mandates (Massachusetts, etc.).

New 4/1/2020: *The Coronavirus Aid, Relief, and Economic Security CARES Act refined covered testing to include:*

- *All testing approved by the Food & Drug Administration (FDA)*
- *Non-FDA approved testing under an emergency use authorization request unless denied or the test developer fails to file the request with the FDA in a timely manner*
- *State-approved testing when the state has notified the U.S. Department of Health & Human Services (HHS) of its intent to use the test*
- *Other tests approved by HHS*

The FFCRA indicates this provision includes telemedicine visits, but we do not interpret this to mean that employers must offer telemedicine coverage to employees. Plans are not required to cover other care or services received during a visit that are unrelated to COVID-19 at 100% without cost sharing.

In addition to the mandate to cover COVID-19 testing, it also includes Emergency Paid Sick Leave and Emergency Expansion to Family and Medical Leave Act (FMLA). See below for further detail.

New 4/1/2020: *Several national carriers have announced that they have expanded benefits to offer treatment, as well as testing, with no member cost share. While this does remove the cost barrier, it does create a challenge in regards to ERISA compliance as this could trigger a qualified life event that most employers are not prepared to support as well as potential stop loss coverage issues.*

Emergency Paid Sick Leave (EPSL)

New 4/1/2020: *Effective Date*

- *April 1, 2020 through December 31, 2020, unless extended.*
- *If a leave that began before April 1st otherwise qualifies as EPSL, only the period of the leave occurring on or after April 1st is covered as EPSL.*

Purpose

- Requires covered employers to provide "emergency paid sick leave" if the employee is unable to work (including remotely) and needs leave because:

1 This includes grandfathered plans under the Affordable Care Act (ACA).
2 Other FFCRA provisions extend this requirement to Medicare, Medicaid, and other government programs.

1. The employee is subject to a federal, state, or local government or agency quarantine or isolation order
2. A health care provider has advised the employee to quarantine
3. The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis
4. The employee is caring for an individual subject to (1) or (2)
5. The employee is caring for a son or daughter[3] due to a school or day care provider closure or the unavailability of a child care provider
6. The employee is experiencing any other substantially similar condition specified in regulations issued by the U.S. Department of Health & Human Services (HHS)

- In all instances, the sick time **must** be due to COVID-19.
- **New 4/1/2020:** *An employee who is able to work remotely is not eligible for EPSL.*

Note: *Based on DOL guidance released March 27, 2020, a general shelter in place order from a state, county, or city does not qualify for purpose (1).[4] HHS may later indicate that a shelter in place order qualifies for purpose (6), but this appears unlikely. Purpose (5) is available even if an employee's teenage son or daughter is generally self-sufficient and does not require constant monitoring.*

Covered Employers

- Private employers with fewer than 500 employees and federal, state, and local governmental employers[5] of any size.

New 4/1/2020: ***Note:*** *Employers with fewer than 50 employees may also apply to the DOL for hardship relief if this expansion will put the employer at risk of going out of business. This hardship relief is available for purpose (5) only. The DOL will address how to apply for the exemption in later guidance.*

Benefit

- Covered employers must provide full-time employees with 80 hours of paid sick leave and part-time employees with paid sick leave equal to their average number of hours worked in a two-week period.[6]
- Emergency paid sick leave must be paid at a rate at least equal to the greater of: (i) the employee's regular rate of pay; (ii) the applicable minimum wage rate under the Fair Labor Standards Act; or (iii) the applicable state/local minimum wage rate where the employee is employed.
- If the leave is taken for purposes (4) – (6), the rate described above is reduced to two-thirds.
- The maximum benefit is $511/day (up to a maximum total benefit of $5,110) for the employee's own quarantine, diagnosis, or illness and up to $200/day (up to a maximum total benefit of $2,000) if the paid leave is to care for another.[7]

New 4/1/2020: *Eligibility*

- *All employees are eligible, even if employed for only one day.*
- *An employer may exclude health care providers and emergency responders from EPSL if needed for the employer to continue to function.*

3 "Son or daughter" is defined broadly to include an employee's natural, adopted, step, or foster child, a child who is the legal ward of the employee (including under legal guardianship), or a child for whom the employee acts as the parent (known as in loco parentis). The DOL indicates this will also include an adult child age 18 or older if incapable of self-care. Please see DOL's FAQs on FFCRA, Q/A #40.

4 Please see the DOL's FAQs on FFCRA, Q/A #27. Unemployment benefits may be available.

5 We interpret an Indian Tribal Government to qualify as a covered governmental employer.

6 Special rules apply for employees covered under multi-employer collective bargaining agreements. An employer may satisfy its emergency paid sick time requirement by contributing toward a union program that provides the paid sick time.

7 An employer could provide a larger benefit, but the excess will not be reimbursable to the employer as a credit. Please see Employer Reimbursement later in this table.

- *The term "health care provider" is not limited to the medical professionals themselves and includes any employee working at the health care provider's location as well as employees who manufacture medical products for the diagnosis, treatment, or prevention of COVID-19.*[8]
- *Although the permitted exclusion broadly includes nearly any type of health care provider, the DOL indicates the primary purpose of EPSL is to minimize the spread of COVID-19 and encourages employers to exercise restraint when excluding employees.*
- *The exclusion for emergency responders is similarly broad.*
- *An employer may still want to provide EPSL for a health care provider or first responder who actually contracts COVID-19.*
- *Employers cannot require employees to meet any service time or other eligibility requirements prior to taking EPSL.*

Note: *Based on DOL guidance released March 27, 2020, employees who are not working due to a work location closure or furlough for business reasons or because of a general shelter in place order are not eligible for EPSL. The rationale is these employees would not be working anyway.*[9] *If an employee was receiving EPSL prior to the closure or furlough, the employer must provide covered EPSL up to the closure or furlough date.*

Employer Notice

- *The DOL released a model notice which must be conspicuously displayed at worksite locations similar to the display requirements for other legal notices*[10] *(there is no requirement to provide the notice in another language).*
- *In FAQs, the DOL indicated that employers may also satisfy the delivery requirement by mail, email or posting the notice on its website.*
- *Employers are not required to post the notice before April 1, 2020, but employers may wish to provide the notice earlier.*

Employee Notice and Substantiation

- An employer may require an employee to provide reasonable notice of the need for continuing emergency paid sick leave after the first paid sick day.
- **New 4/1/2020:** *The DOL indicates that employees are required to provide documentation supporting the leave and that the employer should retain the substantiation to support its claim for reimbursement if needed.*[11]
- *The DOL's recommendation conflicts with the Centers for Disease Control's request that employers not require a doctor's note to validate an absence or for return-to-work purposes due to the demands on health care providers' time.*

Other Notes

- *The DOL indicates this is job-protected leave similar to the FMLA.*
- *Employers may permit employees to use other paid leave in addition to EPSL to supplement their leave benefits up to 100% of the employee's regular compensation.*
- Unused emergency paid sick leave does not carry over to the next year.
- Employers cannot require employees to use other paid leave before using emergency paid sick leave.

New 4/1/2020: Note: *It appears an employer that already implemented a paid leave policy to address COVID-19 concerns may modify its policy to comply with the EPSL requirements.*

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8 Please see the DOL's FAQs on FFCRA, Q/A #56.

9 Please see the DOL's FAQs on FFCRA, Q/A #23 – 27. Unemployment benefits may be available.

10 This model notice addresses both the emergency paid sick and public health emergency leaves. A separate notice applies to federal employees.

11 DOL's FAQs on FFCRA, Q/A #15 and 16. Q/A #15 also indicates an employer may provide leave without substantiation.

Employer Reimbursement

- Reimbursable to employers in the form of a refundable payroll tax credit for 100% of covered paid leave.
- **New 4/1/2020:** *Although the FFCRA provides that EPSL is reimbursable to employers in the form of a refundable payroll tax credit, the IRS indicated it intends to permit employers to offset their estimated credits against payroll taxes owed and will also provide rapid payment to employers owed refunds as a result.*
- *We expect IRS guidance will provide for some sort of true-up mechanism to address reimbursement overpayment and/or underpayments.*

Additional Credits

- *Additional tax credits are available to reimburse employers for the cost of maintaining health coverage for employees on EPSL, which cover the employer's share of premiums or the premium-equivalent.*
- *These credits are not available to reimburse for paid claims related to COVID-19.*

***Note**: There are unknowns for the IRS to address in later guidance, including: (1) Is an employer required to collect employee contributions for coverage during or after the leave, or are credits also available if the employer pays or forgives them? (2) How will an employer be required to substantiate its costs for maintaining health coverage for employees on leave? (3) Is this credit also allowed as an offset against payroll taxes? We expect IRS guidance will indicate that an employer cannot receive a credit for any portion of the coverage paid for by an employee during the leave or recouped after the employee returns and will provide for some sort of mechanism for the IRS to recover overpayments*.

Emergency Expansion to the Family and Medical Leave Act - Public Health Emergency Leave (PHEL)

New 4/1/2020: *Effective Date*

- *April 1, 2020 through December 31, 2020, unless extended.*
- *If a leave that began before April 1st otherwise qualifies as PHEL, only the period of the leave occurring on or after April 1st is covered as PHEL.*

Purpose

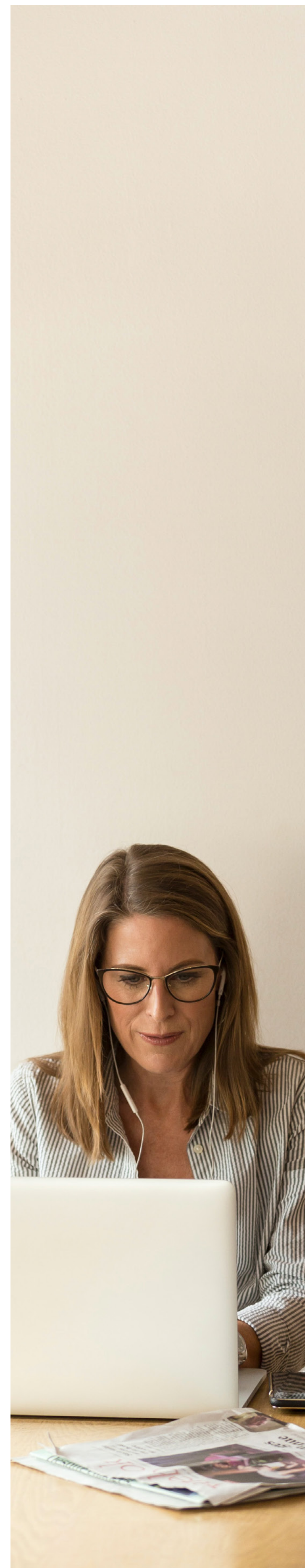
- Temporarily expands the FMLA to include "public health emergency leave" when an employee is unable to work solely because the employee must care for a son or daughter under age 18 due a school or day care provider closure or the unavailability of a child care provider.
- The closure or unavailability **must** be due to COVID-19.

Note: An employee who is able to work remotely while caring for a son or daughter is not eligible for public health emergency leave.

Covered Employers

- Employers with fewer than 500 employees.

Note: This includes employers who are not traditionally subject to the FMLA due to their small size. The FMLA already applies to federal, state, and local government employers[12] of any size, and the FFCRA does not restate this.



12 The DOL interprets an Indian Tribal Government to qualify as a covered governmental employer under the FMLA.

- The DOL has the authority to exclude certain health care providers and first responders from this expansion out of necessity.
- Employers with fewer than 50 employees may apply to the DOL for hardship relief if this expansion will put the employer at risk of going out of business.
- **New 4/1/2020:** *Please See Determining Employer Size on page 9 of this guide for more information.*

Benefit

- 12 weeks of leave – After a 10-day elimination period, the remaining public health emergency leave is paid leave.

New 4/1/2020: ***Note:*** *PHEL leave does not provide an additional 12 weeks of FMLA leave and is merely another qualifying reason to take FMLA leave. If an employee has already used some or all of their FMLA leave during the current FMLA leave year, it reduces the remaining time available for PHEL.*

- Covered employers must pay employees at least two-thirds of their regular rate of pay for the remainder of their FMLA leave period based on the employee's regular work schedule.[13]
- For employees with variable work schedules, the average number of hours worked is determined using a 6-month look back period from the date the leave began or a reasonable expectation of average hours worked for new hires.
- The maximum benefit is $200/day per employee (up to a maximum total benefit of $10,000 per employee).

Eligibility

- Employees who have worked for at least 30 days with no minimum number of service hours.[14]
- Eligibility is determined without regard to whether the covered employer has 50 employees within a 75-mile radius.
- **New 4/1/2020:** *The term "health care provider" is not limited to the medical professionals themselves and includes any employee working at the health care provider's location as well as employees who manufacture medical products for the diagnosis, treatment, or prevention of COVID-19.*
- *The exclusion for emergency responders is similarly broad.*

Note: *Based on DOL guidance released March 27, 2020, employees who are not working due to a work location closure or furlough for business reasons or because of a general shelter in place order are not eligible for PHEL. The rationale is these employees would not be working anyway. If an employee was receiving PHEL prior to the closure or furlough, the employer must provide covered PHEL up to the closure or furlough date.*

Undoubtedly, these are unprecedented times, MMA remains committed to being there for our colleagues, clients and communities. If you have questions about next steps reach out to your dedicated MMA representative or visit MarshMMA.com.

13 Special rules apply for employees covered under multi-employer collective bargaining agreements. An employer may satisfy its paid public health emergency leave requirement by contributing toward a union program that provides the paid sick time.

14 This differs from the FMLA's usual 12 months/1,250 hours of service eligibility requirement.

Employer Notice

- *The DOL released a model notice which must be conspicuously displayed at worksite locations similar to the display requirements for other legal notices (there is no requirement to provide the notice in another language).*
- *In FAQs, the DOL indicated that employers may also satisfy the delivery requirement by mail, email or posting the notice on its website.*
- *Employers are not required to post the notice before April 1, 2020, but employers may wish to provide the notice earlier.*

Employee Notice

- Standard FMLA notice rules apply.
- If public health emergency leave is foreseeable, an employee should provide notice of the need for leave as soon as it is practical to do so.
- **New 4/1/2020:** *The DOL indicates that employees are required to provide documentation supporting the leave and that the employer should retain the substantiation to support its claim for reimbursement if needed.*

Other Notes

- This is job-protected leave under the FMLA.
- Unused PHEL does not carry over to the next FMLA year.
- As with other FMLA leave, employees may use EPSL or other accrued paid leave during the unpaid leave period.
- Employers may permit employees to use other paid leave to supplement their paid PHEL leave benefits up to 100% of the employee's regular compensation.

Employer Reimbursement

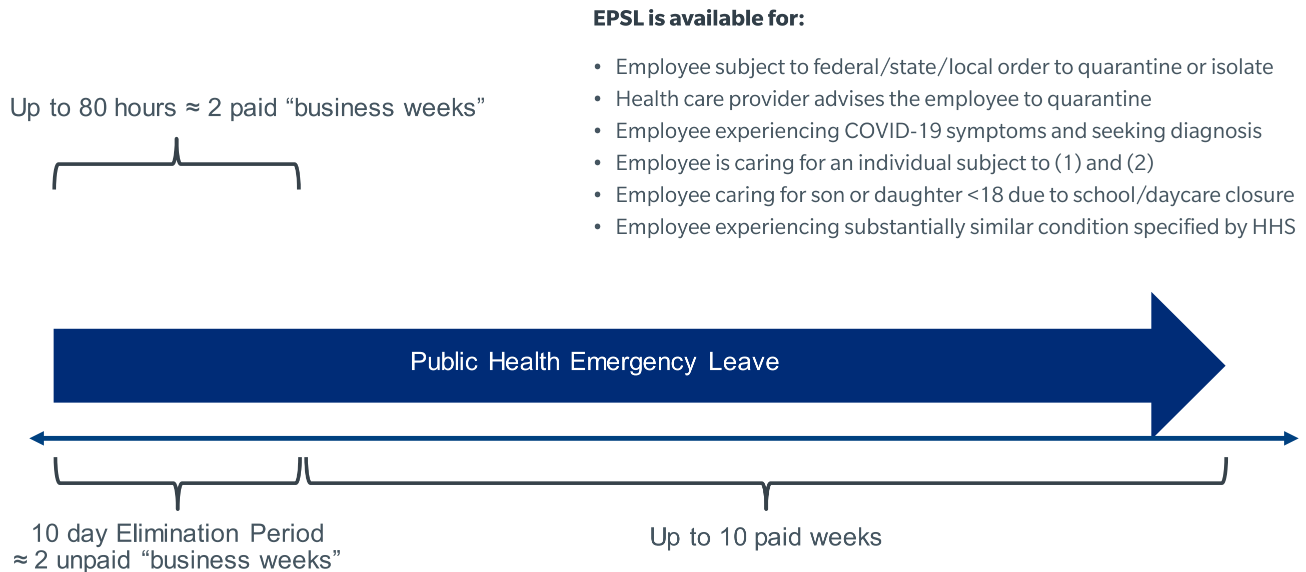
- Reimbursable to employers in the form of a refundable payroll tax credit for 100% of covered paid leave.
- **New 4/1/2020:** *Although the FFCRA provides that covered leave is reimbursable to employers in the form of a refundable payroll tax credit, the IRS indicated it intends to permit employers to offset their estimated credits against payroll taxes owed and provide rapid payment for employers owed refunds as a result.*
- *We expect IRS guidance will provide for some sort of true-up mechanism to address reimbursement overpayments and/or underpayments.*

Additional Credits

- *Additional tax credits are available to reimburse employers for the cost of maintaining health coverage for employees on PHEL, which cover the employer's share of premiums or the premium-equivalent.*
- *These credits are not available to reimburse for paid claims related to COVID-19.*
- *There will be further guidance on Employer Credits based on recent clarification issued. According to the most recent legislation, State and Local Government Employers are not eligible for the tax credit at this time.*

Note: *There are unknowns for the IRS to address in later guidance, including: (1) Is an employer required to collect employee contributions for coverage during or after the leave, or are credits also available if the employer pays or forgives them? (2) How will an employer be required to substantiate its costs for maintaining health coverage for employees on leave? (3) Is this credit also allowed as an offset against payroll taxes? We expect IRS guidance will indicate that an employer cannot receive a credit for any portion of the coverage paid for by an employee during the leave or recouped after the employee returns and will provide for some sort of mechanism for the IRS to recover overpayments.*

At a Glance



New 4/1/2020:

Determining Employer Size

Counting Employees

In general, all full-time and part-time employees[15], temporary and staffing agency employees[16] (even if paid by the staffing agency), and employees on leaves of absence count for the purposes of determining employer size. This will also generally include employees performing services for a client company through a professional employer organization (PEO). The PEO rules are complex, and employers should review the employment relationship status of PEO employees with their labor & employment counsel.

Independent contractors and most unpaid interns/students do not count toward employer size.

The <500 employee calculation is performed on the day an employee's FFCRA leave is to begin. Employers who are very close to the 500-employee mark may find themselves moving in and out being subject to FFCRA leave. This may mean some employees will be covered while others are not. A safe harbor from the DOL would be welcome.

Integrated Employers

In general, each business entity is a single employer for the purposes of determining employer size. Separate businesses are combined for determining employer size if they are deemed "integrated employers" using a four-factor test:

15 This can include partners, LLC members, and other owners who perform employee functions for the employer.
16 The staffing agency and client employer may be "joint employers" for these employees.

1. Common management between the employers *– Do the employers share common leadership and/or a significant overlap in human resource functions?*

2. Interrelation of the employers' business operations *– Do the employers coordinate their business activities? Does one employer provide services to another? Do they share building space, equipment, bank accounts, or other financials?*

3. Centralized control of labor relations *– Do the employers share employees, transfer employees between them, or exercise any control over hiring, firing, training, or other personnel decisions with respect to each other?*

4. Common ownership or financial interests *– This is fairly self-explanatory, but it is worth a mention that this does not require the traditional controlled group standard of 80% or more common ownership or financial interest.*

More than one factor is usually necessary for the DOL or courts to determine an integrated employer relationship exists, and no single factor controls. Interestingly, the common ownership or financial interests factor is usually considered the least important when determining whether an integrated employer relationship exists.

Service Contract Act/Davis Bacon Act Employees

Service Contract Act (SCA) and Davis Bacon Act (DBA) employees count when determining if an employer is a covered employer. If an employer is a covered employer, SCA and DBA employees can qualify for EPSL and PHEL. Since a covered employer is required to provide these paid leaves under federal law, they do not count toward satisfying the employer's applicable SCA or DBA wage or fringe benefit rates.

What Employers Need to Do Right Now

Fully Insured Plans

- If the medical plan is fully insured or subject to any state mandated coverages, Employers should work with their carriers to understand the impact to their benefits including whether telemedicine and or treatment has been expanded with no cost share.
    - If the plan is subject to state mandated provisions that are more generous than FFCRA, like the state of Massachusetts, Employers should work with their insurance carrier to make the required changes.

Self-Insured Plans

- If the medical plan is self-funded, Employers should work with their Third Party Administrator (TPA) to cover testing with no cost share. Many self-funded employers have already voluntarily opted to expand coverage with no cost share for testing.
    - Some Pharmacy Benefit Managers (PBMs) are relaxing rules around refill limitations as well as trying to promote the availability of home delivery or mail order to help avoid any issues with patients not being able to get the prescription drugs they need.
    - For self-funded medical plans that opt to change or expand coverage (waiving cost share for testing telemedicine or treatment or relaxing refill limitations on the prescription drug), the stop loss carrier should be consulted to confirm that there will be no impact to the current policy terms and conditions.
    - If treatment is being covered with no cost share the Employer should review the Qualified Life Events section on page 16 of this guide to review potential responsibilities as the Plan Sponsor.

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Action Items Regardless of Funding Arrangement

- **Update plan documents** as quickly as possible to reflect these changes (FFCRA mandated or otherwise).
- **Employers with less than 500 employees, or State and Local Government Employers of any size will need to act quickly** to comply with the Emergency Paid Sick Leave portion of FFCRA. For many Employers the easiest way to do this is to continue to pay employees through their payroll administrator with updated benefit calculations consistent with the final law.
- Employers should determine if they would like expand PTO/Sick Leave and FMLA programs to allow up to 12 weeks of Coronavirus-related time off following the requirements of the Act.
- Some states have mandated leave benefits that would also provide a benefit to employees, which may apply to Employers of any size. Employers should continue to monitoring federal, state, and local legislation for additional changes that could affect your company. Disability carriers or administrators are working to provide timely updates on any expansion of benefits impacting your covered employees.
- If Employers outsource their leave administration already, they should **work with the leave administrator to update leave programs and help communicate** any changes to your employees. Some Employers who self-insure their plans are considering adding specific coverage for quarantine or emergency leave.
- Employers in the healthcare industry need to keep in mind that certain health care providers and emergency responders may be excluded from the definition of employee for the paid sick leave as defined in the EPSL eligibility.

Frequently Asked Questions

If an employee is quarantined but does not test positive for COVID-19, will the employee be considered disabled?

A quarantine is not a qualifying medical condition so the employee would not meet the definition of a Disability under most fully insured policies.

If an employee is quarantined and does test positive for COVID-19, is the employee considered disabled?

Under most policies, a positive test for COVID-19 is not by itself a Disabling condition. The employee would only be considered Disabled if they were sick and unable to perform the essential duties of their occupation due to the sickness.

If my employee contracted COVID-19 at work or during travel for work is that considered workers' compensation or disability?

It depends on the specific circumstances, for example if the employee is a health care worker or first responder, the answer is likely that this would be a workers' compensation claim but it is still subject to variations in state law . For other employees, a payable workers' compensation claim may still be possible but should not be assumed. In general, most coverage assumes workers compensation applies to "on the job" injuries while disability applies to "off the job" but there are many disability policies including some individual short term disability plans that pay benefits for on the job injuries as well. Employers should be careful to make broad statements in regards to coverage in either situation and should let the carrier adjudicate the claim per the specific terms and conditions of their policy.

Our employee headcount can vary between under and over 500 employees. What date should be used to determine if this law applies to my company?

New 4/1/2020: *You have fewer than 500 employees if, at the time your employee's leave is to be taken, you employ fewer than 500 full-time and part-time employees within the United States, which includes any State of the United States, the District of Columbia, or any Territory or possession of the United States. In making this determination, you should include employees on leave; temporary employees who are jointly employed by you and another employer (regardless of whether the jointly-employed employees are maintained on only your or another employer's payroll); and day laborers supplied by a temporary agency (regardless of whether you are the temporary agency or the client firm if there is a continuing employment relationship). Workers who are independent contractors under the Fair Labor Standards Act (FLSA), rather than employees, are not considered employees for purposes of the 500-employee threshold.*

We offer STD coverage and need to close our location with limited ability to have employees work remotely, would STD apply?

No, if an employee is unable to work remotely, is not permitted to access their usual work location and/or is quarantined, but is still physically capable of working, they would not qualify for disability. Employer's paid time off (PTO) benefit or other employer-paid salary continuation benefit would be appropriate options to consider in these situations.

Who pays for the sick time or leave? How can we be expected to pay employees more when our business has slowed?

Employers must pay the benefits, but they will receive a tax credit for doing so. The FFCRA also provides for a refundable tax credit to employers for 100% of the qualified sick leave wages paid to their employees. These tax credits will be provided on a quarterly basis and are allowed against the employer's Social Security taxes. Employers with less than 50 employees can seek an exemption from this requirement based on overall business viability but details on how to apply for and the criteria that will be used to determine have not yet been released.

Is the paid sick leave in addition to current leave provided by the employer?

Yes, Congress removed a provision in the original bill that would have prevented employers from changing their current policies and benefits in response to the Act. An employer cannot require an employee to use other paid leave provided by the employer before the employee uses the paid sick leave available under the Act but the employee may decide to do so.

What notice must an employee provide for leave?

New 4/1/2020: *The DOL indicates that employees are required to provide documentation supporting the leave and that the employer should retain the substantiation to support its claim for reimbursement if needed.*

We have less than 50 employees, FMLA does not apply to us right?

While traditional FMLA does not apply, this Emergency Expansion of FMLA does apply to all Employers with less than 500 Employees, even those under the 50 employee mark not traditionally subject to FMLA. It is important to note that employers with fewer than 50 employees in a 75-mile radius are exempt from civil FMLA damages in an FMLA lawsuit. Small Employers can file for exemption if these requirements would jeopardize their business.

How does my company apply for exemption?

Based on FAQs released on March 28, 2020 by the DOL, Small Employers 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 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.

Would my employees be better off if they received unemployment versus this benefit?

The Department of Labor (DOL) announced new guidelines to allow flexibility to assist with job loss due to COVID-19. It is important to note that each state's benefit amount, application process and payment timing will vary. In some cases, Employees may receive more money under unemployment than they would have under the new paid leave laws but not in every case and they may need to wait several weeks to get payment based on anticipated backlog and high volumes of activity.

TESTING AND TREATMENT OF COVID-19

Quick Points

- Testing is now available through state and local health labs in all 50 states and D.C.
- Cost of the test will vary based on where it is completed (lab, physician's office, hospital, drive through) but in general ranges from $50-$200.
    - **New 4/1/2020:** The *CARES ACT is requiring any provider providing testing to publish their costs for testing on a public website.*
- Test results are sometimes available same day.
- Some regions offer drive up testing – this will vary based upon CDC guidelines on who should be tested.
- CPT code established – 87635.
    - Our MMA Clinical teams will begin to track this in medical claims.
- 35 companies currently in process of attempting to produce effective vaccine.
- Vaccine is months away; likely not an option for current pandemic (but certainly will be option in preventing future outbreaks).
- The Food and Drug Administration (FDA) is testing two anti-inflammatory drugs used for treating malaria (Hydroxychloroquine, chloroquine) to determine if fast track approval for Coronavirus will be granted.
    - **New 4/1/2020:** *On March 30, 2020, the FDA issued an emergency use authorization for hydroxychloroquine and chloroquine which are anti-inflammatory drugs approved for the treatment of lupus, rheumatoid arthritis (RA), and HIV. This approval is not without controversy as there are significant concerns on the efficacy and safety of these drugs for COVID-19 and the issue of potential drug hoarding, which is affecting members who were using these drugs to treat lupus, RA, and HIV.*
    - *Several PBMs have announced prior authorization policies and quantity limits on these and other drugs that could potentially be used to treat COVID-19 to help reduce the impact to members suffering from other conditions where these are the primary and in some cases only available treatment.*
- *As of 3/27/2020 Abbott Labs received FDA approval for 15 minute rapid test portable unit that will be used to perform up to 50,000 tests per day.*
- *As of today, we do not have any specific cost projections regarding the short and long term impact of COVID1-9. Studies are emerging with long term cost impact ranging from +2% to +50% with significant variations based on how an insurer or plan is covering (expanding telemedicine, treatment, etc.), underlying demographics of the population, severity of condition and prevalence within those categories, etc. Our MMA Actuarial Practice is developing a model that will help our Clients understand a range of outcomes that will*

be adjusted over time as more data emerges. We do believe that COVID-19 costs may be partially offset by the significant reduction in elective procedures but there is significant debate about whether those procedures will still occur but at a later service date. We will continue to monitor and keep you informed as to the availability of our model and any direction provided by your carrier and Third Party Administrators.

Frequently Asked Questions

Do we have to waive cost share for the test itself? What about telemedicine and treatment?

Yes, per the FFCRA, all plans regardless of funding or size will need to cover the cost of testing. Waiving cost share for telemedicine and treatment is not a requirement, some fully insured carriers have agreed to cover the cost of telemedicine care related to visits associated with diagnosis and in some cases the treatment of COVID19 related care. Some states like Massachusetts have also mandated coverage for treatment with no cost share. For self-funded plans, employers can elect to cover but need to get approval from their stop loss carrier and should work with their TPA to make sure they understand how they can administer.

We have a High Deductible Health Plan with Health Savings Account, would we be violating IRS rules around first dollar coverage if we waive cost share for testing?

No, the IRS has released IRS Notice 2020-15, which allows HDHP plans to cover testing and treatment without requiring members to satisfy their deductible first in an effort to remove any cost barriers to identifying and treating members with Coronavirus.

How does testing work?

Testing procedures may vary based on where the test is performed but in general, the test involves a nasal swab similar to the test done for the flu. The swab is then sent to the lab for review and the member is advised of their test results and if appropriate the CDC. It is important to note that based on severity some local municipalities and states have set up or are in the process of setting up locations meant to process a high volume of tests including drive through testing services. The processes and time needed to get results still vary significantly throughout the country so members should continue to practice isolation and social distancing while waiting for their results. Some telemedicine vendors are advising that they can only direct potential COVID-19 cases for further evaluation versus ordering tests directly. Employers should confirm what support your vendor may be able to provide to avoid member confusion or frustration given the long wait times they may also encounter.

Can an employer require employees who have traveled to destinations where there is a COVID-19 outbreak to remain away from work until it is clear they do not have COVID-19 symptoms?

Yes. When CDC or state or local public health officials recommend people remain away from work for a specified period of time after visiting specific locations, employers can require employees who have traveled to those locations to remain away from work for the recommended time period.

COMMUNICATION WITH EMPLOYEES DURING COVID-19

Communicate Often

- Assign both internal and external communication responsibilities to leadership to avoid communication gaps.
- Keep employees updated with messages such as: regular check ins, work from home tips, consistent messages from leadership, stress reducing tips or resources and/or at-home fitness resources.

Resources from Health Plan

- Telemedicine
  - Patients are encouraged to NOT seek care in a physician office, Urgent Care, or Emergency Room unless they meet the CDC criteria (i.e. signs of acute respiratory distress, etc.).
  - All major carriers have waived telemedicine co-pays, however it is important to check with your local market to verify.
  - Telemedicine resources will vary based upon health plan.
  - Medicare has expanded telemedicine coverage for members (3/17/2020).
- Families First Coronavirus Response Act (FFCRA) mandates all self-funded and fully insured health plans cover testing of COVID-19.
- The IRS issued IRS Notice 2020-15, which permits high deductible health plans (HDHPs) to provide coverage for COVID-19 testing and treatment before a participant satisfies the minimum statutory HDHP deductible for the plan year without affecting the participant's ability to make or receive health savings account (HSA) contributions.
  - This also covers telemedicine visits for COVID-19 related visits. This also includes treatment costs.

What Employers Need to Do Right Now

- **Deploy communications to members** on their benefits and what medical and prescription drug services may be of most use to them including testing, telemedicine and any costs being waived.
- Employers should also be **communicating changes or expansion of leave programs or availability of FMLA** during this time period.
- As many employers shift to remote or work from home status, **continue updating and checking in with employees regularly.**

CARE & WELLBEING RESOURCES

Employers and employees are facing challenges and changes, with work-life balance blending more than ever before. To help with limitations from the norm and adjustments to routine, here are some recommendations to help you **CARE** for yourself and your employees:

- **C**onnect with others: avoid feelings of isolation or loneliness by talking with people you trust about your feelings and concerns.
- **A**void pandemic news overload: take breaks from watching, reading, or listening to news stories, including social media.
- **R**emain active: make time to unwind and find new ways to stay engaged with activities you enjoy.
- **E**xercise, Eat and Elate: take care of your body and your mind by exercising regularly, eating healthy and managing stress.

MMA has a developed a list of no-cost resources to help your employees stay healthy while staying at home. These resources include at-home specific content on topics including physical activity, mental health, nutrition, and more. Access the resources here.

OTHER COVERAGE CONSIDERATIONS FOR EMPLOYEES

Considerations

- Employees are able to increase or decrease contribution to Dependent Care Flexible Spending Account due to closure or increased need of daycare.

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- Employers may consider offering separate telemedicine coverage for non-benefit eligible employees.
- **New 4/1/2020:** *The CARES Act permits HSAs, health care flexible spending accounts, health reimbursement arrangements, and Archer medical savings accounts to reimburse for the cost of over-the-counter drugs and other medicine purchased after December 31, 2019 without a prescription. This relief is permanent. This change alone does not constitute a substantial improvement under Qualified Life Event rules.*
- *Employees may have other options available to obtain coverage. The FFCRA requires federal programs, such as Medicare, Medicaid, and CHIP, to cover diagnosis and testing at 100% and gives states the option to expand Medicaid eligibility to address this.*
  - *On 4/1/2020 it was announced that the Federal Exchanges would not allow for a Special Enrollment Period although some states may opt to offer one.*
- *The FFCRA also allocates funds to reimburse health care providers for performing diagnosis and testing services for the uninsured. While the law requires emergency rooms to provide diagnosis and testing for those in need, it does not require a hospital to waive its costs for those who are uninsured or cannot pay.*
- *Through an abundance of caution, we want to bring beneficiary designation to your attention to ensure that employees have supplied appropriate beneficiaries , which are documented either on paper or via an online enrollment system. Some employers have set this enrollment process step up as optional, some are mandatory.*

New 4/1/2020: *Qualifying Life Events (QLEs)*

This section assumes the employer's Internal Revenue Code Section 125 cafeteria plan document permits mid-year, pre-tax election changes for the qualifying life events described below. The underlying benefit coverage issuer also needs to permit the election change.

Enrollment

Adding coverage for COVID-19 diagnosis and testing at no cost may qualify as a significant improvement of a benefit option permitting a mid-year election change to enroll in the plan by itself, and we are aware that many plans are taking the position that it does. Adding coverage for COVID-19 treatment at no cost likely is a QLE. An employer has some discretion to determine what a significant change is, and the rules merely indicate a change is significant if the average participant would consider it significant. The employer should confirm if its insurance carrier or stop-loss carrier will allow these specific mid-year election changes.

Want to stay informed?

Visit our dedicated resource page on **MarshMMA.com** for up-to-date information designed help employers navigate these evolving times.

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Dropping Coverage

The loss of eligibility for medical coverage as a result of a closure or furlough is generally a COBRA qualifying event and may result in a QLE permitting the employee to enroll in coverage through another employer (such as a spouse's employer) or the public health insurance marketplace. This QLE also occurs if the employee remains eligible for coverage but the employer reduces its employer contribution toward coverage to $0.

If the employer merely reduces – but does not eliminate – its contribution toward coverage, this may result in a QLE permitting the employee to change to a lower cost medical option or enroll in coverage through another employer if the cost of the employer's coverage has significantly28 increased. This event is a QLE for the public health insurance marketplace if the increased cost for the employer's coverage causes the employee to become newly eligible for premium subsidies.

New 4/1/2020: Dependent Care Flexible Spending Account (DCFSA) Coverage

Decrease Election

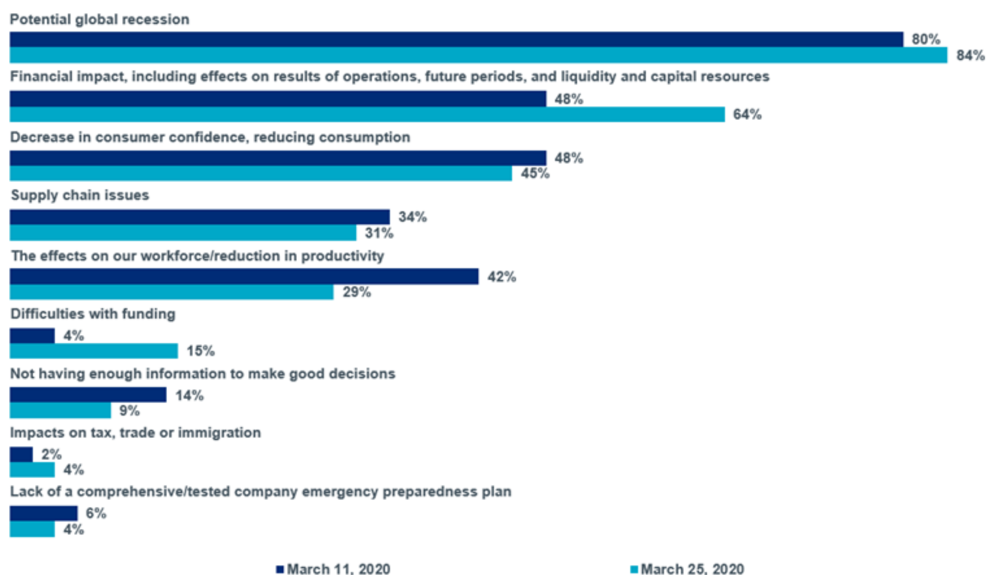
The closure of a day care provider due to COVID-19 concerns or a reduction in available day care provider hours would likely qualify as a significant reduction of coverage permitting an employee to decrease an existing DCFSA election and/or stop future contributions.30 This would also apply if a child is required to stay home and is supervised by a parent or relative.

Increase Election

If day care needs increase (and are available) due to school closure, an employee could start contributing to a DCFSA or increase an existing election.

Getting Back to Business

Many Employers are wondering what tomorrow will bring and if COVID-19 will kick off a global recession. According to the 2020 PwC's COVID-19 CFO Pulse Survey 87% of respondents say the outbreak has the potential for "significant" impact to their business operations.

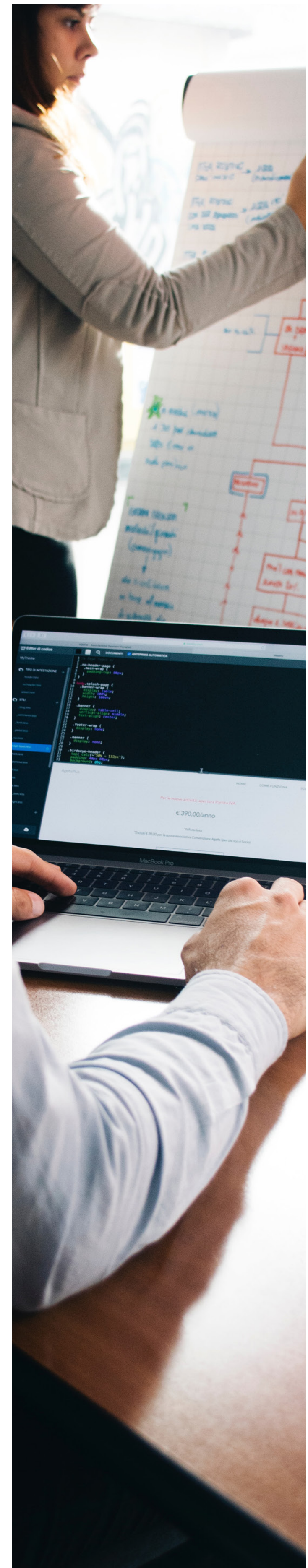


Employers are considering challenging decisions about how to weather the storm and if financially their business can survive these challenging conditions for an unknown period of time. Some employers (based on industry): such as hospitality, tourism and manufacturing have already moved to cost reduction strategies including reductions in force, layoffs and furloughs. While these terms sometimes get used interchangeably each has a different meaning and requires different actions and communications by the Employer, here is a brief overview of the differences:

- **Layoffs** are temporary separations from payroll because there is not enough work for an employee to perform. In these situations the employer may believe that the situation will improve and when it does the impacted person will be recalled. For most layoffs employees are able to collect unemployment benefits while on an unpaid leave and at the Employer's discretion and with their insurance carriers approval they may be able to retain benefits coverage for a set period of time. This acts as an incentive to the impacted individual to remain available for recall when economic conditions/work volume improves.

- **Furloughs** are an alternative to layoffs when impacted employees are required to work fewer hours or to take a certain amount of unpaid time off. For example, an employer may furlough all employees to take a week or two of unpaid leave sometime during the year. Employers need to be careful when furloughing exempt employees including continuing to pay them on a salary basis to avoid jeopardizing their exempt status under the Fair Labor Standards Act (FLSA). Employer may require all employees to go on furlough, or it may exclude some employees who provide essential services to their company or their customers. Generally, the theory is to have the majority of employees share some hardship as opposed to a few employees losing their jobs completely. Some employers look to continue benefits for the furloughed employees, in order to do this the Employer will need to get approval from their insurance carriers and very clearly define the eligible group, eligible time period and assure payment of premium if the carrier approves this exception. It is possible that furloughed employees may become eligible for unemployment compensation. State unemployment compensation requirements differ, and some states require a one week waiting period before an individual qualifies for payments while other states are actually waiving waiting periods in an effort to help impacted employees. Assuming your plan is subject to COBRA, all covered employees experiencing a reduction of hours and loss of coverage due to the furlough are entitled to a COBRA election (as are their covered spouses and dependent children), even though they will presumably elect and continue COBRA coverage for only one month. Your company should timely provide COBRA election notices and otherwise follow its standard COBRA procedures.

- **Reductions in Force (RIF)** are when positions are eliminated with no intent to replace that role, layoffs could turn into a RIF if the employee is not recalled, these should be considered permanent separations. Unemployment may be available subject to state requirements and COBRA may apply assuming your plan is subject to COBRA. Employers may decide to offer severance to employees impacted by a RIF or in the case some collective bargaining agreements may be required to offer. Employers offering severance need to be mindful of subsidizing healthcare costs as part of a severance agreement as it could lead to issues as to when the COBRA qualifying event occurred effectively extending the COBRA coverage window and potentially shifting risk for catastrophic claims back to the employer from the stop loss carrier.



What Employers Need to do Right Now?

- Employers considering employment actions as a cost reduction strategy **should consult with their legal counsel** to assure compliance with the following:
  - Employment contracts
  - Collective bargaining agreements
  - The WARN Act at both the federal and state level
  - Older Workers Benefit Protection Act
  - FMLA
  - ADAAA
  - COBRA
  - Any state level requirements regarding the use of accrued time
- Provide not only required notices, but also **provide information to impacted employees** on the impact to their benefits including applicable premiums, any leave programs that can be used and referrals to unemployment.
- All Employers should be mindful to consider all the benefits offered as focus will most likely be on medical benefits. Employees may need to take action to continue other coverage like life insurance per specific policy guidelines around portability and conversion.
- **New 4/1/2020:** There are several pieces of legislation (Paycheck Protection Program, etc.) that we will be addressing in upcoming guidance that act at stimulus packages that will assist employers in receiving loans to keep their employees on payroll and maintain their business. The Paycheck Protection Program begins accepting applications on 4/3/2020. See more detailed information from the Small Business Administration (SBA).

Frequently Asked Questions

What do I need to consider if my company is considering a furlough?

After determining if any benefits you would like to continue during a furlough period the Employer should consult applicable insurers to confirm their approval. Employers in conjunction with their legal counsel should review and provide written notice to impacted employees.

Are employees who were actively at work prior to a furlough eligible for benefits while on furlough?

Sometimes benefits are continued, but most policies do not include furlough language that would allow for this expansion of actively at work requirements assuming premium is paid. Many carriers and third party administrators are working with Employers to allow benefits to continue for furloughs for a set period of time, however each employer should confirm that their plans have that approval before communicating continuation to their employees. Additional questions may arise in regards to benefits such as how the average salary is calculated for any applicable disability or like insurance benefit.

What if we need to reduce hours? Are employees whose hours are reduced below the minimum hours required in the plan document or certificate still eligible for benefits?

No, just like with furlough the carrier would need to approve a temporary reduction in required hours for a set time period as an exception assuming premium continues to be paid.

Do we have an obligation to provide notice under the federal WARN Act if we have to close a plant or layoff a portion of our workforce?

Yes, if your company is covered by the Worker Adjustment and Retraining Notification (WARN) Act but this is may change due to the unexpected nature of the Coronavirus. The federal WARN Act imposes a notice obligation on covered employers who implement a “plant closing” or “mass layoff” in certain situations. Employers need to consider any state level WARN regulations that may also apply.

ADDRESSING THE CORONAVIRUS OUTBREAK

Marsh & McLennan Agency is there for our clients, colleagues, and communities in the moments that matter. The Coronavirus pandemic is top of mind for companies and their employees. The threat of COVID-19 has grown increasingly real, infecting countries all over the world, spreading across boundaries and oceans, and rattling the global economy. Let MMA be your trusted resource during this challenging time, reach out to us today to see how we can help.

Learn More

Visit our dedicated Coronavirus Resource page at mma.marshmma.com/coronavirus-outbreak-resource-page to access resources at your fingertips.

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