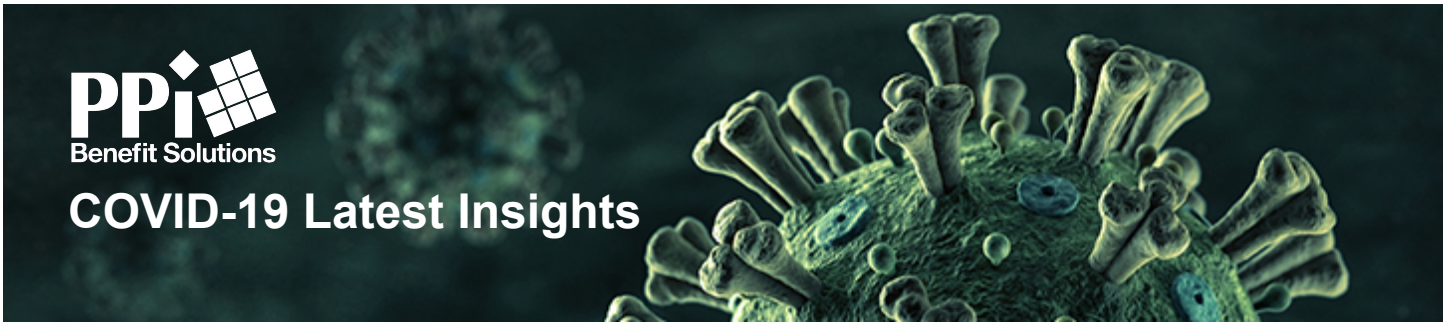


# Frequently Asked Questions: Benefits Compliance and COVID-19

*Last Updated August 31, 2020*

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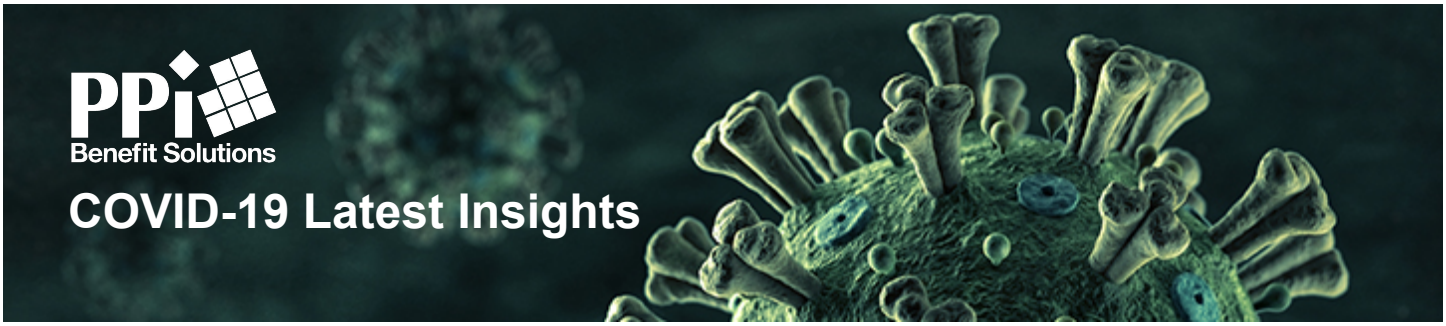


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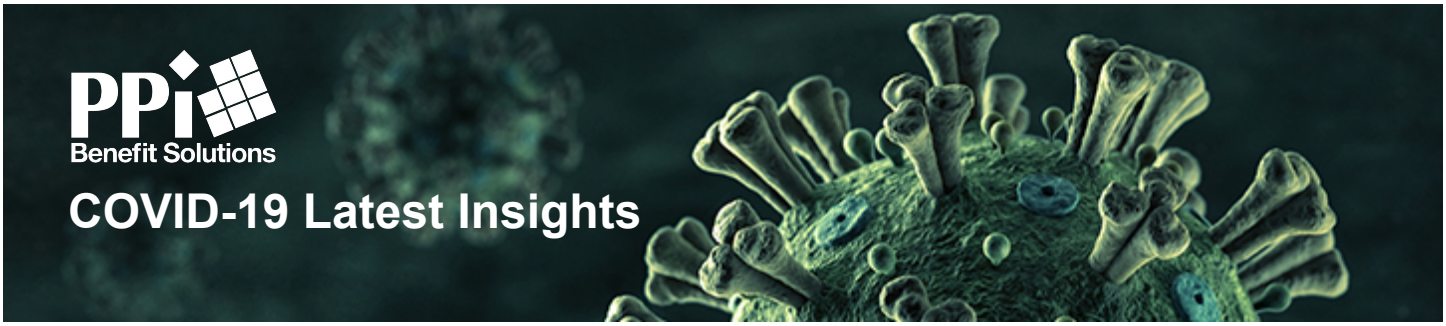


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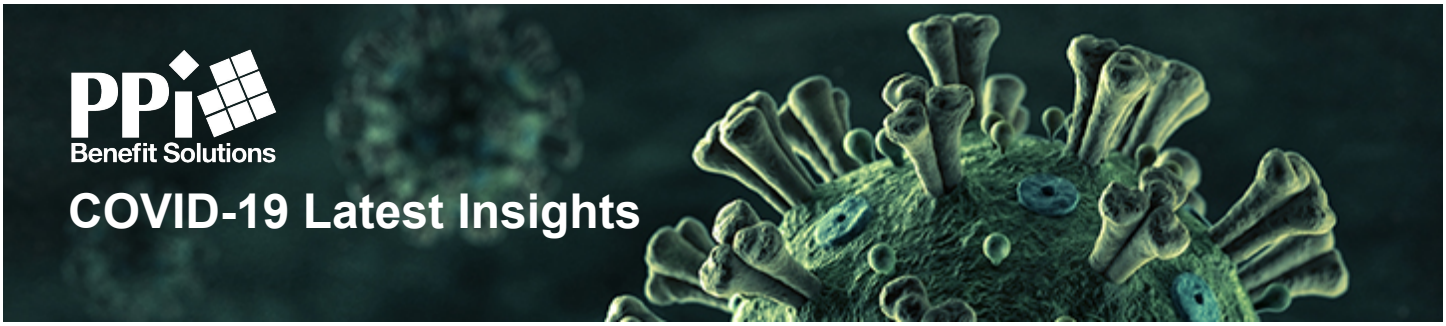


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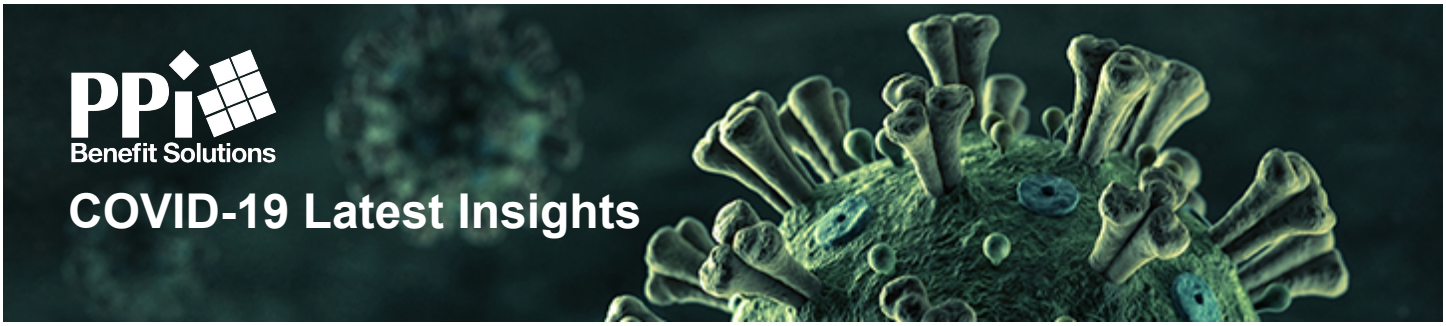


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## COVID-19-Related Furloughs, Leave, and Layoffs and Impact on Benefits

1. **What are the implications for group health plans if employees are furloughed (or on an unpaid leave of absence)?** ^

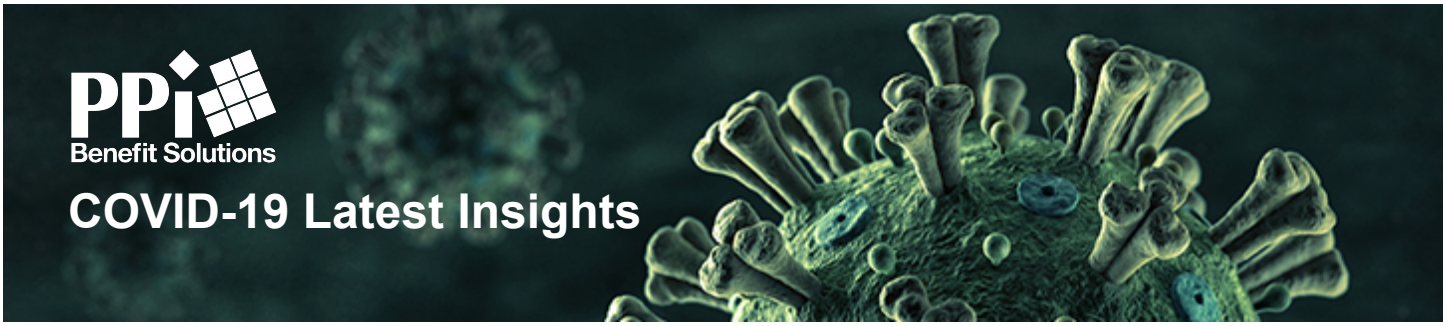
Generally speaking, the impact to benefits administration will depend on employer policies and plan documentation. More specifically, whether benefits can be extended during a furlough would depend upon the eligibility terms of the group health plan. The employer will also need to consider the employer mandate (if applicable), whether the monthly or look-back measurement methods are used, what is outlined in its Section 125 Plan Document as a qualifying event, and how long the furlough lasts.

That said, employers will need to review their current documents (as explained below) and determine what benefits are required to be provided. If benefit continuation is not required during the period of the furlough, the employer could consider amending the plan (which would require coordination with the insurance carrier or stop loss carrier).

**ERISA Plan Document and Any Employment Contracts**
As noted above, an employer needs to look at the plan document and review the plan's eligibility terms. This applies to all benefit offerings, including medical, dental, vision, life, disability, etc. These provisions may specifically address furloughs or leaves of absence and continued coverage. If there are any special employment contracts or collective bargaining agreements in place, these should also be reviewed. If there are no special terms, then the standard eligibility definition applies, which may require a certain number of hours worked to be considered full time. If the SPD or ERISA plan documents include a reservation of rights to amend the plan, the plan may be amended if proper protocols are followed. However, to the extent the plan is fully insured (or self-insured with a stop-loss policy), it will be important to ensure that the applicable third-party insurer, third party administrator, or stop-loss insurer agrees to the extension of coverage.

**ACA Employer Mandate**
Large employers need to consider the employer mandate rules for medical coverage. If they are using the monthly measurement method, then an employee who has a change of status and is no longer eligible for coverage under the plan terms would be terminated at the end of the month with COBRA offered for reduction of hours.

If they are using the look-back measurement method and the employee was previously determined to be full-time in a measurement period, then the employee would remain eligible through the end of the stability period regardless of the number of hours they work. If the employee was continuously offered coverage as a full-time employee (i.e., they were offered coverage after the waiting period), the change in status rules would seem to dictate that the

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employees must be measured (and found to have worked less than 30 hours per week) for a period of three months before being terminated from coverage.

Beyond that, if the employee just experiences a reduction in hours, then the employer can stop offering coverage—the employee wouldn't be working 30 hours/week during the month, and therefore wouldn't be a FT employee to whom the employer must offer coverage.

Employers who use the look-back measurement method should also consider how the employer affordability mandate could be affected when an employee works zero hours and the employer wishes to continue to provide coverage to that employee. If the employer uses the Form W-2 safe harbor, they should consider whether they charge the employee for coverage during the work stoppage period.

**Payment of Contributions**

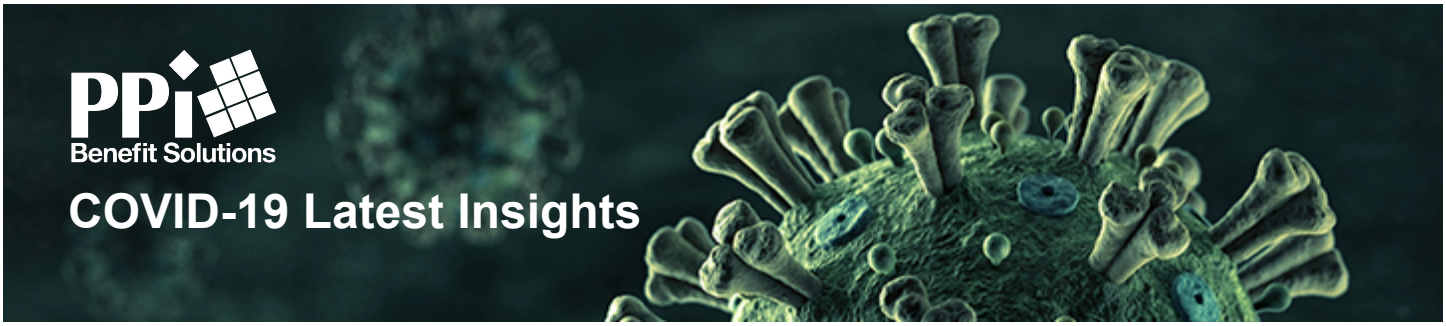
For all sized employers, if an employee continues to be eligible under the plan, how would the employer receive the employee premium contributions without a paycheck from which to make the deduction? Generally, employers mirror the rules for FMLA premium payment. The employer may require that employees pay premiums post-tax during the furlough period by personal check, money order credit card or via electronic payment. The payments may be due per pay period or per month. Employers should provide employees with written notice of the payment method, due date and consequences for nonpayment (termination of coverage). Alternatively, the employer could permit the employee to pay upon return, but this is typically not preferred when the return date is unknown.

**Section 125 Cafeteria Plan Document and Reinstatement**

All sized employers also need to consider the Section 125 cafeteria plan rules. Let's say that an employee continues to be eligible for coverage under the terms of the plan and/or employer mandate rules, but wants to drop coverage because of not being paid. Is this allowed? There is a qualifying event permitting employees to drop coverage based on an unpaid leave of absence if the Section 125 Cafeteria Plan Document provides that such employees lose eligibility under the cafeteria plan. If they return to work within 30 days of dropping coverage, they would be reinstated to the same coverage with no chance to change elections.

For a large employer subject to the employer mandate, if employees return to work after 30 days but within 13 weeks, they would be reinstated to eligibility and would have the right to change elections. If they return beyond 13 weeks – they could be required to meet a new waiting period or start a new measurement period.

On May 12, 2020, the IRS issued IRS Notice 2020-29, which permits employees to make certain election changes under a cafeteria plan during calendar year 2020 without a qualifying event.

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Employees may:

- Drop coverage on themselves if they attest in writing that they have or will immediately enroll in other comprehensive medical coverage (includes Medicare, Medicaid, CHAMPVA, TRICARE, individual coverage through the exchange, or other group coverage);
- Switch plan options offered by the employer;
- Add self, spouse, or dependent(s); or
- Elect, increase, or decrease health FSA and dependent care FSA elections

The change must be prospective. However, if the employer previously allowed such changes before the guidance was issued, those actions are also covered by the relief. Employers are not required to provide employees with the opportunity to make these changes. If they choose to implement, they will need to obtain insurer approval (including a stop loss insurer for a self-insured plan) and amend their Section 125 Cafeteria Plan Document accordingly by December 31, 2021.

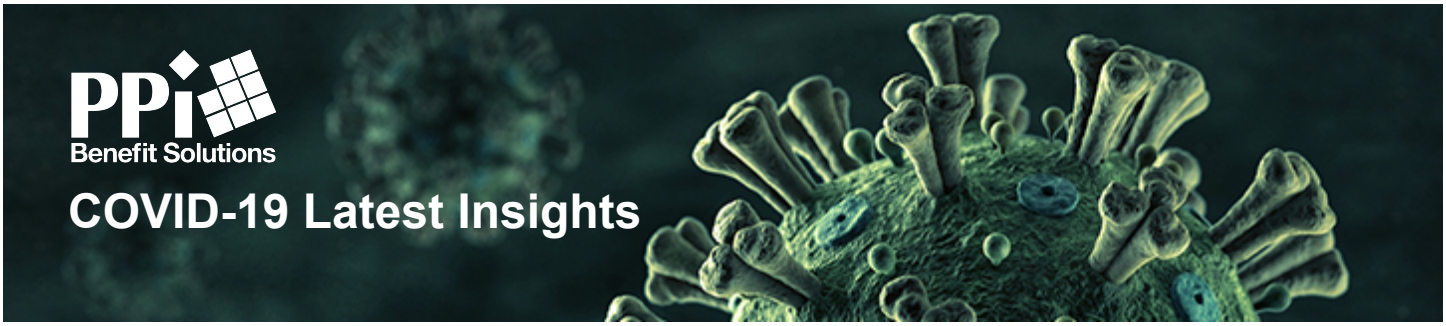
**COBRA**

Eligibility for group coverage also directly affects the question of when someone must be offered coverage through COBRA. To be COBRA eligible, the employee must experience both a COBRA-triggering event (which in the furlough situation, would be a reduction of hours) AND a loss of eligibility for group health coverage. So, although furloughed employees would be experiencing a reduction in hours (albeit temporarily), if the employees remain eligible for group health coverage, they would not be eligible for continuation coverage through COBRA.

So COBRA would not need to be offered. In other instances, a longer furlough could cause a loss of eligibility, such as when the employee is no longer working the requisite hours of service to be eligible. In this case, an offer of COBRA would be due.

Employers that are considering extending COBRA for qualified beneficiaries that may be close to exhausting COBRA could potentially choose to extend COBRA. However, employers that are contemplating COBRA extensions should work closely with their carriers (if fully insured) or stop-loss carriers (if self-insured), and should communicate the extension clearly to impacted qualified beneficiaries. In addition, they'll want to work with COBRA and other plan administrators to help administer the COBRA extension appropriately.

Note that if an employer terminates its plan completely, then there is no COBRA obligation; the COBRA responsibilities terminate with the plan. However, if the employer is part of a larger group of related employers (related through common ownership, sometimes called a 'controlled group'), then the COBRA obligation might spring over (transfer) to the related company. Employers should work with outside counsel in this situation, as the actual obligation depend heavily on the specific facts/circumstances.

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2. **If eligibility during a furlough/leave of absence allows the continuation of benefits, can coverage be terminated at the request of an employee who cannot afford the coverage?** ^

While a qualifying event under the cafeteria plan rules permit an election change when there is a change in employment status (such as an unpaid leave of absence), the change must affect eligibility under the plan. Otherwise it wouldn't be a qualifying event. That said, there's a second qualifying event that permits an election change when there is a reduction of hours even if there is no impact on eligibility (assuming the employer's Section 125 plan permits); however, the employee must intend to enroll in another plan offering minimum essential coverage.

Similarly, under guidance issued May 12, 2020, an employee may drop coverage prospectively during calendar year 2020 if they attest in writing that they are enrolled in or will immediately enroll in other comprehensive coverage.

Considering the circumstances, some employees whose hours are reduced may not be able to afford other coverage. A reduction in a participant's or family's income, standing alone, is not a permitted election change event.

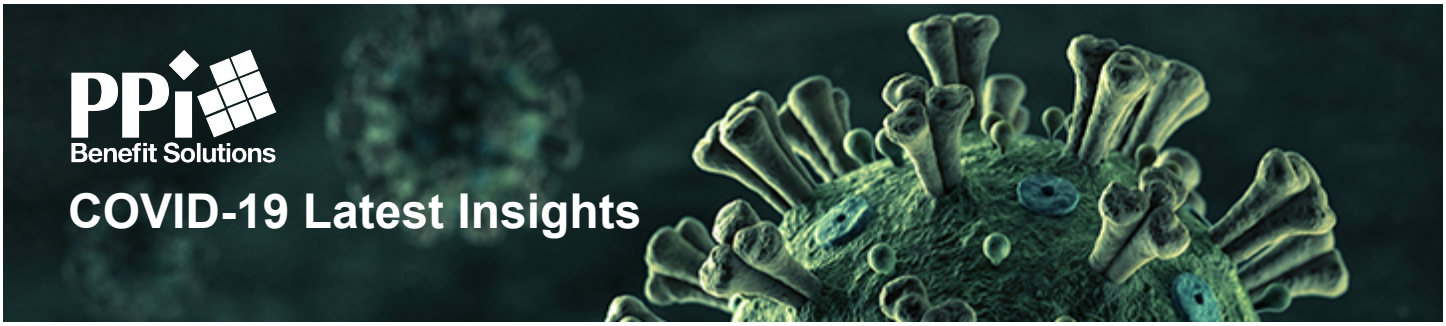
3. **What happens to benefits if the employer decides to lay off (terminate from employment) the employee?** ^

In the case of a true layoff (termination of employment), the employee should be offered COBRA. Because there is a COBRA-triggering event (termination of employment coupled with a loss of eligibility), COBRA would be offered for any plans subject to COBRA (including medical, dental, vision, prescription drug plans, HRAs, health FSAs, and other plans that provide medical care; but not including dependent care FSAs (DCAPs), HSAs, group term life, and disability plans). The employer would essentially be severing the employment relationship, and that results in a loss of eligibility. Of course, if the employer took this route, the employer could help cover the cost of COBRA, should the employee elect. That employer COBRA subsidy should be outlined in the employment termination (or severance) letter, including the amount and length of employer subsidy. This is one strategy employers might use if they wish to formally end the employment relationship or benefits eligibility, but want to assist employees with the cost of continuing health insurance coverage through COBRA.

4. **If employees lost eligibility for group health plan coverage as a result of a furlough, when must their health coverage be effective upon return to work?** ^

There are two ACA rules that come into play with this type of a potential return to work situation.

First, group medical plans are prohibited from applying a waiting period that exceeds 90 calendar days. I.e., an eligible employee must be able to elect coverage that becomes effective within 90 calendar days.

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Under the waiting period rule, a former employee who is rehired may be treated as newly eligible for coverage upon rehire (and subject to the plan's eligibility criteria and waiting period requirement). Additionally, if eligibility for coverage depends on being employed in an eligible job classification, a waiting period can be imposed when an employee moves from an ineligible job classification to an eligible job classification. So, if the furloughed status resulted in the employee being ineligible for coverage under the plan terms, resuming work may return the employee to an eligible job classification.

However, the imposition of the waiting period must be "reasonable under the circumstances" and "not a subterfuge to avoid compliance". These terms are not defined, so the situation would need to be reviewed in terms of factors such as the expectation of the parties and the employer's motives.

Additionally, there are the ACA shared responsibility provisions for a large employer to consider. If an employee is rehired within 13 weeks, a new waiting period or measurement period cannot be applied for medical coverage. Their previous eligibility status would continue. If it is beyond 13 weeks, they may be treated as a new employee.

With respect to new hires, there is a limited non-assessment period of three calendar months in which an ALE will not be liable for shared responsibility penalties for not offering coverage to full time employees.

As applied to a furlough situation, if an employee stops working for the ALE and then returns, it is necessary to determine whether the employee is considered to be either a continuing employee or a terminated and rehired employee.

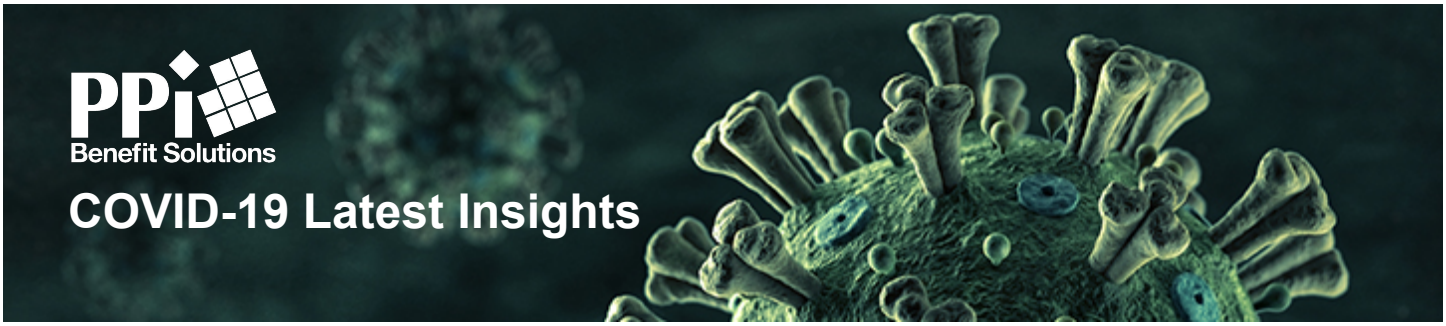
Generally, an employee will be considered to have terminated employment if the employee has a period of 13 consecutive weeks in which he is not credited with an hour of service. (For an educational organization, this period would be 26 consecutive weeks.) In such case, the employee would be considered a new employee upon return.

If deemed a new employee, the limited non-assessment period can be applied, and the group health plan coverage would need to be effective by the first of the month following three full calendar months of employment.

By contrast, if the employee was credited with service hours during the 13 week timeframe, then the returning employee would be classified as a continuing employee. In this situation, the required effective date of the coverage offered would be the first day that the employee is credited with an hour of service or as soon as administratively practicable (i.e., generally interpreted to be the first day of the following month). So, for a continuing employee that returns to work on May 15, the coverage offered should be effective no later than June 1.

Accordingly, the credited hours of service (if any) for each affected employee prior to the return date should be reviewed. Failure to offer coverage in the required timeframe could subject the employer to shared responsibility penalties if the employees sought marketplace coverage and received a tax credit.

Finally, let's say an employee is determined to be terminated and rehired so that a limited non-assessment period can be applied with respect to the coverage offer. The coverage date would still need to be coordinated with the 90

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calendar day waiting period requirement. So, the employee returning on May 15 would need to be offered coverage that would be effective by August 13 to meet the waiting period rule, even if the limited non assessment period rule would only require a September 1, 2020 effective date. So, the employer always needs to coordinate the two dates with any new hire or rehire.

5. **How does a furlough impact health FSA coverage?** ^

If employees on furlough lose eligibility for health FSA coverage, they would be offered COBRA. If they return within 30 days, their coverage would be reinstated. The employer cannot recoup missed contributions. If the leave is more than 30 days, they would be permitted to make a new election for the remainder of the year. They would only be eligible for reimbursement during the leave period if they elected COBRA and paid the appropriate premium.

While not entirely clear in the regulations or sub-regulatory guidance, there is some support for the following plan design options. If employees on furlough do not lose eligibility for health FSA coverage, the employer could:

1) Suspend FSA. There would be no employee contributions or coverage during the leave period. Upon return, the election and contributions would continue. There would be no make-up contributions.

2) Temporarily Suspend FSA. There would be no employee contributions or coverage during the leave period. However, coverage would be reinstated retroactively upon return with make-up contributions taken (recalculated for remaining months).

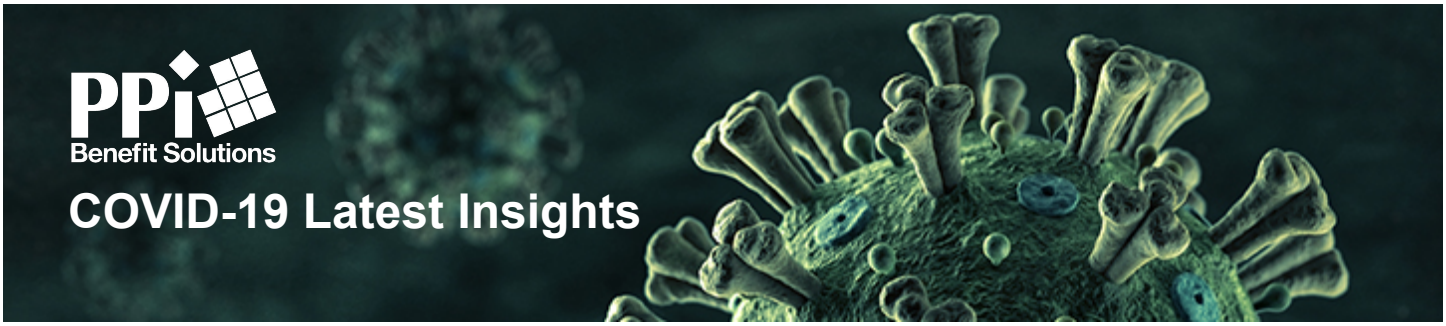
3) Employer continues coverage and pays contributions on employees' behalf. There would be no contributions during the leave period, but the coverage would be continued. Upon return, the employee only needs to continue normal contributions.

6. **Can an employee receive unemployment while on furlough?** ^

Unemployment eligibility varies by state, so it would come down to state law. Many states consider a furlough to be a termination of employment, which would mean the employee could qualify for unemployment even on a furlough (assuming the employee was otherwise eligible). States also appear to be publishing guidance stating that furloughed employees would be eligible for unemployment. Eligibility for group health plan coverage (if continued through a furlough) doesn't usually impact unemployment eligibility. Ultimately, though, the answer to this question depends on the state.

## Families First Coronavirus Response Act

7. **What is the Families First Coronavirus Response Act (FFCRA)?** ^

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On March 18, 2020, the FFCRA was signed into law. Importantly, the FFCRA has a significant impact on employer benefits and leave policies, particularly for those employers with fewer than 500 employees. The FFCRA:

- Provides a new paid sick leave entitlement (Emergency Paid Sick Leave Act) for work absences related to the coronavirus (COVID-19)—effective on April 1, 2020;
- Extends and expands FMLA protections (Emergency FMLA Expansion Act) in certain situations—effective on April 1, 2020;
- Provides payroll tax credits for employers (both for-profit and non-profit) to help address related employer costs of these benefits;
- Requires group health plans to cover COVID-19 related tests, services and other items without cost-sharing—effective March 18, 2020; and
- Authorizes the DOL to promulgate regulations to assist in the administration of the new FMLA and paid sick leave provisions, including regulations that may exclude employers with fewer than 50 employees from new FMLA and paid sick leave obligations.

**8. When is the FFCRA effective?** ^

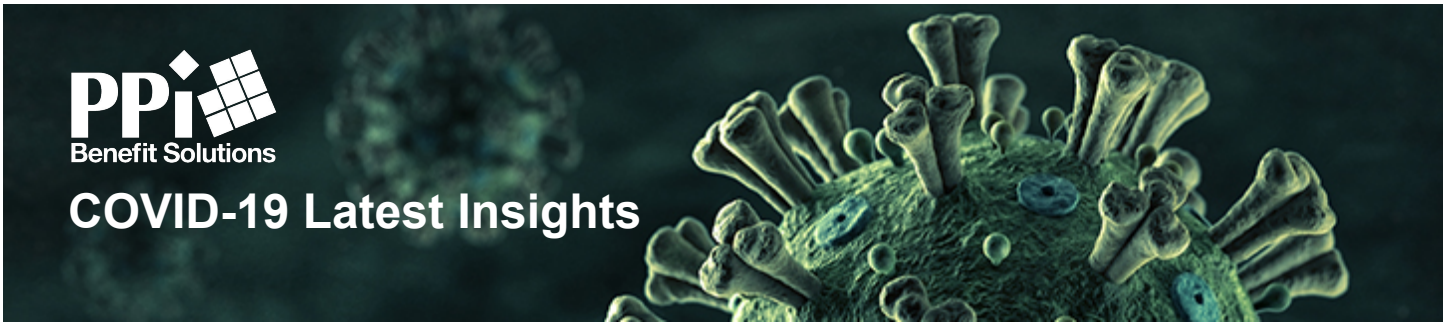
The FFCRA's Emergency Paid Sick Leave Act and Emergency FMLA Expansion Act provisions take effect on April 1, 2020, and will be in effect through 2020. The FFCRA's COVID-19 coverage requirements take effect on March 18, 2020.

**9. Which employers are subject to the FFCRA?** ^

Generally, the provisions regarding new paid sick leave, the expansion of FMLA, and tax credits for employers apply to private employers with fewer than 500 employees and public employers of any size. Federal employees are not covered by the expanded FMLA but are covered by the Emergency Paid Sick Leave provisions.

An employer has fewer than 500 employees if they employ less than 500 full-time and part-time employees within the US or any of its territories as of the date that an employee's leave is to be taken. The 500 employee threshold includes any employees on leave, temporary employees, and day laborers. Independent contractors, as defined by the Fair Labor Standards Act, do not count as an employee for this purpose.

Furloughed employees are not included in the count. Unfortunately, the DOL has not provided a standard definition of 'furloughed employee' and how that might differ from an employee on unpaid leave. The analysis typically involves whether the employee will be subsequently reemployed, but of course that may be difficult for the employer to determine at the onset. Additionally, state laws may vary on the issue. Generally, if a furloughed employee is

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treated more like an employee who has been laid off rather than an active employee, they likely should not be included in the count to determine an employer's size.

DOL guidance specific to the FFCRA has not addressed whether owners are included in the count to determine an employer's size. If we look to existing FMLA guidance on this issue, owners who are considered Form W-2 employees (i.e. C-Corp owners) are included in the count. The determination for those who are considered self-employed owners (i.e. sole proprietors, more than 2% S-Corp shareholders, and partners in a partnership) owners – depends on whether he or she acts independently and participates in management or instead is subject to the control of the organization.

A corporation, including its separate establishments or divisions, is generally considered to be a single employer and all of its employees must be counted in order to determine whether the corporation meets the "fewer than 500 employee" threshold. However, the controlled group/ aggregate employer rules are not the sole factor in determining an employer's size for this purpose. The employees of entities with common ownership would be counted together if they meet the definition of an integrated employer:

a. Common management,

b. Interrelation between operations,

c. Centralized control of labor relations, and

d. Degree of common ownership or financial control.

Additionally, the employees of separate entities would be counted together if they are determined to be joint employers. A joint employer exists when an employee has an employer who suffers, permits, or otherwise employs the employee to work, but another individual or entity simultaneously benefits from that work. The following four factors should be considered when determining whether a joint employer has direct or indirect control over the employee.

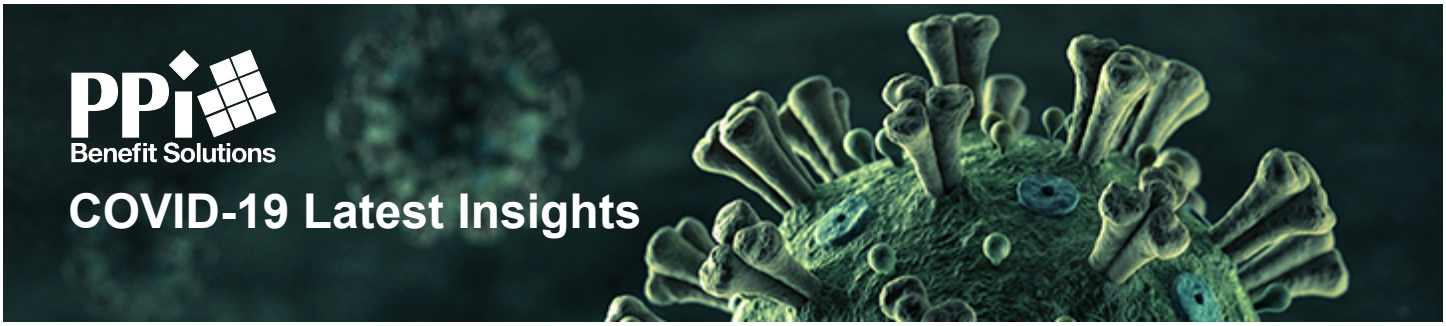
a. Hires or fires the employee,

b. Supervises and controls the employee's work schedule, or conditions of employment to a substantial degree,

c. Determines the employees' rate and method of payment, and

d. Maintains the employee's employment record.

The DOL is authorized to exempt employers with fewer than 50 employees from complying with the FMLA expansion or the Emergency Paid Sick Leave. The DOL has provided some guidance about this exemption which is

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discussed in more detail below. In addition, the DOL states that small businesses should document why they believe offering paid sick leave and expanded FMLA would jeopardize the viability of their business.

The FFCRA's provisions on group health plan coverage for certain COVID-19 costs apply to all group health plan (regardless of size), take effect immediately, and will expire when HHS determines that the public health emergency has expired.

**10. How do the controlled group rules interplay with the FFCRA?** ^

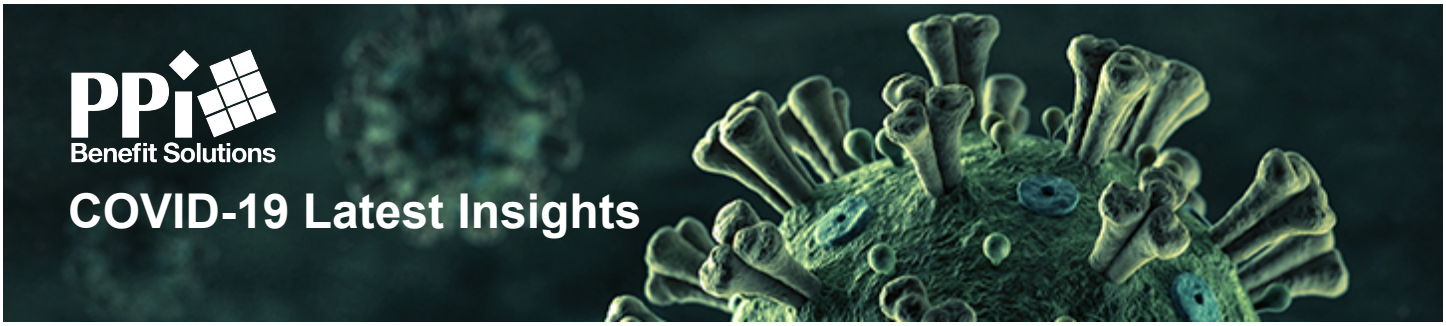
The general FMLA rules for counting employees would apply, at least with respect to the Emergency FMLA Expansion provisions. That is, if separate business entities (e.g., separate EINs or business lines) have different management and separate operations, then the entity would count employees separately from the bigger controlled group of entities. The Emergency Paid Sick Leave Act considers two corporations to be separate employers unless they are considered joint employers under the FLSA. If they are considered joint employers, all of their common employees must be counted in determining whether the Emergency Paid Sick Leave Act applies. Employers should work with counsel to confirm applicability under both provisions of the FFCRA.

**11. When does the small business exemption apply to exclude a small business from providing paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons?** ^

According to the DOL, employers (including religious or nonprofit organizations) with fewer than 50 employees is exempt from providing for those reasons 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.

**12. When is a business with fewer than 50 employees exempt from the requirements to provide paid sick leave or expanded family and medical leave?** ^

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The DOL has provided information regarding exemptions from the following reasons to take either emergency paid sick leave or expanded FMLA leave: (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. According to the DOL, a small business is exempt from those mandated paid sick leave or expanded family and medical leave requirements only if the:

- Employer employs fewer than 50 employees;
- Leave is requested because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
- An authorized officer of the business has determined that at least one of the three conditions described in the above question is satisfied.

Importantly, the small business exemption applies on a case by case basis taking into consideration the specific employee requesting leave and their position. It is not a blanket exemption. Further, the small business exemption does not apply to the other reasons for paid leave (ex. the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.)

**13. How does FFCRA apply to non-profit organizations?** ^

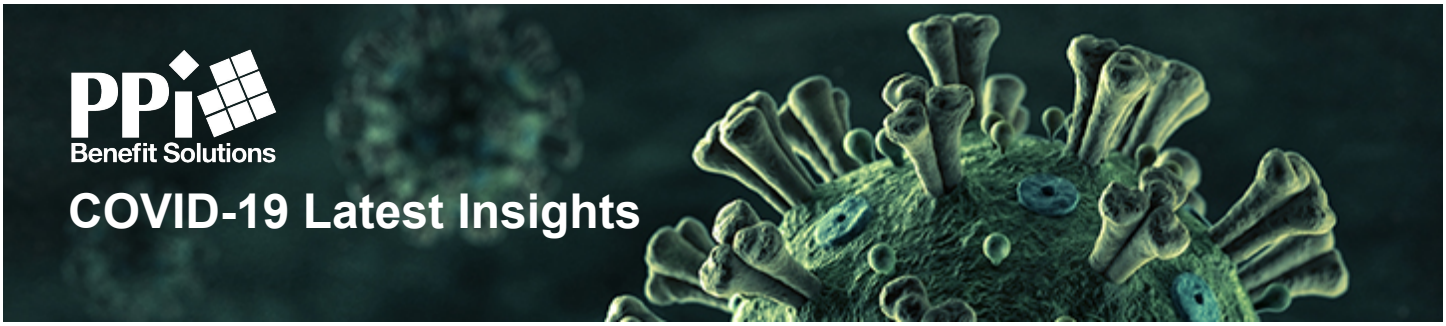
There is no exemption generally, and non-profit and other tax-exempt organizations can claim the related refundable tax credits as well (since those are an offset to employment taxes, which non-profits and tax-exempt organizations must pay).

**14. How does FFCRA apply to public sector employees?** ^

Employees of most public agencies or other units of government can take emergency paid sick leave, unless the Office of Management and Budget (OMB) has excluded them from taking certain kinds of paid sick leave, the employee is a health care provider, or the employee is an emergency responder.

Generally, public sector employees are entitled to the expanded FMLA leave too. However, federal employees are likely cannot use this leave, if they are covered by Title II of the FMLA. The OMB has the authority to exclude certain categories of executive branch employees from this leave as well. As with emergency paid sick leave, federal employees who are health care providers or emergency responders may be excluded too.

**15. Does FFCRA apply to union employees?** ^

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Yes, union employees would still be eligible for the Emergency Paid Sick Leave and the expanded FMLA that is provided under the FFCRA. The FFCRA further clarifies that employers can comply with the Act by making contributions to a multiemployer fund, plan, or program that are based on the hours of paid sick leave to which each of their employees are entitled under the Act based on each employee's work under the multiemployer collective bargaining agreement. The fund, plan, or program must allow employees to receive this pay for the related leave pursuant to the collective bargaining agreement. Employers may satisfy its obligations under both the Emergency Paid Sick Leave and the expanded FMLA by other means, provided they are consistent with its bargaining obligations and collective bargaining agreement.

**16. If an employer utilizes a staffing agency for temporary workers, which entity includes those workers in their count? Which entity is responsible for providing the paid leave?** ^

DOL guidance related to FFCRA indicates that both the temporary staffing agency and the recipient employer must include the temporary worker in their count regardless of which entity has the employee on payroll.

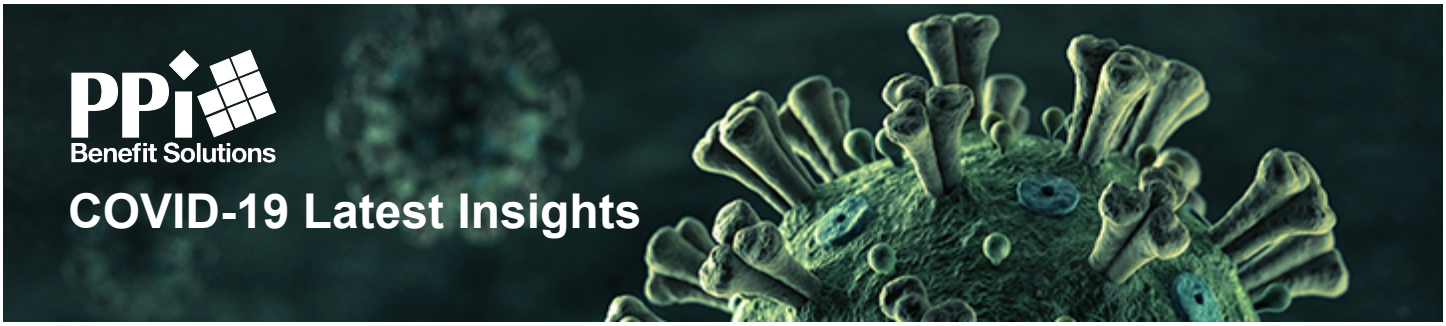
As for which entity must provide the paid sick leave, DOL guidance specific to the paid leave is unclear. However, if we look to existing FMLA regulations for joint employers, only the primary employer is responsible for providing required notices, providing leave, and maintaining health benefits. Factors considered in determining who the primary employer is include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary staffing agencies, the staffing agency is typically the primary employer.

Recent guidance indicates that if the staffing agency has more than 500 employees (not subject to FFCRA) and the employer has fewer than 500 employees, the employer may have responsibility to provide the paid leave if it is a joint employer.

If the employer directly or indirectly exercises significant control over the terms and conditions of the employee's work, then it is a joint employer and must provide the employee with paid sick leave or expanded FMLA. To determine whether such control exists, the DOL would consider whether the employer exercises the power to hire or fire, supervises and controls the employee's schedule or conditions of employment, determines the rate and method of pay, and maintains the employment records. The weight given to each factor depends on how it does or does not suggest control in a particular case.

**17. Are there definitions of "full time" and "part time" for purposes of FFCRA?** ^

According to the DOL, under the Emergency Paid Sick Leave Act "full-time" means working 40 hours a week and "part-time" means working fewer than 40 hours per week. Emergency Family and Medical Leave Expansion Act does not distinguish between full- and part-time employees, but the number of hours an employee normally works each week will affect the amount of pay the employee is eligible to receive.

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**18. Are there definitions of "son" and "daughter" for purposes of FFCRA?** ^

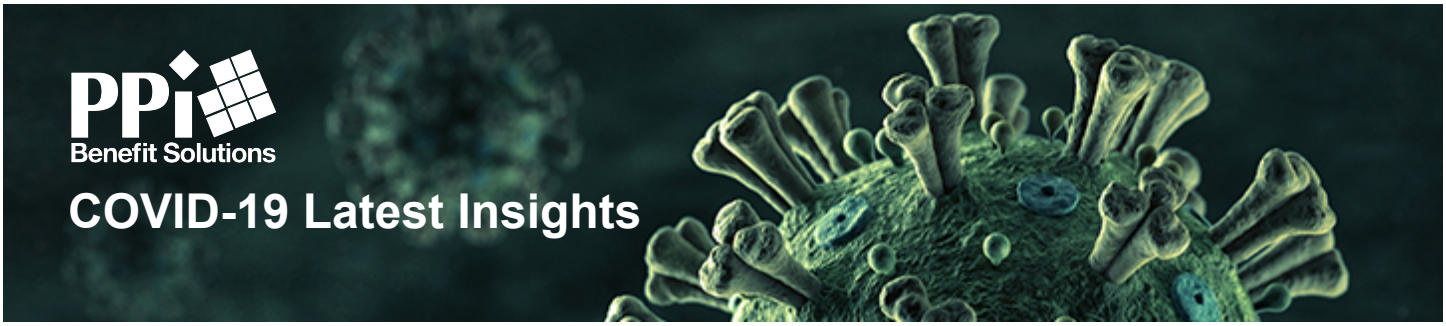
Employees may take the expanded FMLA leave or the emergency paid sick leave granted by the FFCRA to take care of their sons or daughters under certain circumstances. According to the DOL, a "son or daughter" is the employee's own child (including biological child, adopted child, foster child, stepchild, legal ward, or a child for whom an employee is standing in loco parentis). This definition also includes sons or daughters who are 18 years old or older and who 1) has a mental or physical disability, and 2) is incapable of self-care because of that disability.

**19. Which "health care providers" can be excluded by their employers from the emergency paid sick leave and expanded FMLA leave granted under the FFCRA?** ^

According to the DOL, 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."

**20. Which "emergency first responders" can be excluded by their employers from the emergency paid sick leave and expanded FMLA leave granted under the FFCRA?** ^

According to the DOL, the definition of "emergency responder" includes "an emergency responder is an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is an emergency responder necessary for that state's or territory's or the District of Columbia's response to COVID-19."

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**21. What are the consequences for an employer who refuses to comply with the FFCRA requirements?** ^

According to the DOL, the employee and employer should seek to resolve this issue between themselves. In any event, the employee can call WHD 1-866-4US-WAGE (1-866-487-9243) or visit https://www.dol.gov/agencies/whd. In most cases, employees can also file a lawsuit against their employers directly without contacting WHD. Note that, although these options are available to public sector employees as well, employees of state and local governments may not be able to pursue direct lawsuits because their employers are immune from such lawsuits.

Notably, the DOL has already taken action against employers who failed to comply with the leave provisions under the Families First Coronavirus Response Act (FFCRA). In recent instances, WHD worked with each employer to ensure that the employees received the paid leave benefits to which they were entitled. The DOL encourages employers to contact them with any questions related to the FFCRA.

**22. How does an employee qualify for expanded FMLA?** ^

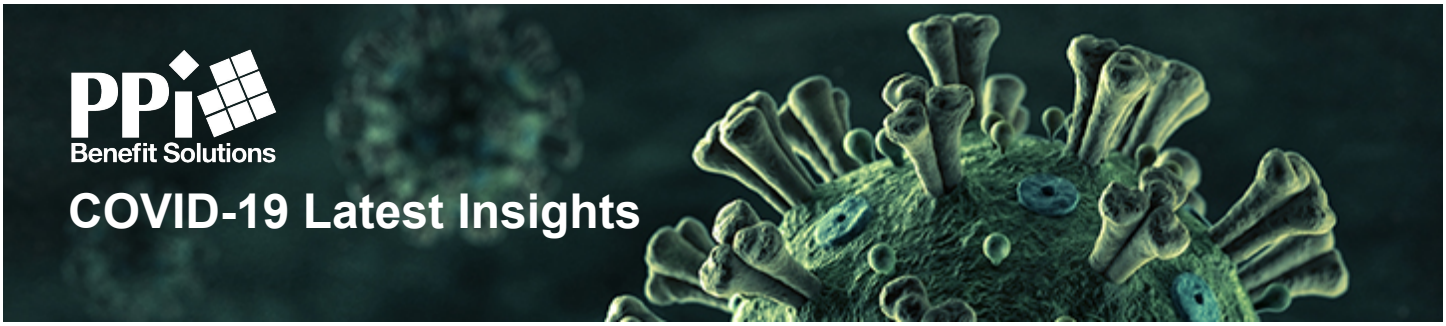
Employees must have been employed for 30 calendar days immediately prior to the day the employee's leave would begin in order to qualify for the expanded FMLA leave. In addition, employees can take expanded FMLA-protected leave if they have a "qualifying need," which means the employee is unable to work OR telework due to a need to care for their son or daughter under 18 years of age whose school or place of care has closed because of a COVID-19 emergency declared by a federal, state or local authority.

As discussed above, employers are not required to pay employees who are health care providers or emergency responders the paid sick leave or expanded FMLA leave, as determined on a case-by-case basis.

**23. What pay benefits are provided for under the expanded FMLA provision?** ^

The first 10 business days of expanded FMLA leave is unpaid, although the employee may utilize accrued vacation, PTO or sick leave during that time (in accordance with the employer's leave policy). During this time, the employee may also qualify for pay under the Emergency Paid Sick Leave provisions (outlined below).

For each day of expanded FMLA leave taken thereafter, employers are obligated to pay employees at the rate of two-thirds of the employee's regular pay rate for the number of hours the employee would otherwise be normally scheduled to work. For employees with variable hours, look at the number equal to the average number of hours worked over a 6-month period. The amount of paid leave is capped at $200 per day and $10,000 in the aggregate.

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**24. Can the emergency paid sick leave and expansion to FMLA be used intermittently?** ^

Yes, if the employer allows it and the employee requests leave because during the employee's normal schedule, he or she is unable to work (including telework) and needs to care for his or her child whose school or place of care is closed, or child care provider is unavailable due to COVID-19 related reasons. According to the DOL, this intermittent leave can be taken in any increment, and employers and employees are encouraged to be flexible.

If the employee is taking leave due to one of the other qualified reasons, such as the employee experiencing COVID-19 symptoms and seeking a medical diagnosis or caring for an individual who has been quarantined by a health care professional due to COVID-19, and the employee is unable to telework, the leave must be taken on a consecutive basis until the total sick leave entitlement is exhausted or there is no longer a qualifying reason for taking paid sick leave.

If the employee no longer has a qualifying reason for taking paid sick leave or expanded FMLA leave, the employee may take any remaining amount to which he or she is entitled at a later time, up until December 31, 2020, if another qualifying reason occurs.

**25. If an employee has used 12 weeks of FMLA within the last 12 months, are they entitled to the emergency FMLA expansion now?** ^

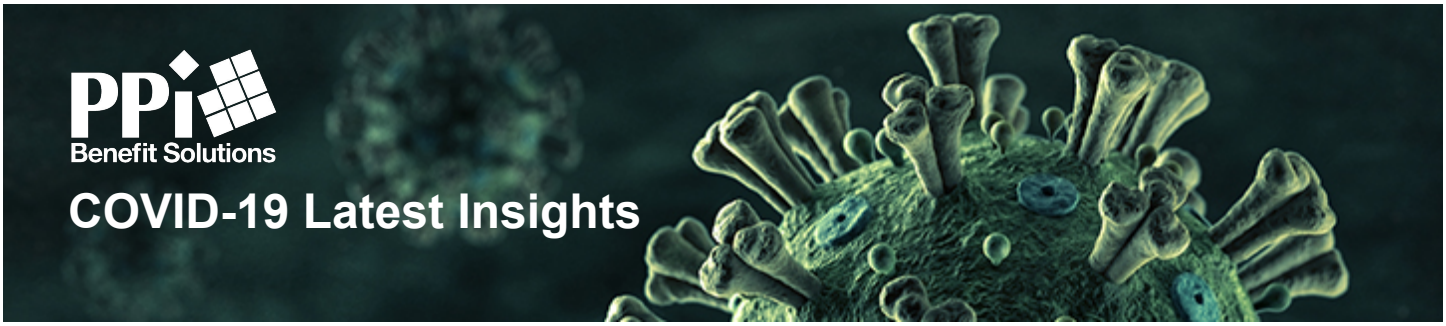
According to the DOL, the FFCRA does not add additional time to the standard twelve weeks during a twelve month period provided under FMLA.

If an employee has already used up his or her FMLA leave, then he or she will not be able to use the expanded FMLA leave.

**26. Will FMLA forms be updated to reflect the new leave?** ^

According to the DOL, all existing certification requirements under the FMLA remain in effect if an employee takes leave for one of the existing qualifying reasons under the FMLA. In addition, employers are allowed to require employees to provide additional documentation in support of their expanded family and medical leave taken to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons. Employers must retain the supporting documentation they require in support of expanded family and medical leave.

If employers intend to claim a tax credit under the FFCRA for their payment of expanded family and medical leave wages, then they should retain appropriate documentation in their records. Employers should consult Internal

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Revenue Service (IRS) applicable forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to be retained to support the credit. According to the DOL, employers are not required to provide leave if materials sufficient to support the applicable tax credit have not been provided.

**27. What new notice or documentation requirements, if any, apply to the expanded FMLA leave?** ^

If the leave granted under the expanded FMLA statute is foreseeable, employees are required to provide notice to their employers that they are taking the leave "as is practicable". According to the DOL, all existing certification requirements under the FMLA remain in effect if an employee takes leave for one of the existing qualifying reasons under the FMLA. In addition, employers are allowed to require employees to provide additional documentation in support of their expanded family and medical leave taken to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19-related reasons. Supporting documentation may include a notice of closure or unavailability from the child's school, place of care, or child care provider, including a notice that may have been posted on a government, school, or day care website, published in a newspaper.

Employees, school officials, or child care provider can also email such notifications to employers. Employers must retain the supporting documentation they require in support of expanded family and medical leave.

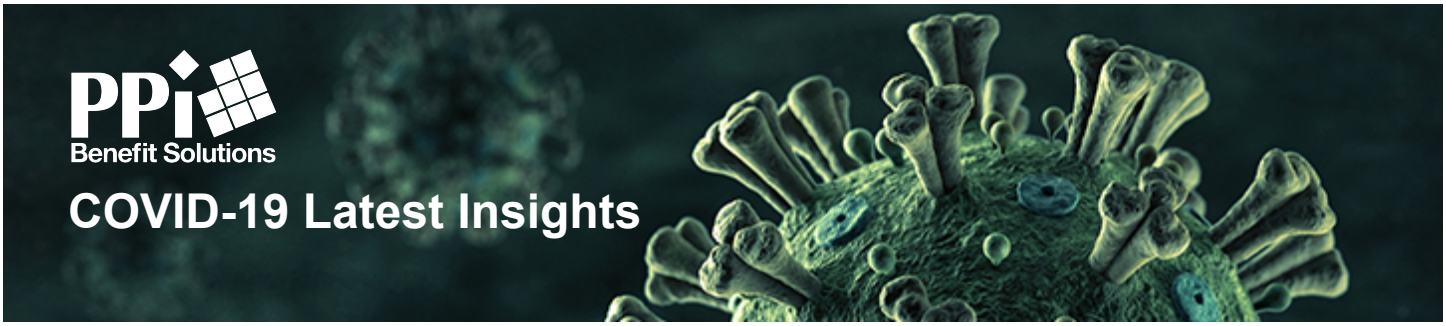
On March 25, the DOL provided the FFCRA model notice available here:
https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Each covered employer (i.e., certain public sector employers and private employers with fewer than 500 employees that are covered by the paid sick leave and expanded FMLA leave provisions in the FFCRA) must post the notice in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website. All current employees must receive the notice, including new hires. (See the DOL's FAQs for more information: https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions)

**28. How does an employee qualify for the Emergency Paid Sick Leave?** ^

This provision requires employers to provide up to 80 hours of paid sick time to employees who are unable to work (including telework) due to one of the following reasons:

- Subject to a Federal, State, or local quarantine or isolation order related to COVID–19;
- Advised by a health care provider to self-quarantine due to concerns related to COVID–19;

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- Experiencing symptoms of COVID–19 and seeking a medical diagnosis;
- Providing care to an individual who is subject to a federal, state, or local quarantine order related to COVID-19 or who has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Caring for a son or daughter if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions; or
- Experiencing any other substantially similar conditions specified by HHS (in consultation with the DOL and Treasury)

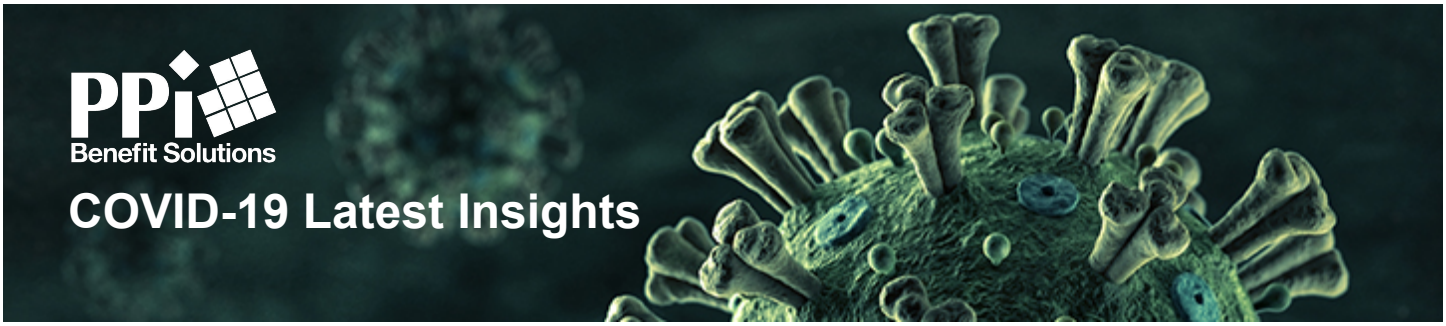
DOL guidance confirms that leave is not available to an employee who is caring for a child whose school is closed for the summer. Leave is only available when the school or day care provider is unavailable due to COVID-19.

An employee who has been furloughed or had hours reduced because the employer has no work for that employee to perform is not eligible for paid sick leave. They may be eligible for unemployment benefits depending on state law. For example, if a shop temporarily or indefinitely due to a downturn in business related to COVID-19 or a government order for non-essential businesses, it would no longer have any work for its employees. A cashier previously employed at the shop who is subject to a stay-at-home order would not be able to work even if she were not required to stay at home. As such, she may not take paid sick leave because her inability to work is not due to the stay-at-home order, but rather due to the closure of her place of employment.

All employees may qualify, regardless of how long they've been employed. Full-time employees may use up to 80 hours of sick time, while part-time employees may use proportionally less time, based on the average number of hours the employee is normally scheduled to work over a two-week period. Absent additional regulatory guidance, we do not believe that employees can take Emergency Paid Sick Leave if they self-isolate/self-quarantine out of concern for their health, even if the employee is pregnant, unless under an order from a governmental authority or advice from a health care provider.

Additionally, an employee may not carry this sick time over into the next year, nor is an employee entitled to payment of unused sick time upon separation from employment. Emergency paid sick leave does not diminish the rights and benefits to which an employee is entitled under state or local law (such as a state sick leave or paid family and medical leave law), a collective bargaining agreement or an existing employer leave policy.

Employers may not require an employee to use other paid leave before using the Emergency Paid Sick Leave. There are notice requirements and non-retaliation provisions that apply.

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**29. Does a quarantine order due to voluntary travel (i.e., vacation) qualify an employee for Emergency Paid Sick Leave?** ^

Yes, the employee would be eligible, provided they otherwise meet the eligibility requirements for emergency paid sick leave (EPSL) under the Families First Coronavirus Response Act (FFCRA). An employee that takes a vacation and is required by a state order to quarantine upon return would be eligible for EPSL leave based on reason one listed in Question 28. The fact that the employee's trip was voluntary as opposed to work-related is not a disqualifying factor. In other words, the FFCRA does not distinguish between reasons for receiving a self-isolation or quarantine order; it simply requires that EPSL be offered if the person is ordered to quarantine and cannot work or telework as a result.

Importantly, state COVID-19 paid sick leave may not be available to those who are quarantined following voluntary travel; eligibility for any such state leave would depend upon the particular state's leave law provisions.

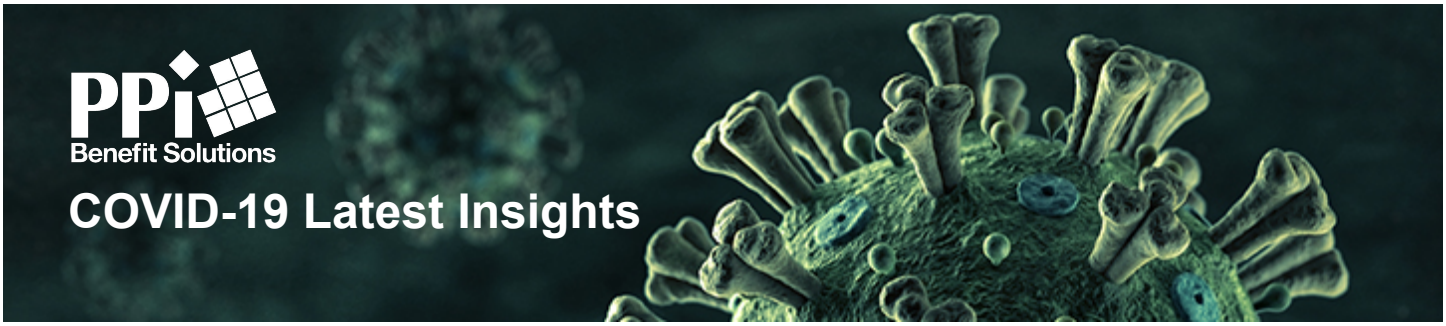
**30. Does a summer camp qualify as the "place of care" for an employee's child for purposes of paid leave under the FFCRA?** ^

The Department's regulations specifically recognize that summer camps and programs may qualify as "places of care" of employees' children for the purposes of FFCRA leave. However, when a summer camp (or the like) is considered a "place of care" depends on the specific circumstances.

As background, FFCRA provides up to 80 hours of emergency paid sick leave, and up to twelve weeks of expanded family and medical leave (10 of which may be paid), if an employee is unable to work or telework due to a need to care for his or her child because that child's place of care is closed due to COVID-19 related reasons. Because of this, a common question is whether summer camps, summer enrichment programs, and other summer programs count as "places of care" for this purpose.

On June 26, 2020, the DOL issued Field Assistance Bulletin No. 2020-04, which focuses on this issue. Whether a summer camp qualifies as a "place of care" must be established by a preponderance of evidence. To determine whether a summer camp is a "place of care", evidence of the employee's intent to use the camp or program for child care is considered. The Bulletin suggests that the matter seems clear enough that summer camps or programs are "places of care" for this purpose when the employee actually enrolled his or her child in the camp or program before the camp opted to close due to COVID-19.

However, there are cases where the employee had not enrolled his or her child in the camp or program. In this instance, guidance provides that it must appear that the employee would have more likely than not enrolled his or her child in the camp in question, when evaluating those cases. For example, steps taken by the employee short of actual enrollment may indicate that intent, such as paying a deposit, prior attendance in the camp or program, or

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submitting an application to enroll. A mere statement of intent is likely not enough. Similarly, a camp or program that is available for 12 year old children would not be appropriate for the 13 year old child of an employee, so such a camp or program would not qualify as a "place of care" for that child.

**31. If a child's school provides the options for in-person or remote learning, does choosing the remote learning option qualify an employee for paid leave under the FFCRA?** ^

No, paid leave under the FFCRA is not available when a school is open for in-person attendance. As background, in order for employees to qualify for paid leave under the FFCRA for these purposes, they must be unable to work OR telework due to a need to care for their children under 18 years of age whose school or place of care *has closed* (or whose childcare provider is unavailable) for reasons related to COVID-19, among other requirements. If a choice is made for remote learning when the school is not otherwise closed, paid leave under the FFCRA would not apply as the school remains open.

However, if a school is operating on an alternate day (or other hybrid-attendance) basis, meaning children are permitted to attend school only on certain days, an employee would be eligible for paid leave under the FFCRA during the days his or her child is not permitted to attend school in person (as long as the leave is to actually care for the child during that time and other requirements are met). In this instance, school is effectively "closed" on the days in which the child is not permitted to attend.

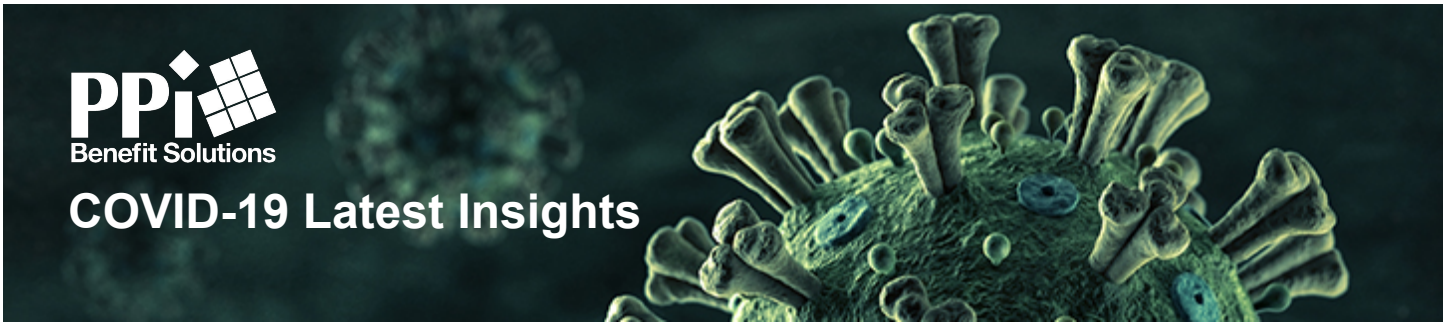
For additional information, the DOL's FAQ 98-100 address school and FFCRA leave considerations.

**32. Who is a "health care provider" that can advise a person to self-quarantine due to concerns related to COVID-19 for purposes of paid sick leave?** ^

According to the DOL, "the term "health care provider," as used to determine individuals whose advice to self-quarantine due to concerns related to COVID-19 can be relied on as a qualifying reason for paid sick leave, means a licensed doctor of medicine, nurse practitioner, or other health care provider permitted to issue a certification for purposes of the FMLA."

**33. What benefits are provided under the Emergency Paid Sick Leave?** ^

During sick leave relating to an employee's own condition, employers are obligated to pay employees the higher of their regular rate of pay or the applicable minimum wage for a maximum of 80 hours. That amount is capped at $511 per day and $5,110 in the aggregate. For sick leave taken to care for a family member, the rate of pay is reduced to two-thirds of the employee's regular rate of pay. That amount is capped at $200 per day and $2,000 in the aggregate.

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**34. How is the employee's regular rate of pay calculated?** ^

To determine the employee's regular rate of pay for FFCRA paid leave purposes, the employer would average the employee's paid wages for the six months prior to the leave start date. All hours worked, including overtime hours, are taken into consideration. However, any overtime differential pay is excluded. Only hours worked would be included- any periods of zero hours worked would be disregarded.

**35. Does an employer with federal contracts covered by the Service Contract Act (SCA) and the Davis-Bacon Act have to include fringe benefits in compensation for paid leave under the FFCRA?** ^

WHD explains in Questions and Answers that an employer must pay its federal contractors the SCA health and welfare fringe benefit rate (in addition to the SCA wage rate) only if such federal contractors take FFCRA leave concurrently with leave provided under the SCA or Executive Order 13706. Otherwise, if the federal contractor is taking FFCRA paid sick leave, an employer is required to provide compensation based on the higher of the federal contractor's regular rate of pay, the federal minimum wage under the FLSA, or the applicable state or local minimum wage. Further, if the federal contractor is taking expanded FMLA leave, compensation is based on the employee's regular rate. (As background, the SCA health and welfare rate is usually not included in the regular rate of pay.)

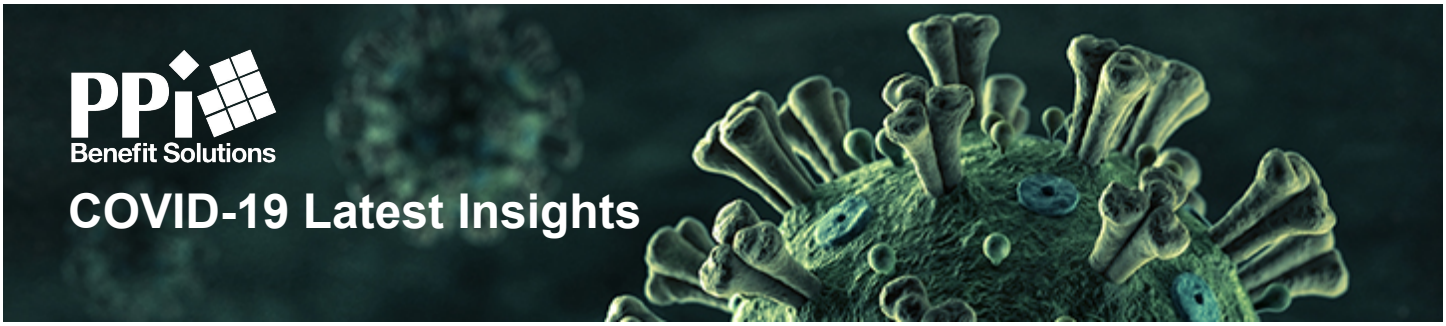
Importantly, for employers who have been providing health insurance to its federal contractors, health insurance must be maintained during FFCRA leave. In addition, if a federal contractor takes FFCRA leave concurrently with leave provided under the SCA or Executive Order 13706, an employer must provide health and welfare payments for all hours paid under the SCA (up to 40 hours per week and 2,080 per year on each contract).

This guidance also generally applies for contracts covered by the Davis-Bacon Act.

**36. May an employee use emergency paid sick leave for 10 days before their paid emergency FMLA extension leave kicks in, if they are unable to work or telework because they are caring for a son or daughter who is out because school or daycare is closed?** ^

Yes, assuming the employee is unable to work or telework. Alternatively, employees could choose to use employer paid time off (vacation, PTO, or other accrued sick leave) during that 10-day period rather than EPSL. An employee could also choose to use such accrued paid time off concurrently with EPSL as a supplement in order to receive up to 100% of normal wages. An employer cannot require an employee to use employer provided paid time off during the initial two week period (when EPSL may run), but an employee may choose to do so. During the 10-week expanded FMLA period, an employer may require an employee to use any accrued paid time off in conjunction with the leave resulting in the leave times running concurrently.

**37. Will emergency paid sick leave toll any waiting period for an employer's health coverage?** ^

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An employee on emergency paid sick leave is entitled to employer-provided group health coverage on the same terms as if he or she had continued to work. Days on emergency paid sick leave counts toward the waiting period mandated by the employer's plan documents.

**38. What notice requirements, if any, apply to Emergency Paid Sick Leave?** ^

On March 25, the DOL provided the FFCRA model notice available here: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf. Each covered employer (i.e., certain public sector employers and private employers with fewer than 500 employees that are covered by the paid sick leave and expanded FMLA leave provisions in the FFCRA) must post the notice in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website. All current employees must receive the notice, including new hires. (See the DOL's FAQs for more information: https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions)

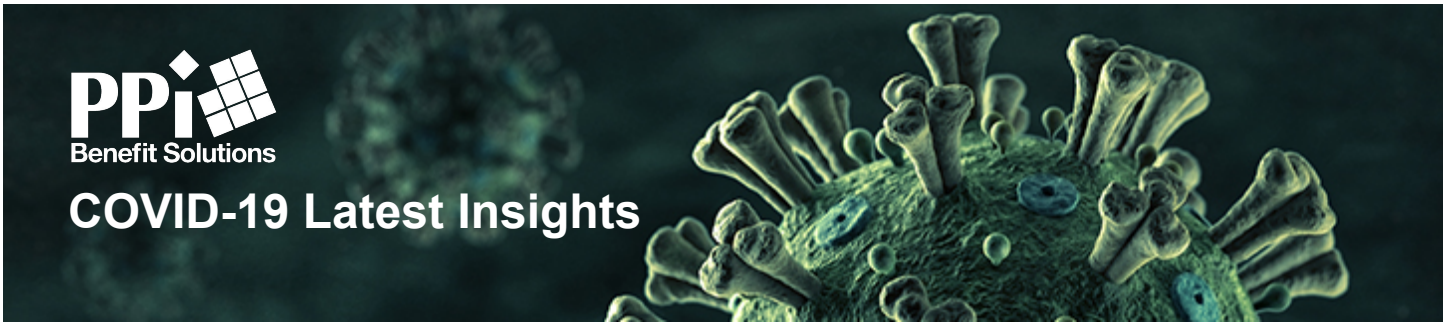
As for employees, after the first workday (or portion thereof) an employee receives paid sick time under the FFCRA, an employer may require the employee to follow reasonable notice procedures in order to continue receiving such paid sick time. According to the DOL, employees must provide to their employers documentation in support of their paid sick leave as specified in applicable IRS forms, instructions, and information.

**39. Is an employer required to restore an employee's position upon return from FFCRA leave?** ^

The job protection requirements of the FMLA apply to COVID-19-related leaves (meaning employers must reinstate employees after their emergency FMLA period ends), although there are some exceptions for employers with fewer than 25 employees if certain conditions are satisfied. Non-FMLA leave does not garner the same restoration requirements.

There is an exception for key employees. An employer may not deny leave to a key employee, but may deny restoration if doing so would cause substantial and grievous economic injury to the employer's operations. A "key employee" is defined as a salaried FMLA-eligible employee who is among the highest paid 10% of all employees, both eligible and ineligible, within 75 miles of the worksite.

FFCRA also includes anti-retaliation provisions that prohibit an employer from terminating, disciplining or otherwise discriminating against an employee for taking FFCRA leave. That anti-retaliation provision would not likely apply for a broad reduction in force that transpires while a random subset of affected employees happens to be an FFCRA leave (although hopefully the DOL will further clarify details of the anti-retaliation provisions).

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**40. What does the FFCRA require for cost-sharing related to COVID-19 screening and treatment? ^**

Under this provision, group health plans of any size (fully insured and self-insured, including grandfathered plans) and health insurers in the group and individual market are required to cover COVID-19 tests and related services without cost sharing, prior authorization requirements, or other medical management requirements. Excepted benefits and retiree-only plans are exempt from this requirement.

The tests and services include in vitro diagnostic tests (cleared by the FDA) and items and services furnished during an in-office visit, telehealth, urgent care visit or emergency room visit that result in an order for an in vitro diagnostic test. Thus, an individual visiting an ER who is given several lab tests, an MRI and a chest x-ray may be swept into this "no cost" requirement as there is no qualifier that the other items and services relate to the relevant evaluation.

Additionally, the CARES Act amends the FFCRA by expanding the types of COVID-19 tests that group health plans and carriers must cover without cost sharing, prior authorization, and other medical management requirements. Specifically, the new tests that must be covered without such restrictions include tests for which the developer has requested "emergency use authorization" under the Federal Food, Drugs, and Cosmetics Act and tests authorized and used by a state to diagnose patients.

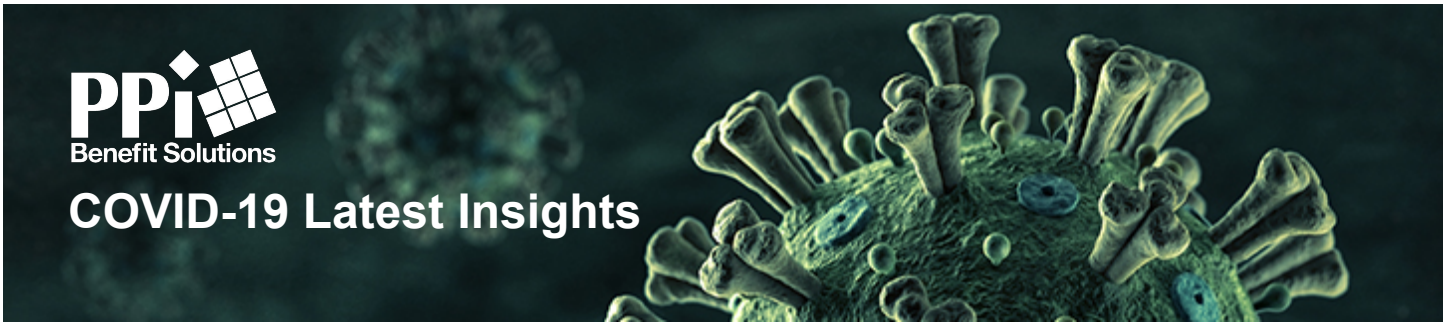
Important to note, FAQs about FFCRA and CARES Act Implementation Part 43 clarifies that the requirement to cover COVID-19 tests without cost sharing only applies to testing for diagnosis or treatment of COVID-19, as determined by a healthcare provider. Further, COVID-19 tests intended for at-home testing must also be covered without cost-sharing, when the test is determined medically appropriate and is ordered by a health care provider. In contrast, testing conducted to screen for general workplace health and safety (e.g., employee return-to-work programs), or any other purpose not primarily intended for individualized diagnosis or treatment of COVID-19 is beyond the FFCRA's scope.

Note that separately, most states have published guidance that requires COVID-19 coverage without cost sharing as well, which would apply to fully insured plans in each state.

Employers should work with their carriers and plan administrators to ensure COVID-19 coverage is provided.

a. What does it mean that plans cannot apply "prior authorization or other medical management" to COVID-19 screening?

Plans often exclude coverage for certain procedures or treatment unless the participant obtains prior authorization for the procedure. Additionally, medical management programs may also impose certain

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requirements such as medical necessity reviews, formulary or provider tiered network designs, concurrent authorization or step therapy approaches. In essence, the Act does not allow for any of that to be a barrier to COVID-19 diagnosis or screening.

b. Does the Act require group health plans and issuers to cover the cost of treatment for COVID-19 without cost sharing?

No, the Act does not require plans to cover, without cost-sharing, the treatment of COVID-19 once an individual has been diagnosed. Keep in mind, though, that some states may choose to require such treatment without cost-sharing (that would apply to fully insured plans in those states). In addition, many insurers are covering the cost of COVID-19 treatment without cost sharing. Otherwise, most group health plans cover general medical expenses of an employee, which likely includes treatment for an illness such as COVID-19; but the plan likely applies cost-sharing to such treatment, as it would for treatment of other illnesses. Employers should consult their carriers and plan documents to understand specific coverage under their plan.

**41. If the cost for COVID-19 testing is waived, does this disqualify an HDHP for purposes of HSA-eligibility? What about for costs for COVID-19 treatment? ^**

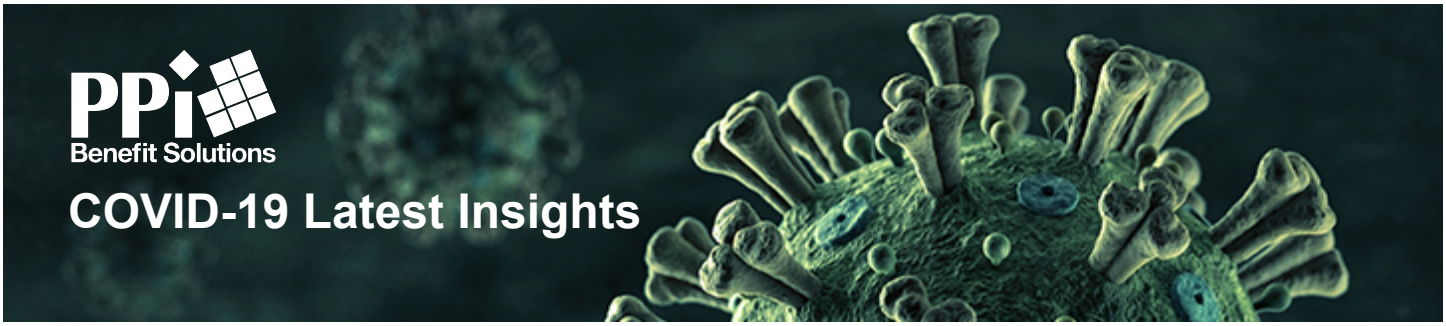
No, in Notice 2020-15, the IRS clarified that cost-free COVID-19 testing will not jeopardize qualified HDHP for purposes of HSA-eligibility. Similarly, Notice 2020-15, states that COVID-19 treatment without cost-sharing will not impact HSA eligibility.

**42. What are employers doing for employees that are ineligible for or previously waived group health plan coverage? ^**

a. If an insurer offers an employer a mid-year open enrollment opportunity for previously waived employees to elect coverage, are there any compliance considerations for the employer?

It is important to remember that if employees pay health plan contributions with pre-tax salary reductions, their elections are governed by Section 125 of the Internal Revenue Code. Typically, they cannot change those elections mid-year unless they experience a qualifying event.

If an insurer increases coverage under the plan by waiving cost sharing for telehealth, COVID testing and treatment, this could fall under the Section 125 qualifying event of Significant Improvement of a Benefit Plan

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Option. It's unclear at this point, but an argument could be made that the increased coverage is considered significant improvement. If so, the newly enrolled employees could be permitted to contribute with pre-tax salary reductions.

On May 12, 2020, the IRS issued a notice which provides the opportunity for employees to make election changes under a cafeteria plan without a qualifying event. Thus, a previously waived employee could elect coverage mid-year in 2020 if the insurer agrees and the coverage is prospective. Similarly, an employee could add coverage for a spouse and child. Also, the employer's Section 125 Plan Document would need to be revised by December 31, 2021 to reflect this opportunity.

The election change would have to be prospective in nature (no retroactive effective date).

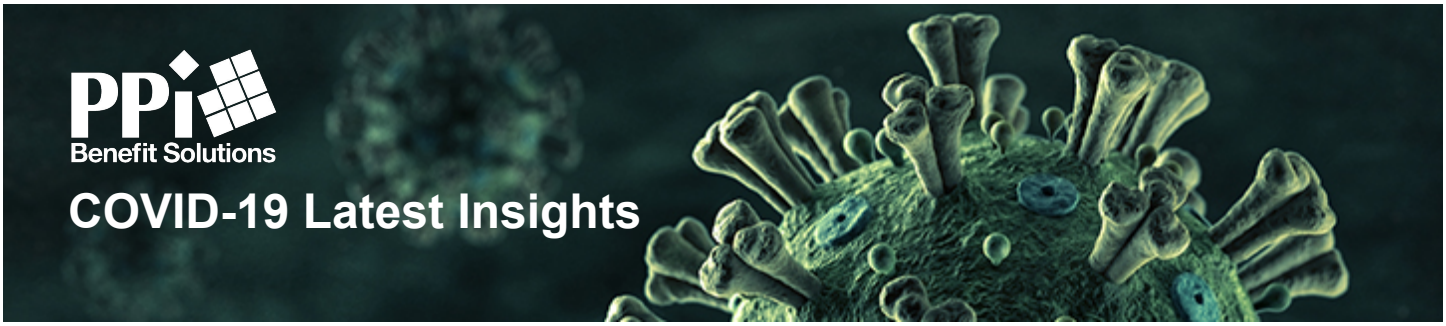
b. Can employers provide COVID-19 screening and treatment to employees who aren't enrolled in benefits (i.e., those who opted out of coverage or those who aren't eligible for coverage)?

An employer could choose to offer this treatment to employees that are not enrolled in the health plan. There are different ways that an employer could do this, but they would need to consult with their legal counsel or other professionals. Some possible options for funding this care would be to create an individual coverage HRA (ICHRA), to provide access to an on- or near-site clinic, or to simply provide taxable cash that the employees can use to obtain COVID-19 treatment. Note that ICHRAs can only be offered by an employer who doesn't offer a group health plan to the same class of employees. So, it could be offered to those not eligible for coverage, but not those who were eligible but waived offers of coverage.

c. Can telehealth services be provided to non-benefit eligible employees?

In light of the continued public health emergency, group health plans and insurers are able to provide only telehealth (or other remote care services) to employees who are not eligible for any other group health plan offered by the employer. FAQs for FFCRA and CARES Act Implementation Part 43 specify that this relief is limited to telehealth and other remote care service sponsored by a large employer (generally, one with at least 51 employees) and is applicable for the duration of any plan year beginning before the end of the COVID-19 public health emergency. Such plans are exempt from certain group market reforms and mandates, such as prohibition on annual and lifetime limits and preventative services mandate. However, other mandates, such as the prohibitions of pre-existing condition exclusions and discrimination based on health status, the prohibition of rescissions, and the application of the mental health parity requirements continue to apply.

**43. Does the FFCRA apply to employees who were on furlough prior to the FFCRA's effective date?** ^

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No, the DOL's guidance indicates that paid sick leave and expanded family and medical leave provided through FFCRA is not retroactive back to the date the Act was enacted. As such, employees (including those in a furlough) are only entitled to the required paid sick or family and medical leave beginning on April 1, 2020.

**44. What tax credits does the FFCRA provide?** ^

The FFCRA provides covered employers with tax credits to cover certain costs of providing employees with required paid sick leave and expanded family and medical leave for reasons related to COVID-19, from April 1, 2020, through December 31, 2020.

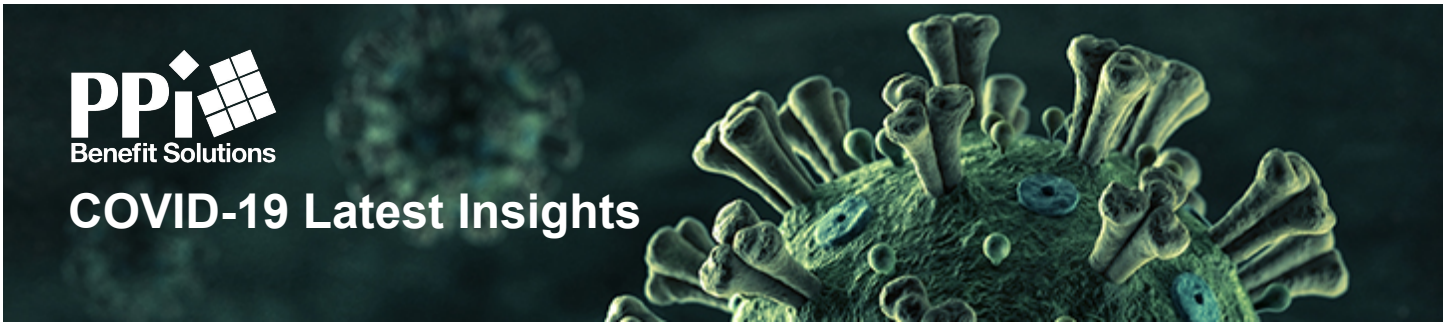
**45. What is the amount of the tax credit available to employers?** ^

The credit covers 100 percent of up to ten days of the qualified sick leave wages and up to ten weeks of the qualified family leave wages (and any qualified health plan expenses allocable to those wages) that a covered employer paid during a calendar quarter, plus the amount of the employer's share of Medicare taxes imposed on those wages.

Example: An employer pays $10,000 in qualified sick leave wages and qualified family leave wages in Q2 2020. It does not owe the employer's share of social security tax on the $10,000, but it will owe $145 for the employer's share of Medicare tax. Its credits equal $10,145, which include the $10,000 in qualified leave wages plus $145 for the employer's share of Medicare tax (this example does not include any qualified health plan expenses allocable to the qualified leave wages). This amount may be applied against any federal employment taxes that the employer is liable for on any wages paid in Q2 2020. Any excess over the federal employment tax liabilities is refunded in accord with normal procedures.

**46. What are "qualified health expenses"?** ^

Qualified health plan expenses are amounts paid or incurred by a covered employer to provide and maintain a group health plan that are allocable to the employee's qualified leave wages. The amount taken into account in determining the credits generally includes both the portion of the cost paid by the employer and the portion paid by the employee with pre-tax salary reduction contributions (but not any portion the employee paid with after-tax contributions). The amount is prorated based on the daily plan cost and the number of leave days used by the employee. The plan cost is generally based on the annual premium (or premium equivalent) divided by the number of work days per year.

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The IRS website contains further information for both fully-insured and self-insured plans regarding the determination and allocation of qualified health plan expenses.

Qualified health plan expenses includes contributions to health FSAs and HRAs, but not contributions to HSAs or QSEHRAs.

**47. How can employers start claiming the credit? ^**

Eligible employers can claim the credits on their federal employment tax returns (e.g., Form 941, Employer's Quarterly Federal Tax Return), but they can benefit more quickly from the credits by reducing their federal employment tax deposits.

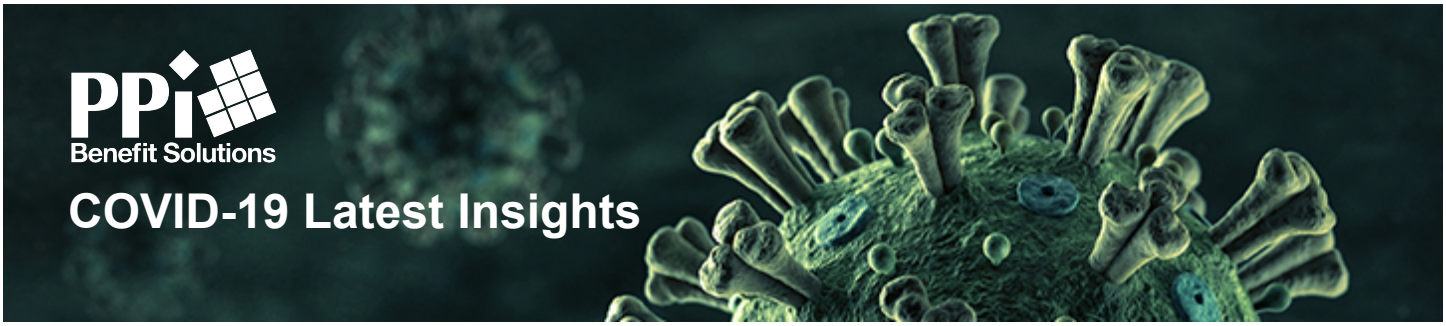
If there are insufficient federal employment taxes to cover the amount of the credits, an employer may request an advance payment of the credits from the IRS by submitting a Form 7200, Advance Payment of Employer Credits Due to COVID-19. The IRS expects to begin processing these requests during April 2020. What documentation must a covered employer retain to substantiate eligibility to receive the tax credits?

Covered employers claiming the credits for qualified leave wages (and allocable qualified health plan expenses and the employer's share of Medicare taxes), must retain records and documentation related to and supporting each employee's leave to substantiate the claim for the credits, and retain the Forms 941, Employer's Quarterly Federal Tax Return, and 7200, Advance of Employer Credits Due To COVID-19, and any other applicable filings made to the IRS requesting the credit.

**48. What documentation should an employer receive from an employee to substantiate the FFCRA paid sick leave or expanded FMLA leave? ^**

An employer can substantiate eligibility for the tax credits if it receives a written request for the leave from the employee that includes:

- The employee's name;
- The date or dates for which leave is requested;
- A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
- A statement that the employee is unable to work, including by means of telework, for such reason.
- In the case of a leave request based on a quarantine order or self-quarantine advice, the statement should include the name of the governmental entity ordering quarantine or the name of the health care professional

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- advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.

In the case of a leave request based on the employee's COVID-19 symptoms, an employer may require the employee to identify his or her symptoms and a date for a test or doctor's appointment. An employer may not, however, require the employee to provide further documentation or similar certification that he or she sought a diagnosis or treatment from a health care provider in order for the employee to use paid sick leave for COVID-19 related symptoms.

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

An employer should not request any additional information or documentation other than what is outlined in the regulations and guidance.

**49. Are federal income taxes withheld from qualified paid sick leave or expanded FMLA wages? Can employees make salary reduction contributions from the amounts?** ^

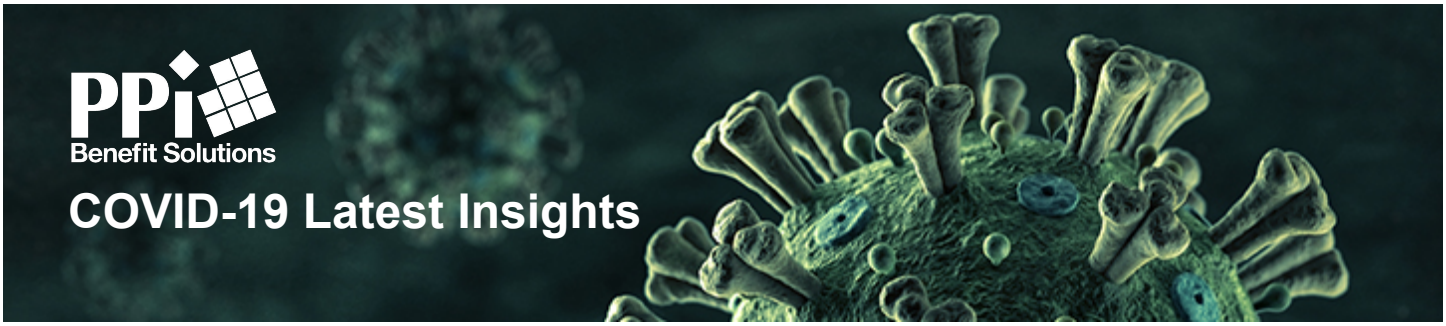
Yes. Qualified leave wages are wages subject to withholding of federal income tax and the employee's share of social security and Medicare taxes. Additionally, the leave wages are considered wages for purposes of other benefits that the employer provides, such as contributions to 401(k) plans. Accordingly, the FFCRA does not prohibit salary reduction contributions to the extent that an employee has a salary reduction agreement in place with the employer.

**50. May a tax exempt employer receive the credits?** ^

Yes. Tax-exempt organizations that are required to provide paid sick leave or expanded paid family and medical leave may claim the tax credits.

**51. Are employers required to report the amount of FFCRA paid sick leave or expanded FMLA leave wages paid to employees on Form W-2?** ^

Yes, according to IRS Notice 2020-54 employers will be required to report these amounts either on Form W-2, Box 14, or on a separate statement. Per the IRS, this required reporting provides employees who are also self-employed

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with information necessary for properly claiming qualified sick leave equivalent or qualified family leave equivalent credits under the Families First Act.

**52. Where can I obtain more information regarding the tax credits, forms and filing process?** ^

The employer should visit the IRS website page "COVID-19 Related Tax Credits for Required Paid Leave Provided for Small and Midsize Businesses FAQs" at: https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#substantiate_eligibility

**53. Are there state and/or local laws mandates that apply?** ^

Several states have pending and/or enacted legislation related to COVID-19 impacting benefits and leave administration. Generally speaking, the FFCRA applies in addition to any state protections, meaning Emergency Paid Sick Leave Act and Emergency FMLA Expansion Act leave would be in addition to any protected state family and medical leave—we hope for more guidance from the agencies on that interaction. Overall, though, employers should consider state or local laws—as well as their own salary continuation policies—that may impact benefits administration.

FFCRA https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf
Families First Coronavirus Response Act: Questions and Answers
https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

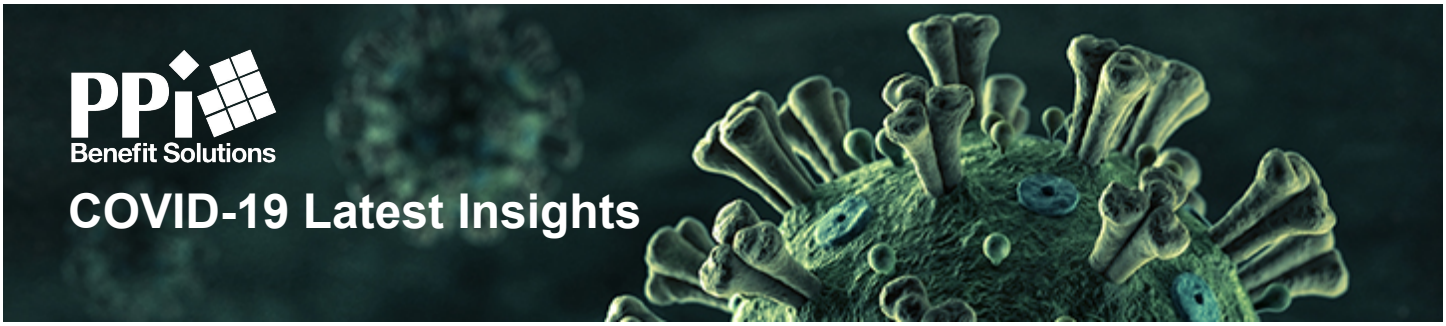
**54. HIPAA and ADA - Protected Information** ^

It is important to keep in mind that HIPAA will apply when the employer is gathering health information from the group health plan. For example, HIPAA would apply if an employer learns of an employee's diagnosis from the group health plan. Alternatively, if the employer learns of the diagnosis (or the symptoms) from the specific individual, HIPAA would not apply.

## CARES Act FAQ

**55. What is the CARES Act?** ^

On March 27, 2020, the president signed the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) into law. The CARES Act is a comprehensive economic stimulus package that includes loans to small businesses attempting to navigate the COVID-19 pandemic and an expansion on unemployment benefits available through states (supported by federal funding) - among many other components.

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While most of the law is dedicated to providing economic stimulus for businesses and individuals, the CARES Act also has several provisions relating to employee benefits, both health and retirement, as well as a few miscellaneous provisions on fringe benefits (e.g., student loan repayment).

For the full text of the CARES Act, see https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf.

**56. How does the CARES act amend the rules concerning HDHP status and HSA eligibility as they pertain to telehealth coverage that is provided before the deductible is met? ^**

Yes. The CARES Act permits telemedicine to have no cost-sharing (including deductibles, copayments or coinsurance) without endangering a plan's HDHP qualified status or participants' HSA eligibility. But this expanded flexibility is only available temporarily.

Expanding on the IRS Notice 2020-15 – stating that an HDHP can cover COVID-19-related tests and coverage absent cost-sharing without adversely affecting HSA eligibility – the CARES act permits (but does not require) HDHPs to waive deductibles for all telehealth or remote care services without adversely impacting HSA eligibility. This allows HDHPs to cover telehealth with no cost-sharing, whether or not the telehealth relates to COVID-19, without impacting the plan's status as an HDHP and without impacting the HSA eligibility of those covered under the HDHP.

While the CARES Act does not mandate telehealth coverage, note that laws in some states have been recently enacted to provide additional telehealth coverage (at least for fully insured plans in those states).

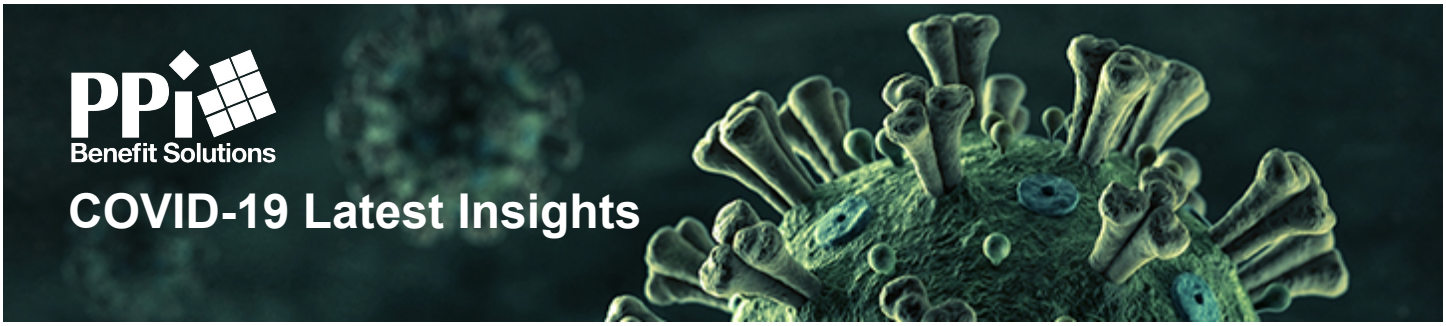
As mentioned, this expansion on telehealth is temporary—applying to plan years beginning on or before December 31, 2021.

**57. Can reimbursement accounts (HSAs/FSAs/HRAs) now be used for over-the-counter drugs and menstrual products? ^**

Yes. The CARES Act eliminates the ACA rule that individuals cannot be reimbursed from their HSAs, HRAs and FSAs for over-the-counter (OTC) drugs unless the drug was accompanied by a prescription.

Under the CARES Act, effective January 1, 2020, individuals can reimburse themselves from those accounts for non-prescribed OTC drugs. Similarly, menstrual care products (defined to include a tampon, pad, liner, cup, sponge or similar product) will be considered qualified medical expenses payable from those accounts. Employers should consult with their vendors to determine whether an amendment to their plan terms is required.

**58. What are the additional COVID-19 tests that group health plans must cover without cost-sharing (or other medical management requirements)? ^**

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The CARES Act amends the recently-enacted FFCRA by expanding the types of COVID-19 tests that group health plans and carriers must cover without cost-sharing, prior authorization, and other medical management requirements. Specifically, the new tests that must be covered without such restrictions include tests for which the developer has requested "emergency use authorization" under the Federal Food, Drugs, and Cosmetics Act and tests authorized and used by a state to diagnose patients.

**59. Are plans required to cover COVID-19 antibody tests without cost sharing?** ^

Yes, plans must cover COVID-19 antibody tests without cost-sharing. As background, the FFCRA and the CARES Act require both insured and self-funded plans to cover COVID-19 testing without cost sharing. Specifically, the FFCRA provides that the required testing includes "in vitro diagnostic products for the detection of SARS–CoV–2 or the diagnosis of the virus that causes COVID–19."

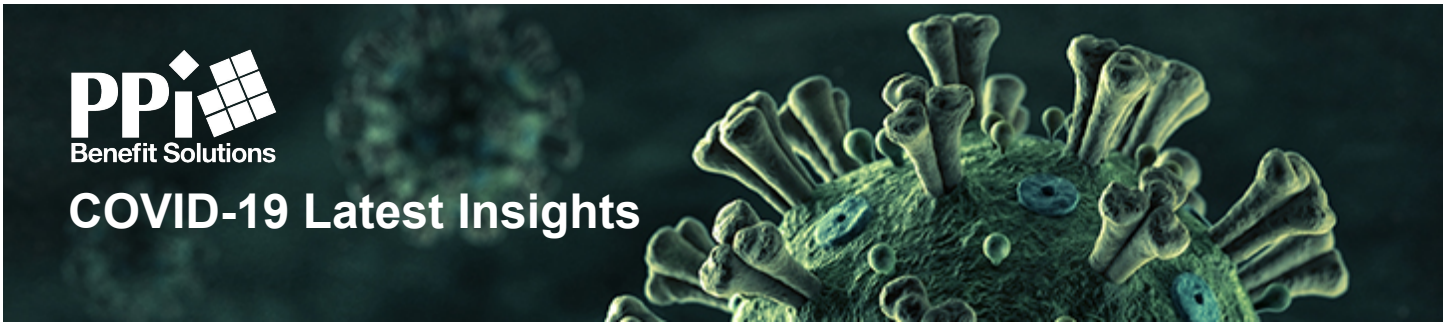
In April, HHS, the DOL and the Treasury provided a set of FAQs on the obligations to cover COVID-19 testing under the FFCRA and CARES Act. One of the questions explicitly indicates that "in vitro diagnostic products" includes serological tests used to detect antibodies for the virus that causes COVID-19. Q/A 4 reads as follows:

> Q4. Do "in vitro diagnostic tests" described in section 6001(a)(1) of the FFCRA, as amended by section 3201 of the CARES Act, include serological tests for COVID-19?
>
> Yes. Serological tests for COVID-19 are used to detect antibodies against the SARS-CoV-2 virus, and are intended for use in the diagnosis of the disease or condition of having current or past infection with SARS-CoV-2, the virus which causes COVID-19. The Food and Drug Administration (FDA) currently believes such tests should not be used as the sole basis for diagnosis. FDA has advised the Departments that serological tests for COVID-19 meet the definition of an in vitro diagnostic product for the detection of SARS-CoV-2 or the diagnosis of COVID-19. Therefore, plans and issuers must provide coverage for a serological test for COVID-19 that otherwise meets the requirements of section 6001(a)(1) of the FFCRA, as amended by section 3201 of the CARES Act.

Although the guidance states that serological tests should not be the sole basis for COVID-19 diagnosis at this time, the FFCRA and CARES Act require plans and insurers to cover these tests (among other services) without cost-sharing when medically appropriate for the individual (as determined by the individual's attending healthcare provider in accordance with accepted standards of current medical practice).

**60. What future immunizations or vaccines related to COVID-19 will be required to be covered without cost-sharing?** ^

The CARES Act directs the relevant agencies (HHS, DOL, and Treasury) to require health plans and carriers to cover any COVID-19 preventive services without cost-sharing. That would include vaccines and immunizations, or any other item or service, that are determined by the CDC or the U.S. Preventive Services Task Force to prevent or mitigate COVID-19.

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**61. How is COVID-19 test pricing determined?** ^

While pricing relates more to the carrier and the provider, understanding the pricing of the COVID-19 tests and how that will be handled remains of interest to employers. The CARES Act addresses price transparency by generally requiring providers to publicize the prices of COVID-19 tests. Group health plans and carriers, which are required to pay for the tests under the FFCRA, are required to reimburse the provider in accordance with the negotiated rate that it had with the provider before the COVID-19 public health emergency. If there is no negotiated rate, then it will be the publicized cash price.

**62. Are student loan repayments now eligible for employer reimbursement as a fringe benefit?** ^

The CARES Act adds 'eligible student loan repayments' to the list of items that can be reimbursed under an educational assistance program under IRC Section 127. 'Eligible student loan repayments' are payments made by the employer, whether paid to the employee or a lender, on any qualified higher education loan (including undergraduate and graduate school) for the education of the employee (but not of a spouse, domestic partner, or other dependent). Student loan repayments are limited to $5,250 (and are combined with other educational assistance provided under the Section 127 program sponsored by the employer).

That said, an employer cannot provide student loan repayment and other educational assistance in a combined amount over $5,250.

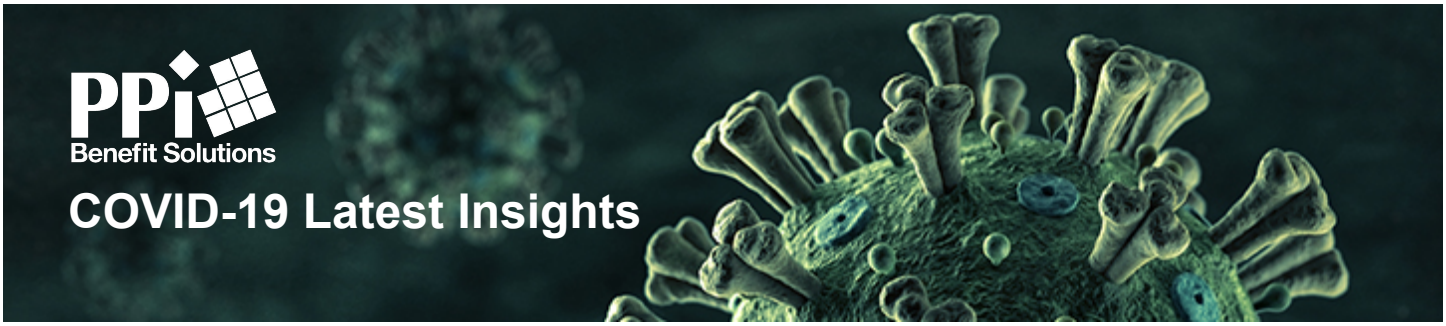
As background, prior to the CARES Act, Section 127 applied only to educational assistance programs (current employee education, not student loans previously incurred). Also, employees may not "double dip" on tax benefits—an employee may not deduct student loan repayment amounts that are reimbursed or paid by the employer.

Importantly, this provision is temporary, as it's effective for payments made after March 27, 2020, and before January 1, 2021. Employers interested in this provision will need to adopt or amend a Section 127 plan document.

## CARES Act & Retirement Benefits

A portion of the CARES Act is intended to loosen access to retirement plan funds for individuals impacted by the COVID-19 pandemic. While this FAQ resource is largely intended for COVID-19 and its impact to health and welfare benefits administration, below are FAQs of retirement-related provisions of the CARES Act that may be of interest to employers.

Note that plans can adopt the new rules under the CARES Act immediately. (The plan will eventually need to be amended on or before the last day of the first plan year beginning on or after January 1, 2022, or later if prescribed by the Secretary of the Treasury.) Additionally, the CARES Act also allows the DOL to potentially postpone certain deadlines under ERISA, which could allow the DOL to postpone certain obligations such as the annual Form 5500 filing requirement.

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**63. How does the CARES Act impact hardship distributions for retirement plans?** ^

The CARES Act allows participants to take hardship distributions of up to $100,000 from their retirement plan or IRA, without being assessed the 10% early withdrawal penalty tax. They can also pay the tax on this income over a three-year period.

They can take advantage of this provision if they are a "qualified individual":

- Diagnosed with COVID-19;
- Have a spouse or dependent diagnosed with COVID-19;
- Experience adverse financial consequences of COVID-19;
- Dealing with other factors as determined by the Secretary of the Treasury.

Importantly, the Act does not require the plan sponsor to verify whether an individual qualifies for the COVID-19 adjusted loan limits or the $100,000 withdrawal. The plan sponsor may rely upon a participant's certification for eligibility. The plan sponsor has discretion whether to offer this design element in their qualified plan.

**64. How does the CARES Act impact plan loans from retirement plans?** ^

The CARES Act increases the amount that participants may request in plan loans up to twice the amount of what is normally allowed, meaning participants can request loans for the lesser of $100,000 or 100% of their vested balance in the plan. Additionally, participants that currently have loans with repayments due between March 27, 2020, and December 31, 2020 may delay their repayment for up to a year without defaulting. Plan participants may take advantage of these loan provisions if they are "qualified individuals" (as defined in the hardship distribution question and answer). The plan sponsor has discretion whether to offer this design element in their qualified plan.

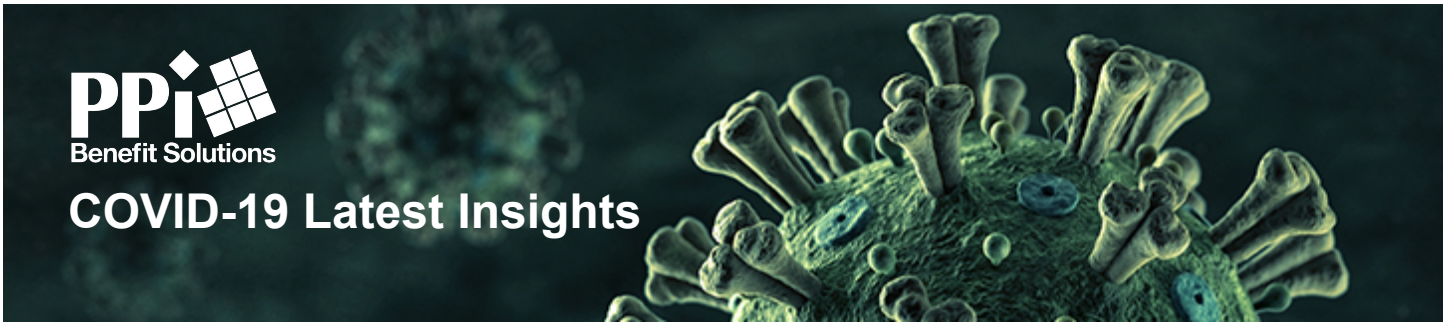
**65. How does the CARES Act impact required minimum distributions (RMD)?** ^

As background, individuals must generally begin to take RMDs from their defined contribution plan or IRA when they turn 72. The CARES Act temporarily waives the required minimum distribution (RMD) rules for the 2020 calendar year, allowing participants to keep funds in their retirement accounts. This includes RMDs attributable to 2019 which were not paid by January 1, 2020, but does not include RMDs that were made in 2019.

For RMDs that were already made in 2020, the participant may defer taxes and roll it back to the plan from which it was made or roll it to another qualified plan or IRA which accepts rollovers. Additional guidance regarding any potential impact to the 60 day rollover period is expected from the IRS.

**Due Dates Extended for Certain Plan Notices and Filings & Mid-year Election Changes**

**66. Which group health and retirement plans have an automatic extension for Form 5500 filing?** ^

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Under IRS Notice 2020-23, deadlines for certain filing obligations – including Form 5500 filings for certain plans – are extended due to the COVID-19 emergency. For group health plans with Form 5500 filings due April 1, 2020 through July 15, 2020 (i.e., group health plans with plan years ending in September, October, and November 2019), the IRS has extended the filing due date to July 15, 2020. In addition, this extension applies to group health plans with a deadline within April 1, 2020 through July 15, 2020 due to a previously filed extension. This extension is automatic. The same applies for retirement plans with similar Form 5500 filing due dates.

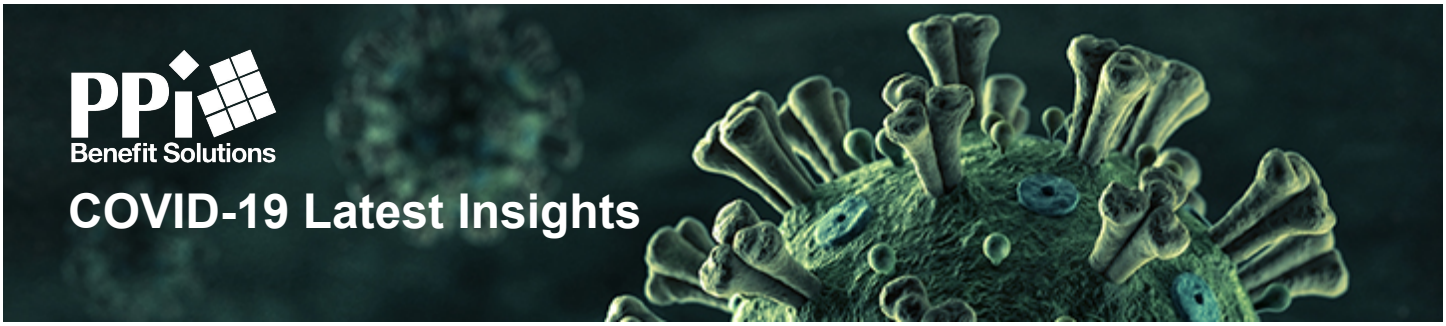
While the automatic extension is not applicable to calendar-year plans, such plans can receive a two and a half month extension by filing Form 5558.

**67. Do the new rules provide relief for any of the retirement plan compliance obligations?** ^

Yes, the new rules provide some relief for retirement plan sponsors during the COVID-19 outbreak. Specifically, the DOL provides guidance on the following retirement plan issues:

- *Plan Loan Verification* – The DOL will not treat plan loan verification procedures as failures as long as the failure is attributable to the COVID-19 outbreak and employers make a good-faith, diligent effort to comply with the requirements and correct any procedural deficiencies as soon as possible.
- *Plan Loan Changes allowed in CARES Act* – The DOL will not treat any qualified individual as having violated the plan loan rules by taking up to a $100,000 loan or delaying their plan loan repayments.
- *Retirement Plan Document Amendments* – The DOL will treat plans as operating in accordance with the plan terms as long as any necessary plan loan or hardship distribution-related amendments are adopted prior to the last day of the plan year beginning on or after January 1, 2022.
- *Participant Contributions and Loan Repayments* – Employers are generally required to forward retirement contributions and loan repayments to the plan trust as soon as they are reasonably segregated from the employer's general assets, but in no event later than the 15th business day of the month following the month in which amounts were withheld. The DOL will not take enforcement action with respect to any temporary delay in forwarding these contributions or loan repayments if the delay is due to COVID-19.
- *Blackout Notices* – Plan administrators generally have to provide 30 days' advance notice of any period that participant accounts will be inaccessible to them. The blackout rules provide an exception to the advance notice requirement when the fiduciary is unable to provide the notice due to events beyond their control. With the new rules, the DOL confirms that the COVID-19 crisis is an event beyond fiduciaries' control, which would provide employers' relief if they are unable to provide the notice 30 days in advance.

**68. What employer and employee notices and filing due dates have been extended under the rules jointly issued by the Departments of Labor and Treasury on April 28, 2020?** ^

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The agencies provide temporary relief for certain plan notice and filing due dates. Plans must not count the time that begins on March 1 and ends 60 days after the end of the National Emergency (referred to as the "Outbreak Period") when determining the due dates for certain notices and filing due dates.

The majority of timeframes impacted relate to a participant's or employee's notice to the plan. Specifically, these are:

- Request to enroll in coverage following a special enrollment event
- Election of COBRA
- Payment of COBRA premiums
- Notification of a COBRA triggering event (ex.- divorce) or disability determination
- Submission of claim for payment
- Request for internal appeal or external review of a denied claim

The rules provide that the required timeframes will not begin until 60 days after the end of the National Emergency related to COVID-19 (which is referred to as the Outbreak Period).

**69. How is an employer's requirement to distribute a COBRA Election Notice impacted by the April 28, 2020 rules?** ^

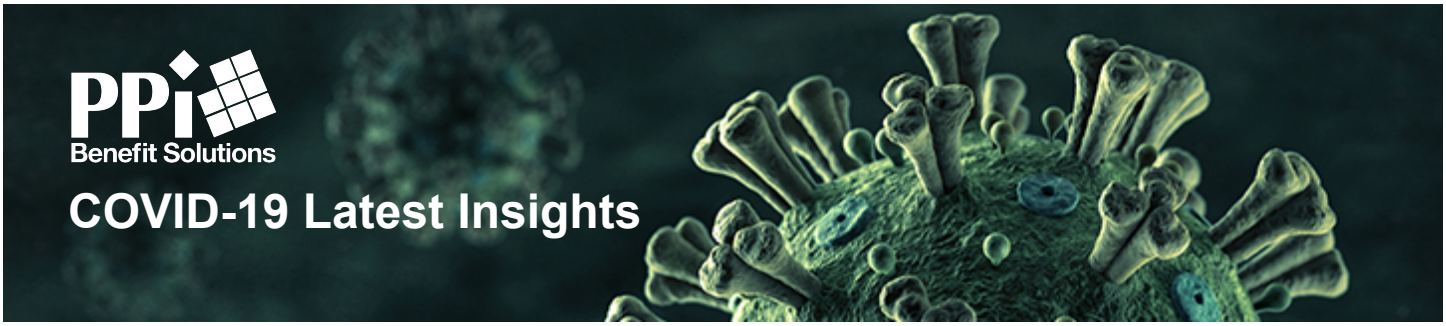
Typically, an employer plan sponsor has 30 days to notify a plan administrator of a participant's COBRA triggering event and the administrator has 14 days to distribute the COBRA Election Notice to the participant(s). If the employer plan sponsor and plan administrator are the same, there is a combined 44-day timeframe to distribute the notice.

Under the new rules, the required timeframe is tolled during the National Emergency and the following 60 days.

For example, John terminates employment and subsequently loses coverage under the Acme Employee Health Plan on March 31, 2020. Acme is both the employer plan sponsor and the plan administrator. The COBRA Election Notice would typically need to be distributed to John and any covered dependents by May 14, 2020. However, let's say that the National Emergency is proclaimed to be over on May 31, 2020. The COBRA Election Notice would not be required to be distributed to John until September 12, 2020 (which is 44 days after the Outbreak Period).

John would have 60 days from the date of the notice to elect COBRA and an additional 45 days to make payment.

**70. Do COBRA participants have additional time under the new rules to submit COBRA premium payments?** ^

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Yes. The deadline for any COBRA premium payment due on or after March 1, 2020 is tolled until the following of the Outbreak Period.

For example, Jane is a COBRA participant in XYZ's Group Health Plan. Her COBRA payment for April's coverage was due April 1, 2020 with a 30 day grace period until May 1, 2020. Similarly, May's COBRA payment was due May 1, 2020 with a grace period until May 31, 2020. Let's say that the National Emergency is proclaimed to be over on May 31, 2020. Payments for both April and May would be due August 29, 2020 (which is 30 days after the Outbreak Period). The same would apply for June and July's coverage. August's payment would be due on August 31.

**71. An employee has a baby during the National Emergency, what is the date by which she must enroll the child in group coverage under HIPAA's Special Enrollment Rights and the new rules?** ^

Typically, an employee has 30 days under HIPAA to enroll a new child following placement for adoption or birth. Under the new rules, any special enrollment event that occurs on or after March 1, 2020 will have the 30-day election period (60-day election period for Medicaid and CHIP related events) begin following the completion of the Outbreak Period.

For example, Mary has a baby on March 31, 2020. Let's say that the National Emergency is proclaimed to be over on May 31, 2020. Mary may request enrollment for the baby (and herself and spouse, if applicable) in the group health plan by August 29, 2020. Coverage would be retroactive for new children back to the event date. All other special enrollment elections would have to be prospective in nature.

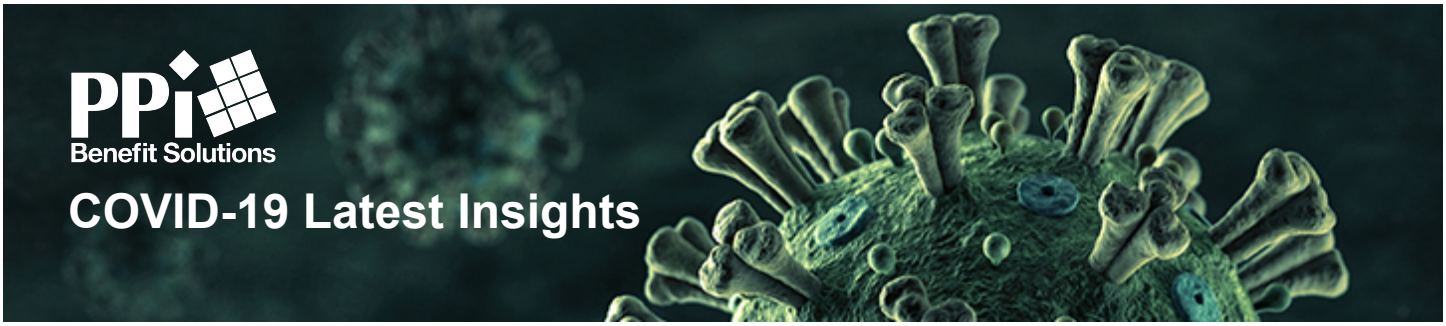
**72. An employer's health FSA has a claims submission date of 90 days following the end of the plan year, which would have been March 31, 2020 for the 2019 plan year. Do employees have additional time to submit claims under the new rules?** ^

Yes. Under the new rules, a plan's timeframe for submitting claims to an ERISA covered plan are suspended until the completion of the Outbreak Period.

For example, under H Company's health FSA, participants must submit claims incurred in the 2019 plan year by March 31, 2020 (also called the run-out period). Let's say that the National Emergency is proclaimed to be over on May 31, 2020. The health FSA participants would have until August 30, 2020 to submit claims, which is 31 day remainder of run-out period following the end of the Outbreak.

**73. Did IRS Notice 2020-29 extend the grace period for health FSA's and dependent care FSA's?** ^

Yes. On May 12, 2020, the IRS issued Notice 2020-29, which provides health FSA and dependent care FSA participants with additional time to incur eligible expenses. For any grace period or plan year ending in 2020, the

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employer may permit employees to incur eligible expenses for reimbursement through December 31, 2020. The Section 125 Cafeteria Plan Document would have to be revised by December 31, 2021 to reflect that opportunity.

Importantly, a general purpose health FSA participant who has a balance during the extension period would be ineligible for HSA contributions.

**74. Are group health plans required to permit mid-year election changes as provided by IRS Notice 2020-29? ^**

Employers may, *but are not required to*, amend their group health plans to permit additional mid-year election changes per IRS Notice 2020-29.

As background, on May 12, 2020, the IRS issued Notices 2020-29 which provides guidance for Section 125 plans for calendar year 2020 regarding additional permitted mid-year election changes. In particular, this guidance temporarily relaxes the rules relating to election changes for health plans offered under a Section 125 plan, including health and dependent care FSAs.

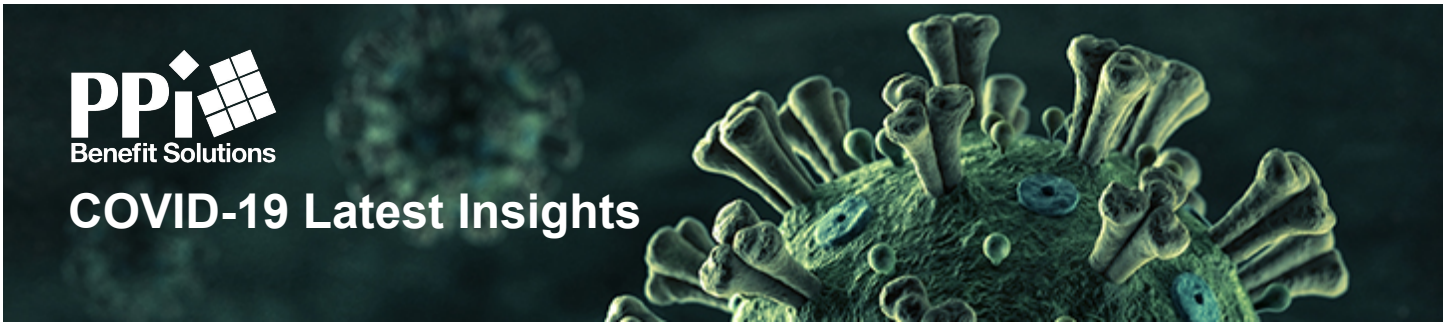
For mid-year elections made during calendar year 2020, a Section 125 cafeteria plan may permit employees who are eligible to make salary reduction contributions under the plan to, with respect to employer-sponsored health coverage:

- Make a new election on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage
- Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis
- Revoke an existing election on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer

In addition, a Section 125 cafeteria plan may permit eligible employers to 1) revoke an election, make a new election, or decrease or increase an existing election applicable to a health FSA on a prospective basis; and 2) revoke an election, make a new election, or decrease or increase an existing election regarding a dependent care assistance program on a prospective basis.

As mentioned above, these flexibilities are optional for the employer. Further, should the employer choose to permit the additional mid-year election changes, the employer can choose to permit only the options it wishes, such as permit changes for enrollment only, to medical only, and/or limit election changes to a defined period of time (e.g., month of June or a two-week period). Importantly, any applicable carrier would have to agree to permit the changes.

If an employer chooses to allow any additional changes to its plan, it must update its plan document (by 12/31/2021) and should communicate with employees accordingly.

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**Other Frequently Asked Questions**

**75. Can small business loans offered through the CARES Act be utilized for insurance premiums?** ^

*NOTE: A full analysis of small business loans is beyond our scope; but employers may be interested in understanding how health insurance premiums might be addressed through small business loans.*

The CARES Act includes a small business loan program (with loan forgiveness under certain circumstances) which specifically allows employers to use loan amounts for payroll support, including employee salaries (up to $100,000), paid sick or medical leave, insurance premiums, mortgage interest, and rent and utility payments.

Although qualifications, loan forgiveness, and other details of the loan program are beyond the benefits compliance scope, employers may be interested (and should consult outside counsel) in better understanding the loan provisions, as loans could be a source for health insurance-related premium payments during a furlough.

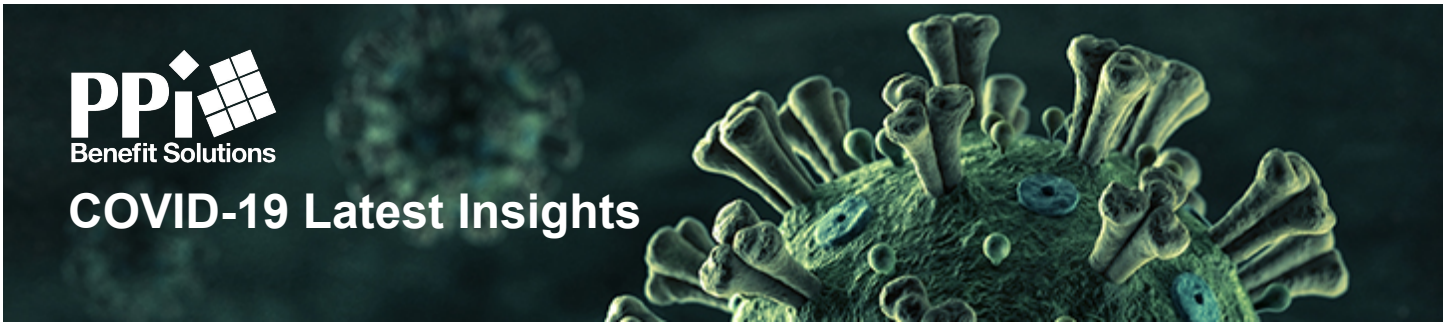
**76. How does the CARES Act unemployment expansion impact furloughed employees?** ^

*NOTE: A full analysis of unemployment benefits is beyond our scope; but employers may be interested in understanding how a furlough may impact employees with respect to unemployment benefits.*

The CARES Act creates a temporary Pandemic Unemployment Assistance program (through December 31, 2020), which is intended to provide unemployment benefits to those that have not traditionally been eligible (including furloughed employees). The Act expands benefits from 26 weeks (in most states) to 39 weeks, increases the state benefit level by $600 for up to four months, and waives the usual one-week waiting period for unemployment benefits.

Individuals are not eligible for these expanded benefits if they have the ability to telework with pay or are receiving paid sick leave (including that provided under the recently-enacted FFCRA) or other paid leave benefits (under a state law or through the employer's PTO/leave policy). However, an individual can qualify for the expanded benefits if they are unemployed (or partially unemployed) and if:

- They or a member of their household has been diagnosed with COVID-19;
- They are providing care for a family or household member with a COVID-19 diagnosis;
- They are the primary caregiver for a child or other household member who is unable to attend school or daycare as a direct result of COVID-19;
- They are unable to reach their place of employment because of a COVID-19 related quarantine;
- They are unable to work because a health care provider has advised them to self-quarantine due to COVID-19 concerns;
- They have become the major support for a household because the head of household has died as a direct result of COVID-19; or
- They had to quit their job or their employer has closed as a direct result of COVID-19.

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The CARES Act provides flexibility for plan sponsors to assist their employees during this pandemic. We will continue to monitor any developments in the law, including agency guidance. Employers should consult with their advisor about any changes that they wish to make to their plan as a result of the law.

**77. With childcare and school closures, can changes be made to dependent care FSA (DCAP) elections? ^**

Yes, if the employer's Section 125 written plan document allows for DCAP changes. When there is a change in the cost of a dependent care provider, the employee's work location changes (so that a different daycare is more convenient), or when a participant changes dependent care providers, or if a daycare closes, then a plan may permit a midyear change in election, including starting, stopping or modifying a DCAP election.

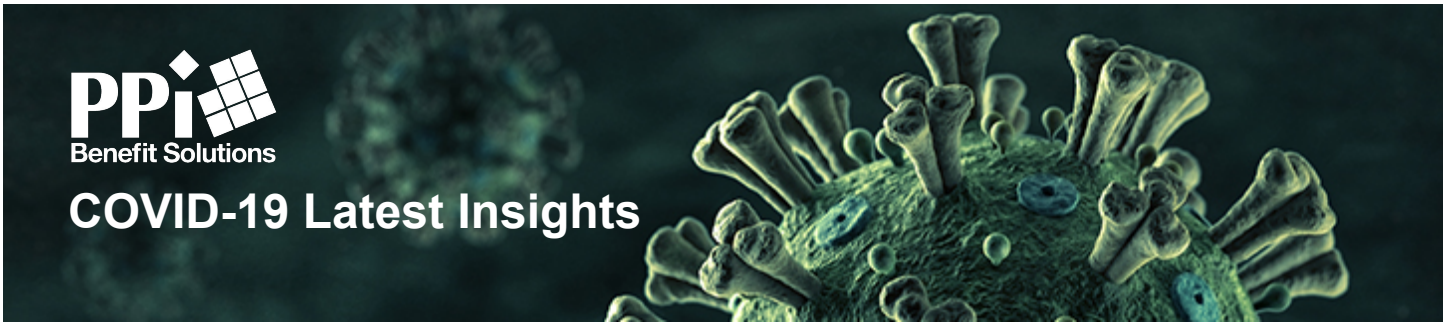
Section 125 prohibits a participant from being refunded unused DCAP contributions. It also prohibits retroactive election changes. Thus, an employee may reduce their annual DCAP election amount to what has already been contributed. However, they may not be refunded any prior contributions unless it is a reimbursement for qualified expenses. For example, if an employee had been making contributions in anticipation of a child attending summer camp, which has been canceled, the employee can stop their DCAP contributions going forward, but cannot be provided a cash-out of the existing balance.

In addition, when the daycare re-opens, participants are able to increase their DCAP elections accordingly.

Further, IRS Notice 2020-29 permits employees to elect, increase, or decrease DCAP elections in 2020 without a qualifying event. If the employer adopts this option, they would need to amend their Section 125 Cafeteria Plan Document by December 31, 2021 to provide such.

**78. If the cost for all telemedicine services is waived, does this disqualify an HDHP for purposes of HSA-eligibility? ^**

No; however, this new flexibility is only available temporarily. The CARES act expanded guidance in IRS Notice 2020-15 stating that an HDHP can cover COVID-19-related tests and coverage absent cost-sharing without adversely affecting HSA eligibility. The CARES act permits (but does not require) HDHPs to waive deductibles for all telehealth or remote care services without adversely impacting HSA eligibility. This allows HDHPs to cover telehealth with no cost-sharing, whether or not the telehealth relates to COVID-19, without impacting the plan's status as an HDHP and without impacting the HSA eligibility of those covered under the HDHP.

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While the CARES Act does not mandate telehealth coverage, note that laws in some states have been recently enacted to provide additional telehealth coverage (at least for fully insured plans in those states). As mentioned, this expansion on telehealth is temporary—applying to plan years beginning on or before December 31, 2021.

IRS Notice 2020-29 further explains this relief may be applied retroactive to January 1, 2020.

**79. Can employers take the temperature of employees coming to work? ^**

Yes. The EEOC has provided guidance (available here: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm) that confirms that because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendance precautions, employers are permitted to measure employees' body temperature.

**80. Did the extension of the individual tax filing deadline extend the date by which certain employee benefits contributions can be made for 2019? ^**

Yes. In a set of Filing and Payment Deadlines Questions and Answers related to IRS Notice 2020-15, the IRS indicates that the deadlines to make IRA, HSA, and employer retirement contributions for the 2019 year have been extended to July 15 along with the individual tax filing deadline.

**81. Can a former employee's furlough be extended to avoid providing FFCRA leave? ^**

No. Employers may not discriminate or retaliate against employees (or prospective employees) for requesting or taking leave under the FFCRA. If an employee's need to care for his child qualifies for FFCRA leave, he has a right to take that leave until he has used all of it. A request for leave cannot influence an employment decision (e.g., deciding which employees to recall from furlough).

*This information has been provided as an informational resource for PPI clients and business partners. It is intended to provide general guidance, and is not intended to address specific risk scenarios. Regarding insurance coverage questions, each specific policy must be reviewed in its entirety to determine the extent, if any, of coverage available for the impact of the Coronavirus.*