April 13, 2020

Coronavirus Compliance Guide

FAQs: Furloughs and Layoffs, New Paid Leave Requirements, Cost Containment and Carrier Enrollment Options, and Other Benefit Plan Issues

Introduction

As companies struggle with how to respond to the COVID-19 outbreak, Congress has passed legislation, the agencies are issuing guidance, and state insurance departments and carriers are taking their own measures to help manage the crisis. These developments, in conjunction with the many operational approaches employers are considering, create a host of compliance considerations for both the benefit plan and employment practices generally. We have organized and addressed these questions by the topics noted below. Given the rapidly evolving nature of this situation, we will continue to provide periodic updates on these issues.

Furloughs and Lay Offs

Q1. What is the difference between termination, layoff, and furlough?

A. *Termination*: A termination marks the end of an employee's employment. Terminations can happen for any number of reasons, including lack of work, poor performance, misconduct, or a company closing.

Layoff: A layoff is a termination of employment for a period of time due to lack of work and a separation from payroll. Layoffs can be temporary or permanent. Temporary layoffs are most common when an employer is addressing slowdowns or closures that are expected to be relatively short term. Permanent layoffs are most common when a company is closing and does not expect to rehire the employee or if a slowdown is expected to be long term.

Furlough: A furlough is a temporary, leave of absence that continues employment but reduces scheduled hours or requires a period of unpaid leave. An employer may require all employees to go on furlough, or it may exclude some employees who provide essential services. Implementing a furlough could be an option for employers seeking to retain talent and reduce the cost of separation.

It is important to note that these terms are not defined under ERISA or the Affordable Care Act (ACA). Many employers use "layoff" and "furlough" interchangeably – which makes a difference when addressing how benefits eligibility is handled.

Note that group health plan determinations will largely be based on whether the employment relationship continues to exist, or whether it has been terminated—temporarily or permanently—regardless of what term the employer uses.

Q2. Do we need to offer COBRA if we have a workforce reduction?

A. Terminations of employment, with rare exceptions, are COBRA-qualifying events, meaning COBRA must be offered as soon as there's a loss of coverage. Termination of employment or reduction in hours resulting in a loss of coverage provides 18 months of COBRA coverage, but a number of state insurance laws provide continuation of coverage for an additional 18 months through the insurance carrier, e.g., CalCOBRA. Contact your carrier, TPA, and/or COBRA vendor to confirm. Alliant also has a 50-state chart on mini-COBRA laws.

Q3. Can an employer pay for their employees' COBRA due to the circumstances around COVID-19?

A. Employer payments for medical coverage (including COBRA) for a current or former employee can be tax favored as long as the employee is not in direct receipt of the funds. However, providing a former employee with a single lump sum payment that is taxable to the employee is the recommended approach. Part of that payment can be used for COBRA or to pay for coverage on another health plan, which may be preferable than keeping COBRA risk on the employer plan. Also, subsidizing COBRA on a tax favored basis for self-funded plans raises potential non-discrimination issues under 105(h). With an insured plan an employer can pay a carrier directly for a portion of COBRA coverage on a tax favored basis, but this minimal tax advantage may not be worth the potential downstream complications. Specifically, subsidizing a limited period of COBRA can foreclose other enrollment opportunities for the employee/former employee. Under HIPAA, to have a special enrollment right due to loss of other coverage, COBRA once elected must be exhausted. Thus, a few months of a COBRA subsidy may entice an employee not to enroll in a spouse's plan or exchange plan when they initially lose coverage and they may not be able to enroll later when the period of subsidized coverage ends.

Q4. Instead of offering COBRA, can we keep our furloughed employees on the benefit plan?

A. Eligibility for benefits is always determined by and should be administered pursuant to the written terms of the plan. For employers generally over 20 employees, COBRA applies when an employee's hours drop below the plan eligibility threshold and coverage is terminated. In addition, many employers allow employees on unprotected or unspecified leave ("employer policy leave") to remain on the plan for a certain period of time. As a result, employers should:

1. Confirm the written eligibility terms of the group health plan. Consider the application of ACA full-time status rules.
2. Review employer policy leaves to determine if you have a policy that permits the continuation of benefits where an employee is on furlough or unpaid leave.
3. Confirm medical carriers and/or stop loss carriers are informed and have approved any benefits continuation policy.

Employers that do not have a current benefits continuation policy, but want to implement one during this crisis should first seek approval from their medical and/or stop loss carriers, draft the written policy and update all relevant documents accordingly, determine how plan premiums will be handled, and clearly communicate this policy change with employees. Employers that do not have an employer leave policy and do not plan to implement one should offer COBRA coverage to employees who are furloughed or otherwise have reduced hours that render them ineligible for benefits under the terms of the plan.

Q5. What about those employees still in their ACA stability period? Aren't employers required to keep them on the plan?

A. Under the Affordable Care Act (ACA) applicable large employers (ALEs) must offer affordable, minimum value coverage for full-time employees in order to eliminate penalty risk. Employers that use the lookback measurement method will generally have full-time employees in a stability period, meaning the employees maintain their full-time status for the entire stability period regardless of how many hours actually worked. When these employees have a reduction in hours, they are unlikely to lose eligibility. However, there is an exception that does allow employers to break an employee out of their stability period status as a result of an employment status change. An employer can only use this exception if:

- The employee was hired as FT and covered within three months of employment (*not placed in an Initial Measurement Period on hire*)
- The employee actually averages <130 hours per month for *three full months* after the status change

If these conditions are met the employer can take employee out of a stability period, i.e., drop coverage, effective *1st day of 4th month* after change and after averaging <130 hours per month for three full months.

In addition, remember that a reduction in hours to below 30 per week is a Section 125 or Cafeteria Plan status change event, even if the change in status does not impact plan eligibility, as long as the employee and other dependents who lose coverage intend to enroll in other MEC (an employee can drop coverage to enroll in Exchange or other MEC plan). This means that employees can choose to drop benefits even where eligibility is not impacted and the employer's offer of coverage will still count for pay or play purposes.

Q6. If an employee has been furloughed with no pay but remains eligible for coverage, how should premiums be paid?

A. There's no direct guidance on this point, but best practice is to allow employees to pay as they go, which means the employee would pay for coverage by sending post-tax payments to the employer. Note that an employer can terminate coverage for failure to pay premiums and that loss of coverage would not be a COBRA qualifying event.

Q7. Can an employee whose hours were reduced following the COVID-19 outbreak drop their health plan coverage?

A. Yes, where a reduction in hours causes an employee to lose health plan eligibility he or she can drop coverage due to a change in employment status. Also, as noted above, employees can also drop coverage following a reduction in hours to below 30 hours per week – even if eligibility isn't affected – if the employee intends to enroll in other minimum essential coverage. Employers may rely on an employee's reasonable representation about enrolling in other coverage in administering this change. Notably, this latter election change event does not apply to health FSA coverage, which generally cannot be changed solely due to a reduction in hours where eligibility is not impacted. This issue is discussed in greater detail below.

Q8. Where an employee is laid off instead of furloughed, how do we handle group health plan benefits?

A. Where the employment relationship is terminated and the employee was enrolled in the benefit plan, coverage continuation should be offered in compliance with COBRA.

Q9. Can employees choose to change their Dependent Care FSA election during a furlough?

A. Yes, the election change rules around DCAPs are relatively flexible, and can generally accommodate changes that are necessary to reflect changes in the care of the child (for example, a family member agreeing to watch the child for free because a child-care facility is closed). The plan document must allow this change, but almost all of them permit this change.

Q10. What happens to a furloughed employee's Health FSA?

A. As noted above, the rule allowing an employee to drop coverage if they have a reduction in hours but no eligibility change does not apply to health FSAs. In that situation, an employee will stop making contributions to the health FSA and will not be eligible to reimburse expenses during that time. When a furloughed employee returns to work, the employer can allow the employee to make catch up contributions to reach their original annual election amount or continue to make their standard monthly salary reduction, which will result in contributions that are less than the annual election amount.

Note that the standard COBRA rules for health FSAs (limited COBRA obligation where an account is underspent) apply to employees who are terminated or laid off.

Q11. When employees are furloughed are they still eligible for short-term or long-term disability (STD/LTD) benefits?

A. Generally, STD and LTD contracts contain actively at work provisions which require that eligible employees be actively at work immediately prior to eligibility for benefits under those plans. Given the current crisis, certain carriers are modifying those standard provisions to allow individuals to remain otherwise eligible for a certain period of time as long as premiums are paid during that time. This is an insurance carrier based decision, not a compliance requirement. This would not apply to someone who is laid off with no expected return to employment.

Q12. Are furloughed employees eligible for any federal and state mandated leaves?

A. Employees furloughed as a result of a business downturn are generally not eligible for any federal or state mandated leaves while on furlough. Those benefits are designed for leave when work is available, but an employee is unable to perform that work. They may, however, be eligible for unemployment insurance benefits under the CARES act, often referred to as the stimulus bill.

Q13. If I furlough employees rather than lay them off, will I still be required to pay out their unused paid time off (PTO)?

A. Generally no. But this issue varies by state and we recommend consulting employment law counsel for specific questions.

Q14. What is the WARN Act? Does it only apply on the Federal level?

A. The Federal Worker Adjustment and Retraining Notification Act (WARN Act) requires employers to provide 60-days advance notice of mass layoffs and plant closings to affected workers and their families. It generally applies to employers with 100 or more full time employees. Although an employer can provide full compensation and benefits for 60-days in lieu of providing notice this costly and complex alternative can be difficult to administer.

Importantly, there are two key exceptions to the notice required under the WARN act that likely apply in the face of the COVID-19 crisis. First, when a company experiences a "sudden and dramatic" downturn in its business, it may qualify for the Unforeseen Economic Circumstances Exception. The conditions that caused a sudden and dramatic downturn in business must not have been "reasonably foreseeable" at the time that 60-day notice would have been required to protected employees affected by a notice-triggering action working under covered employers. Next, when a plant closing or mass layoff is the direct result of a natural disaster the employer may be excused from providing 60 days' advance notice to employees if it is forced to terminate those employees. Although this exception was intended to apply in the event of a hurricane, earthquake, drought, storm, flood, tidal wave, etc., it seems to also encompass a global pandemic. In any event employers should provide notice as soon as reasonably possible to employees.

There are also a number of states that have "mini-WARN" acts so employers should consult their employment law advisor to better understand their obligations under these states laws. That said, we know that at least one state—California—has suspended the notice requirements under the state provisions, To utilize this suspension, employers that have employed at least 75 employees in the last 12 months must: (1) provide written notices in the form normally required under CA WARN; (2) give as much notice as is practicable and, at the time of notice, briefly explain the reason for the shortened notice period; (3) consistent with the similar federal WARN UBC defense, order the mass layoff, relocation, or termination due to "COVID-19-related 'business circumstances that were not reasonably foreseeable as of the time that notice would have been required;'" and (4) include in the notice the following statement: If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019. The California Labor and Workforce Development Agency is expected to provide further guidance on this order. We anticipate other states to follow suit.

New Federal Paid Leave Requirements—Expanded FMLA and Paid Sick Leave for Employers under 500

Q15. How does an employer know if a business is under the 500-employee threshold?

A. An employer has fewer than 500 employees if, at the time an employee's leave is to be taken, it employs fewer than 500 full-time and part-time employees within the United States, (including any Territory or possession of the United States). An employer must count employees on leave; temporary employees who are jointly employed with another employer (regardless of whether the jointly-employed employees are maintained on another employer's payroll); and day laborers supplied by a temporary agency. Independent contractors are not considered employees for purposes of the 500-employee threshold.

If two entities are found to be joint employers all of their common employees must be counted in determining whether paid sick leave must be provided and whether leave must be provided under the FMLA expansion. Typically, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. If two entities are found to meet the integrated employer test under FMLA, then employees of all entities making up the integrated employer will be counted in determining employer coverage for purposes of the FMLA expansion and the PSL provisions. **The two applicable tests mentioned above generally require a determination by employment law counsel.**

Q16. Does the FFCRA apply to private employers with 500 or more employees?

A. No.

Q17. Is there a small business exemption for businesses with fewer than 50 employees if providing paid sick leave and the FMLA expansion would jeopardize the viability of the business?

A. A small business, including religious or nonprofit organizations, with fewer than 50 employees may be exempt from providing: (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

a. 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;
b. 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
c. 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.

Employers should document why compliance with these leave provisions would jeopardize the viability of the business and retain records for four years.

Q18.How do employers count hours worked by a part-time employee for purposes of paid sick leave or the FMLA expansion?

A. Paid Sick Leave. An employee is considered full-time if normally scheduled to work at least 40 hours each work week. An employee without a normal schedule is considered full-time if the average number of hours per work week the employee was scheduled to work (including leave of any type), is at least 40 hours per workweek over a period of time that is the lesser of: (i) the six-month period ending on the date on which the employee takes EPSL; or (ii) the entire period of the employee's employment.

An employee is considered part-time if normally scheduled (or actually scheduled) to work fewer than 40 hours each work week. The rule for part time employees is:

(1) If the part-time employee has a normal weekly schedule, the employee is entitled to up to the number of hours normally scheduled for him or her to work over two workweeks.

(2) If the part-time employee lacks a normal weekly schedule, the number of hours is calculated as follows:

(i) If employed for at least six months, the employee is entitled to up to the number of hours equal to fourteen times the average number of hours that the employee was scheduled to work each calendar day over the six-month period ending on the date on which the employee takes EPSL (including leave of any type).
(ii) If employed for fewer than six months, the employee is entitled to up to the number of hours equal to fourteen times the number of hours the employee and the employer agreed to at the time of hiring that the Employee would work, on average, each calendar day. If there is no agreement, the employee is entitled to up

to the number of hours equal to fourteen times the average number of hours per calendar day that the employee was scheduled to work over the entire period of employment (including leave of any type)..

FMLA Expansion. The FLMA expansion uses a separate rule to count employee hours.

(1) If the eligible employee has a normal work schedule, regularly scheduled hours are the number of hours the employee is normally scheduled to work on that workday;

(2) If the eligible employee has a work schedule that varies to an extent that an employer is unable to determine the number of hours the eligible employee would have worked on a day leave is taken, and has been employed for at least six months, the regularly scheduled hours are the average number of hours the employee was scheduled to work each workday over the six-month period ending on the date on which the employee first takes EFMLA (including leave of any type); or

(3) If the eligible employee has a work schedule that varies to such an extent that an employer is unable to determine the number of hours the employee would have worked on the day for which leave is taken, and the employee has been employed for fewer than six months, the average number of hours the employee and the employer agreed to at the time of hiring that the employee would work each workday. If there was no agreement, the scheduled number of hours is equal to the average number of hours per workday that the eligible employee was scheduled to work over the entire period of employment (including leave of any type).

Q19. When calculating pay due to employees should overtime hours be included?

A. The FMLA expansion requires employers to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week. Note, however, that the employee will be paid 2/3 of their regular rate of pay, and that calculation will not factor in any overtime rate of pay. Regardless of overtime or hours worked, paid sick leave is paid only up to 80 hours over a two-week period. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid sick leave in the first week and 30 hours of paid sick leave in the second week. In any event, the total number of hours paid under the Emergency Paid Sick Leave Act is capped at 80. Daily and aggregate caps placed on any pay for paid sick leave and the FMLA expansion are discussed below.

Q20. How much will an employee be paid while taking paid sick leave or expanded FMLA under the FFCRA?

A. Paid Sick Leave. It depends on the employee's normal schedule, as well the reason for taking leave. If an employee takes paid sick leave as a result of (1) a Federal, State, or local quarantine or isolation order related to COVID-19; (2) a health care provider's advice to self-quarantine due to concerns related to COVID-19; or (3) COVID-19 symptoms and is seeking a medical diagnosis, the employee will receive the greater of: the regular rate of pay, the federal minimum wage in effect under the FLSA, or the applicable State or local minimum wage. Note that many localities have minimum wage thresholds that are higher than the state and federal rates. Wages are up to a maximum of $511 per day, or $5,110 total over the entire paid sick leave period.

If an employee takes paid sick leave because they are: (1) caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (2) caring for your child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; or (3) experiencing any other substantially-similar condition as specified by the Secretary of Health and Human Services, the

employee is entitled to compensation at 2/3 of the greater of the amounts set forth above, up to a maximum of $200 per day, or $2,000 over the entire two week period.

FMLA Expansion. If an employee takes expanded FMLA leave, they can take paid sick leave for the first two weeks of that leave period (or potentially other PTO). For the following ten weeks, the employee will be paid at 2/3 of the regular rate of pay for the hours normally scheduled to work. The regular rate of pay must be at or above the federal minimum wage, or applicable state or local minimum wage. Employees will not receive more than $200 per day or $12,000 for the twelve weeks that include both paid sick leave and expanded FMLA when on leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

Q21. What is the regular rate of pay for purposes of the FFCRA?

A. For purposes of the FFCRA, the regular rate of pay used to calculate paid leave is the average of the regular rate over a period of up to six months prior to the date on which leave is taken. If the employee has not worked for the employer for six months, the regular rate used to calculate paid leave is the average of the regular rate of pay for each week worked for the current employer. Commissions, tips, or piece rates are generally included in this calculation under the FLSA.

Q22. Can an employee take 80 hours of paid sick leave for self-quarantine and then more paid sick leave for another paid sick leave qualifying reason?

A. No. The total number of hours for which you receive paid sick leave is capped at 80 hours, regardless of whether the employee experiences multiple qualifying reasons for leave.

Q23. Can an employee take 80 hours of paid sick leave multiple times with different employers?

A. No. This is a per-person entitlement and not a per-job entitlement with an absolute upper limit of 80 hours. Once an employee takes the maximum 80 hours, he or she is not entitled to any EPSL from a subsequent employer. However, employers may have difficulty tracking whether employees have previously used this paid sick leave.

Q24. Can an employer exclude any employees from PSL or expanded FMLA requirements?

A. The FFCRA permits employers who are health care providers and emergency responders to exclude employees from these amendments.

Q25. Who is a health care provider for purposes of excluding employees from the PSL and/or expanded FMLA requirements?

A. A health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

Q26. Who is an emergency responder that can be excluded from the expanded FMLA and PSL provisions?

A. An emergency responder is anyone necessary for the provision of transport, care, healthcare, comfort, and nutrition of such patients, or others needed for the response to COVID-19. This includes military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, child welfare workers and service providers, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency, as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility..

Q27. How do paid sick leave and the FMLA expansion interact when an employee is home with a child because a school or place of care is closed or child care provider is unavailable?

A. An employee may take both paid sick leave and expanded FMLA to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons. Emergency paid sick leave provides for an initial two weeks of paid leave at 2/3 of wages that covers the first two weeks of expanded FMLA, which are unpaid. After the first two weeks, employees will receive 2/3 of their regular rate of pay under the FMLA expansion. An employer may require employees to use any existing PTO or other available paid time off concurrently to top-off wages to 100% after the first two weeks of emergency paid sick leave or if paid sick leave does not apply/ has been exhausted.

Q28.Can an employer deny paid sick leave under the FFCRA if it already gave employees paid leave for a reason identified in the Act prior to April 1?

A. No.

Q29.Can an employer deny expanded FMLA leave if an employee already exhausted FMLA leave for another reason?

A. Yes. Employees may take ***a total of 12 workweeks*** for FMLA or expanded family and medical leave reasons during a 12-month period.

Q30.Is all leave under the FMLA now paid leave?

A. No. FMLA leave is only paid for this specific and limited reason, to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, and only for a finite period of time, e.g., April 1 through December 31, 2020.

Q31. What records should employers keep when an employee takes paid sick leave or expanded FMLA?

A. Employers must require employees 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. Documentation of the reason for the leave will also be necessary. For expanded paid sick leave this could include the source of any quarantine or isolation order, or the name of the health care provider who has advised you to self-quarantine. For expanded FMLA, 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. If you intend to claim a tax credit under the FFCRA for your payment of the sick leave wages, you should retain this documentation in your records.

Q32. What documents do employees need to provide to get paid sick leave or expanded FMLA?

A. See above. Also note that all existing certification requirements under the FMLA remain in effect if an employee is taking leave for one of the existing qualifying reasons under the FMLA. For example, if an employee takes leave beyond the two weeks of emergency paid sick leave because of a medical condition for COVID-19-related reasons rises to the level of a serious health condition, the employee must continue to provide medical certifications under the FMLA.

Q33. How long are employers required to retain records related to paid sick leave or expanded FMLA?

A. Four years. Records include all required documentation even where an employee's request for leave is denied.

Q34. When is an employee able to telework under the FFCRA?

A. An employee may telework when the employer permits or allows you to perform work while at home or at a location other than the normal workplace.

Q35. What does it mean to be unable to work, including telework for COVID-19 related reasons?

A. An employee is unable to work if the employer has work for the employee but one of the COVID-19 qualifying reasons set forth in the FFCRA prevents that employee from being able to perform the work, either under normal circumstances or by telework. If the employee and employer agree that the employee will work the normal number of hours, but outside of the normal schedule (for instance early in the morning or late at night), then the employee is able to work and leave is not necessary unless a COVID-19 qualifying reason prevents the employee from working that schedule.

Q36. Is an employee unable to telework entitled to paid sick leave or expanded FMLA?

A. If an employer permits teleworking and an employee is unable to perform those tasks or work the required hours because of one of the qualifying reasons for paid sick leave, then the employee is entitled to take paid sick leave. Similarly, if the employee is unable to perform those teleworking tasks or work the required hours because of the need to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, then the employee is entitled to take expanded family and medical leave. Of course, to the extent the employee is able to telework while caring for a child, paid sick leave and expanded FMLA is not available.

Q37. **Can employees take paid sick leave or expanded FMLA intermittently while teleworking?**

A. Yes. Where an employee is unable to telework normal hours due to one of the qualifying reasons in the Emergency Paid Sick Leave Act, an employer can permit the employee to take intermittent leave. Similarly, where an employee cannot telework normal hours because of the need to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, an employer can permit the employee take expanded FMLA intermittently while teleworking. An employee may take intermittent leave in any increment, provided that the employee and employer agree. For example, if they agree on a 90-minute increment, the employee could telework from 1:00 PM to 2:30 PM, take leave from 2:30 PM to 4:00 PM, and then return to teleworking.

Q38. **Can employees take paid sick leave intermittently while working at a usual worksite (as opposed to teleworking)?**

A. It depends on why the employee is taking paid sick leave and whether the employer agrees. Only paid sick leave to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, can be taken intermittently while working at a usual worksite. This limit is imposed other requested use of intermittent leave creates an unacceptably high risk that the employee might spread COVID-19 to other employees at a worksite.

Q39. **Can employees use expanded FMLA intermittently while a child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons if not teleworking?**

A. Yes. An employer may allow this.

Q40. **If an employee's worksite closed is paid sick leave or expanded FMLA available?**

A. No. If an employer closes (e.g. lack of business or pursuant to a Federal, State, or local directive), before or after April 1, 2020, employees will not get paid sick leave or expanded FMLA but may be eligible for State unemployment insurance. If an employer closes while an employee is on paid sick leave or expanded FMLA, the employer must pay for any paid sick leave or expanded FMLA used before the employer closed. As of the date the employer closes the worksite, an employee is no longer entitled to paid sick leave or expanded FMLA, but may be eligible for unemployment insurance or other wage replacement benefits.

Q41. **If an employer is open, but furloughs employees on or after April 1, 2020 can employees receive paid sick leave or expanded FMLA?**

A. No. An employer that furloughs employees for lack of work is not required to provide paid sick leave or expanded family and medical leave. However, employees may be eligible for unemployment insurance or other wage replacement benefits.

Q42. **Can employees collect unemployment insurance benefits and receive pay for paid sick leave and/or expanded FMLA at the same time?**

A. No. If an employer provides an employee paid sick leave or expanded family and medical leave, that employee is not eligible for unemployment insurance. However, DOL recently clarified additional flexibility to the States (UIPL 20-10) to extend partial unemployment benefits where hours or pay have been reduced.

Q43. Are employers required to continue health benefits for employees who elect to take paid sick leave or expanded FMLA? If employees remain on leave beyond the maximum period of expanded FMLA do they have a right to stay on the group health plan coverage?

A. Where an employer provides group health coverage, enrolled employees are entitled to continue that coverage during their expanded FMLA or new paid sick leave on the same terms as if they continued to work. Employees generally must continue to make normal contributions to the cost of health coverage. The employee's share of premiums must be paid by the method normally used during any paid leave, which will generally be through payroll deductions. For unpaid leave, or where the pay provided under these new leave provisions is insufficient to cover the employee's premiums, the rule on payment of premiums refers back to existing FMLA practices (pay in advance on agreement, pay post tax as you go, or pay on return by agreement). Paying post tax as you go is a strong recommendation.

Employees taking expanded FMLA or paid sick leave must be given notice of any benefits changes during leave and an opportunity to respond accordingly. If an employee chooses not to retain group health plan coverage while taking EPSL or EFMLA, the employee is entitled upon returning from leave to have benefits reinstated on the same terms as prior to taking the leave.

If an employee does not return to work at the end of expanded FMLA or paid sick leave, the employer should review its eligibility provisions and internal policies to determine whether the employee can remain on the plan. If the employee is no longer eligible, COBRA coverage should be offered (generally applies to employers with 20 or more employees). If you elect to take paid sick leave, your employer must continue your health coverage.

Q44. Are employers required to reinstate employees who take paid sick leave or expanded FMLA (is there an FCRAA job protection requirement)?

Employees who take expanded FMLA or paid sick leave must be restored to the same or an equivalent position. However, employees are not protected from employment actions, such as layoffs, that would have affected the employee regardless of whether he or she took leave.

Expanded FMLA has a separate job restoration exclusion that does not add to this general rule. It provides that job restoration requirements will not apply for employers with fewer than 25 employees if the employee's position does not exist due to economic conditions or changes in the operations of the employer.

Employers that deny restoration must be able to show that an employee would not otherwise have been employed at the time reinstatement was requested.

Q45.Can employees use preexisting leave entitlements and FFCRA paid sick leave and expanded FMLA concurrently for the same hours?

A. Emergency paid sick will run concurrently with expanded FMLA where the reason for leave overlaps (school closures or where child care is unavailable as a result of COVID-19). In such cases, after the first two weeks of EPSL (or if EPSL does not apply/was exhausted) employers may require employees to take existing PTO or other appropriate paid leave concurrently to bring wages from 2/3 to 100% of pay. Otherwise, employers cannot require, but may allow, use of other PTO to top off wages during paid sick leave. Although the regulations lack complete clarity on this point, they expressly provide that emergency paid sick leave is provided in addition to any other right or benefit, including paid sick leave, to which the employee is entitled under state, local, or federal law or by policy or bargaining agreement. Further, an employee must be allowed to first use emergency paid sick leave before using any other available leave.

Q46. Can employers pay employees more than they are entitled to receive for new FFCRA leaves and claim a tax credit for the entire amount paid?

A. No. Employers cannot receive a tax credit for amounts paid in excess of the FFCRA requirements.

Q47. When can employers start claiming tax credits?

A. Tax credits are available for any paid leaves taken starting April 1, 2020 and through December 31, 2020.

Q48. What amounts can an employer claim as part of the tax credit designed to offset the cost of providing paid leaves under the FFCRA?

A. The tax credit potentially includes three things: (1) qualified leave wages, up to caps discussed above in Q20, (2) the amount of qualified health plan expenses, which includes both the portion of the cost paid by the eligible employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions, and (3) the employer's share of Medicare tax imposed on qualified leave wages, which is generally 1.45% of wages.

Q49. What is the process for claiming tax credits?

A. Fully refundable tax credits are claimed on Quarterly Tax Return Form 941 (or other applicable tax return such as Form 944 or Form CT-1). In anticipation of claiming credits on the Form 941, employers should first retain any federal employment taxes they otherwise would have deposited. If the federal employment taxes to be deposited are not sufficient to cover the cost of qualified leave wages, the employer can file a request for an advance payment from the IRS via Form 7200, Advance of Employer Credits Due To COVID-19. If an employer's the credit is more than the federal employment taxes the employer owes (and can withhold or request advanced payment for) the excess is treated as an overpayment and refunded to the employer, which is why the credit is referred to as fully refundable. Form 941 will provide instructions about how to reflect the reduced liabilities for the quarter related to the deposit schedule.

Q50. How do employers calculate qualified health plan expenses?

A. Although employers are allowed to use any reasonable actuarial method to determine the estimated annual qualified health plan expenses of the plan, the best approach is to use the COBRA applicable premium. Note, however, the qualified health plan expenses should not include amounts that the employee paid with after-tax contributions.

Q51. What does it mean that qualified health plan expense must be properly allocated on a pro rata basis among covered employees and pro rata on the basis of periods of coverage?

A. This calculation requires that employer identify each employee taking FFCRA paid leave and the duration of that leave. For each employee and each period of leave the employer much calculate the cost of maintaining group health plan coverage that each employee was enrolled in. As noted above, this will generally be the COBRA rate and reflect both the cost to the employer and employee (but not amounts that an employee paid for with after-tax dollars). For an employee who participates in more than one plan, the allocated expenses of each plan in which the employee participates will be aggregated for that employee (e.g., qualified expenses would include both the medical plan, dental and vision coverage and a health-FSA). For practical purposes this means that the qualified healthcare expenses will differ based on the benefit option and tier of coverage the employee elected.

Q52. Do qualified health plan expenses include coverage by account based plans?

A. The tax credit for qualified health plan expense will include contributions to an HRA, or a health-FSA. They do not include contributions to a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA). To allocate contributions to an HRA or a H-FSA, employers should use the amount of contributions made by or on behalf of the particular employee. Qualified health plan expenses do not include contributions to HSAs.

Q53. Should employers withhold federal and state payroll taxes from qualified leave wages paid under the FFCRA?

A. Yes, employer should continue to deduct appropriate payroll taxes.

Q54. Are tax credits available to governmental employers?

A. No.

Q55. Are tax credits available to tax-exempt employers?

A. Yes.

Q56. Can an employer that is part of a multiemployer collective bargaining agreement satisfy expanded FMLA and paid sick leave obligations through contributions to a multiemployer fund, plan, or program?

A. Yes. An employer may (but is not required to) satisfy expanded FMLA and paid sick leave obligations by making contributions to a multiemployer fund, plan, or other program in accordance with existing collective bargaining agreements (CBAs). These contributions must be based on the amount of paid FMLA and paid sick leave to which each employees is entitled under the Act based on each employee's work under the applicable CBA. The fund, plan, or program must allow employees to secure or obtain their pay for the related leave they take under the Act. Alternatively, employers may choose to satisfy their obligations under the Act by other means, provided they are consistent with their bargaining obligations and CBAs.

Cost Containment and Permitted Carrier Changes

Q57. Can employers reduce their contribution to medical plan premiums mid-year?

A. Yes. Employers can always adjust cost-sharing at any time. However, a reduction in an employer's contribution may be a "significant cost change" for employees under cafeteria plan election change or status change rules. When there's a significant cost change (in this case, an increase in cost to employees), employees will generally have the option to switch to a cheaper medical plan offered by the employer, or if there isn't a cheaper option, to drop coverage. There is no specific guidance on when a cost change is considered "significant" but employers should consider the amount of the increase relative to what employees were previously asked to pay as well as the demographics of their employee population. Employers with fully-insured plans should communicate with insurance carriers about anticipated changes in cost-sharing because underwriting is partially based on projected enrollment. Employees should be given advanced notice of any significant cost change. Although details on cost-sharing are not required Summary Plan Description content (or included in Summaries of Benefits and Coverage), a Summary of Material Modifications (SMM) would generally be the best vehicle to communicate this type of change. Lastly, employers should consider the impact of the change on whether at least one minimum value

medical plan (60% AV) is affordable under the Affordable Care Act (ACA) Pay or Play rules and whether bargaining agreements or other employment agreements need to be considered.

Q58. Can employers change medical plan deductibles or out-of-pocket limits mid-year?

A. Possibly. A self-funded plan generally has the flexibility to make these changes mid-year, although doing so raises a number of practical challenges that would need to be addressed with the plan's Third Party Administrator (TPA). These types of mid-year changes may not be possible for fully-insured plans although some carriers may let employers buy down to less rich plans mid-year. Any possible insured plan changes would require contracts amendments. A meaningful change to deductibles or out-of-pocket limits would also be a "significant coverage curtailment" under cafeteria plan election change or status change rules. When there's a significant coverage curtailment, employees will generally have the option to switch to a different medical plan (in this case a richer plan) offered by the employer or drop coverage. Deductible and out-of-pocket amounts are also disclosed in SBCs, which means 60 days advance notice of a mid-year change is required. This type of change would also require an SMM (often labeled as a Summary of Material Reduction in such cases) under ERISA. Although ERISA requires notice of material reductions 60 days after the date the change is adopted, advanced notice is required (at least 60 days to comply with SBC rules and to address any vested rights under contracts law). Lastly, because deductibles and out-of-pocket limits impact the actuarial value of plans, employers should confirm that they still offer at least one minimum value medical plan (60% AV) under ACA Pay or Play rules.

Q59. As a result of the COVID-19 crisis, our health insurance carrier has offered a mid-year "special" enrollment opportunity for people who previously declined coverage. Can we allow employees to take advantage of this opportunity?

A. Yes. As a result of the Families First Coronavirus Response Act (FFCRA) all group health plans are required to provide coverage without cost sharing for COVID-19 testing, products related to testing, and any medical appointment related to testing, including office, emergency, telehealth or urgent care visits. Under existing cafeteria plan guidance, this would likely rise to the level of a "significant improvement of a benefit package option." Under this cafeteria plan election change or status change event eligible employees who had declined coverage could now enroll. Because all benefit options are now required to cover COVID-19 testing and the related visit this would not be an opportunity for employees who had already elected coverage to change benefit options. Employer/plan sponsors should communicate this enrollment opportunity to eligible employees who had previously declined coverage and give them a reasonable opportunity or time period to enroll. There is not required number of days for an enrollment window but this would generally be processed like any other status change event. This type of change would also require an SMM under ERISA describing the benefit improvement. Although ERISA requires notice of material benefit modifications 210 days after the date the change is adopted (within 60 days for material reductions), advanced notice is recommended. Self-funded plans should consult with their stop-loss carriers before extending this enrollment opportunity.

Q60. Can we stop our employer contribution to employees' HSA mid-year?

A. Yes. When an employer offers the HSA through a cafeteria plan (e.g., if employees can make pre-tax contributions to their HSAs), it has considerable flexibility with respect to how and when it makes contributions. If the employer described its HSA contribution amount or funding schedule in any underlying documents (or employee communications) it will need to amend those materials. This would generally include the underlying cafeteria plan document. Employees should also be given as much advanced notice of the change as possible, along with an explanation of the reason for the change, to limit any vested rights arguments under contracts law. This will also allow employees to adjust their own contribution if they so choose. Under the cafeteria plan rules,

salary reduction contributions to an HSA must be permitted at least monthly. Otherwise employees can make a contribution with post-tax dollars and take an above the line deduction. For HSAs that are not offered through a cafeteria plan, employer contributions are subject to comparability rules, which generally require those contributions to be the same amount or same percentage of the HDHP deductible for each group of "comparable" employees. However, nothing in the comparability rules limits an employer's ability to stop all HSA contributions. For additional reference on the comparability rules, click here. In any event, under the comparability rules or with cafeteria plan funding, employers cannot generally continue to fund the HSAs of highly paid or key employees and stop making HSA contributions for rank and file employees. Note that HSAs are not ERISA plans or generally part of the group health plan so those required disclosures do not apply.

Q61. Can we limit HRA funding or terminate an HRA mid-year?

A. Yes. An employer plan sponsor can stop HRA funding mid-year or even terminate the plan mid-year as long as the right to amend or terminate the plan was reserved in associated plan documents or Summary Plan Descriptions (this is a standard provision). Another option may be to unilaterally suspend HRAs for plan participants. This option would at least preserve account balances as opposed to having balances revert to the employer. HRA funding is reflected in medical plan SBCs (or sometimes addressed in a separate SBC), which means 60 days advance notice of a mid-year change is required. This change would also require an SMM (often labeled as a Summary of Material Reduction in such cases) under ERISA. Although ERISA requires notice of material reductions 60 days after the date the change is adopted, meaningful advanced notice is required (at least 60 days to comply with SBC rules and to address any vested rights under contracts law). Lastly, if HRA funding was factored into the actuarial value of medical plans employers should confirm that they still offer at least one minimum value medical plan (60% AV) under ACA Pay or Play rules.

Q62. If a carrier decides to continue coverage but not to collect premiums for a certain period of time to help employers through the COVID-19 crisis, can employers still collect the employees' portion of the premium?

A. Yes. It would be almost unheard of for a carrier to actually forgive premium amounts owed for a period of coverage at a time when claims are increasing, so any forbearance is generally just the carrier allowing for a delay in transferring amounts owed to it by an employer/plan sponsors. A carrier's permitted delay in transmitting premiums will, therefore, not reduce the amount owed for the period of coverage or reduce the cost of that coverage. In such cases, employers should still collect the employee's share or portion of the premium but could delay remitting those sums to the carrier. However, employers should recall that non-enforcement of the ERISA Trust requirement requires that any employee contributions towards the cost of coverage under insured plans be transmitted to the insurance carrier within 90 days. If employers want to increase their percentage of the premium cost-sharing they could certainly do so but this could trigger cafeteria plan significant cost change rules discussed above.

Q63. We offer a wellness plan where employees can earn a financial reward (a reduced premium or account based funding). Can we eliminate the wellness reward mid-year if we are trying to cut costs?

A. Possibly. The employer would likely need to terminate the wellness plan mid-year to eliminate associated rewards or incentives. To do this, the right to amend or terminate the plan must have been reserved in associated plan documents or Summary Plan Descriptions (this is a standard provision). This can, however, be complicated for wellness plans that do not provide medical care (biometrics or flu-shots) because there are no required ERISA documents in connection with wellness plan that do not provide medical care. Employers should be aware that there is a stronger contracts rights argument where participants have engaged in certain tasks etc. with the understanding that this entitles them to a reward where that right to amend or terminate the plan is not expressly

stated somewhere. That said, responses above regarding cost sharing changes and changes to funding HRAs and HSAs would still apply in this context. Likewise, where wellness plans provide medical care employers should follow ERISA rules and issue a SMM (or Summary of Material Reduction). If wellness rewards involved HRA funding that was disclosed in SBCs 60 days advance notice of a mid-year change is required. Regardless of the ERISA status of the plan (which seemingly simplifies things) meaningful advanced notice is strongly recommended to limit any vested rights under contracts law. Lastly, because tobacco cessation premium reductions incentives can be used to assess affordability under ACA Pay or Play rules (other wellness premium reduction incentives cannot) employers should consider the impact of terminating a tobacco cessation program on affordability under ACA.

Other Benefit Plan and Employment Practice Issues

Q64. Should we maintain group health plan benefits for an employee on quarantine of any kind or on a leave related to COVID-19?

A. Possibly. The expanded FMLA and PSL provisions both allow for leave under certain quarantine-related circumstances and under both of these provisions employees enrolled in the group health plan are entitled to remain on the plan and pay their portion of the premium. In addition, otherwise eligible employees experiencing COVID-19 symptoms may be eligible for standard FMLA, in which case the employee would be entitled to remain enrolled in the group health plan.

Q65. Can an employee whose hours were reduced following the COVID-19 outbreak drop their health plan coverage?

A. Yes. In most cases, a loss of health plan eligibility is required before an employee can drop coverage due to a change in employment status; however there is a special rule that allows employees to drop coverage following a reduction in hours to below 30 hours per week – even if eligibility isn't affected – if the employee intends to enroll in other minimum essential coverage (such as coverage under a spouse's plan). Employers may rely on an employee's reasonable representation about enrolling in other coverage. Note that the cafeteria plan document would need to allow the change (again, almost all do). Also, this special rule does not apply to health FSA coverage, which generally cannot be changed.

Q66.Can employees change their DCAP elections if the child care provider/facility is closed as a result of the COVID-19 pandemic?

A. Yes, the election change rules around DCAPs are relatively flexible, and can generally accommodate changes that are necessary to reflect changes in the care of the child (for example, a family member agreeing to watch the child for free because a child-care facility is closed). The plan document would also need to allow the change (almost all of them do but this should be verified).

Q67.Due to the recent COVID-19 outbreak, can employees access telehealth services for treatment? If so, are there any cost-sharing for the telemedicine visits?

A. Yes. Employers with existing telemedicine plans are required to cover telemedicine visits that results in COVID-19 testing at no cost. In addition, under the CARES Act, all telemedicine services can be provided below the deductible without disqualifying health savings account (HSA) eligibility. This applies to both insured and self-funded group health plans.

Q68. Do we need to consider HIPAA privacy rules in light of the spread of COVID-19? What about telemedicine and health care providers?

A. Yes. However, the CARES Act requires that Department of Health and Human Services (HHS) issue guidance within 180 days of enactment on the sharing of protected health information (PHI) during a public health emergency.

In addition, in response to this crisis, HHS announced it will not impose penalties for noncompliance with HIPAA regulations against providers leveraging telehealth platforms that may not comply with the privacy rule during the COVID-19 pandemic. It has also exercised its authority to waive certain HIPAA related sanctions and penalties against a covered hospital that does not comply with the following HIPAA requirements:

- to obtain a patient's agreement to speak with family members or friends involved in the patient's care
- to honor a request to opt out of the facility directory
- to distribute a notice of privacy practices
- the patient's right to request privacy restrictions
- the patient's right to request confidential communications.

HIPAA still applies to sponsors of self-funded plans and insurance carriers in largely the same manner it always has, but note that where an employee discloses to another employee that they are experiencing COVID-19 symptoms, this information does not technically fall within the definition of PHI under the Health Insurance Portability and Accountability Act (HIPAA). However, if the group health plan receives the same information in the course of processing a claim, that information would be PHI and protected under HIPAA. Regardless, employers should adhere to HIPAA's minimum necessary standards and only disclose this type of information to other employees with a legitimate need to know to process claims or administer employment related actions, including office closures and other COVID-related operational measures. Disclosure of de-identified or more general information is always preferable for the workplace.

A HIPAA public health exemption exists where covered entities may disclose PHI, without written patient authorization, to public health authorities legally authorized to receive it, for the purposes of preventing or controlling disease, injury, or disability. This exemption generally applies where a public health emergency has been declared, which is now the case.

Q69. If an employee is placed on a mandatory quarantine in a hospital, would the group health plan pay for the hospital stay?

A. Usually. The group health plan will pay in accordance with its written plan provisions and cover benefits available under the terms of the plan. Generally, there are not pandemic or quarantine related exclusions in group health plan provisions, but employers should contact their insurance carriers or TPAs to better understand the benefits available under the terms of the plan for this situation.

Q70. Can employers require medical screenings in order to be eligible to work onsite (e.g., manufacturing, healthcare)?

A. The EEOC recently confirmed that measuring an employee's body temperature is a medical examination under the ADA but stated that employers may measure employees' body temperature because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions. Note that the ADA generally prohibits employee disability-related inquiries or medical examinations unless they are

job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence: (1) An employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. Employers should be aware that some people with COVID-19 do not have a fever. For more information, employers can review the EEOC's guidance here.

However, it is important to point out that an employer may require post-offer medical examinations to new employees if all entering employees in the same job category are required to undergo the medical examination and if the information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.

Q71. Will our STD or LTD policy pay benefits if an employee is impacted by COVID-19?

A. STD and LTD policies do not generally contain exclusions for communicable diseases or a pandemic, but employers should review their policy provisions and contact their carriers with specific questions about an employee's eligibility for benefits. Note that a short term disability policy would generally not pay during a quarantine period unless and until an individual displays symptoms.

Q72. Are there any other benefit plan resources we can provide our employees during this time?

A. Many employers sponsor an Employee Assistance Program (EAP) that can provide support and information for individuals experiencing the effects of the COVID-19 outbreak. Please check with your EAP provider for available resources for your workforce.

Q73. How have existing rules on HSA compatible High Deductible Health Plans changed in recent weeks?

A. Recent legislative changes require: (1) all COVID-19 testing and any visit that results in testing must be covered without cost-sharing, and (2) any COVID-19 vaccine will immediately become preventive care that must be provided without cost-sharing under the ACA. Neither of these mandates that require coverage without cost sharing below the deductible of an HDHP will impact HSA eligibility. Next, new legislation provides that all telemedicine can be provided below the deductible of a HDHP without impacting HSA eligibility. Furthermore, IRS guidance expressly allows COVID-19 testing and all treatment to be provided below the deductible of an HDHP without impacting HSA eligibility.