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COVID-19: REGULATORY & LEGISLATIVE UPDATES (INCLUDING CARES ACT)

NEW DOL GUIDANCE FOR THE FFCRA

The DOL issued an updated version of their Q&A concerning the Families First Coronavirus Response Act. The update includes revisions and clarifications to questions 1-37 and provides a third round of new questions and answers (38-57) for employers and employees.

Clarified issues included:

- We received a number of questions about whether an employee that was furloughed before the FFCRA goes into effect on April 1 qualifies for paid sick leave or expanded FMLA while on furlough. In short, the DOL states that they do not qualify for either paid sick leave or expanded FMLA.
- Employers can exclude virtually anyone that works in the medical field (e.g., clinics, medical schools, retirement facility, etc.) from the emergency paid family leave and emergency paid sick leave requirements of the FFCRA.
- There is nonenforcement guidance stating that the DOL will not bring an enforcement action against an employer through April 17, 2020, for employers that make a good faith effort to comply with the Act.

Some of the other revisions and clarifications to prior questions include:

- Required documentation in support of paid sick leave (15-16)
- How the ability to telework impacts entitlement to paid sick leave and emergency family and medical leave (17-19)
- Intermittent leave while teleworking and at usual worksite (20-22)
- Furloughs, reduced hours and closed worksites prior to the April 1, 2020, effective date (23-31)

Key points addressed in the newly added questions include: *(The updated Q&A can be found here)*

- Definitions of full- and part-time employees, “covered employer” and “son or daughter” under the FFCRA
- When employers refuse to provide paid sick leave or emergency family and medical leave (41-42)
- Public sector employees (52-54)
- Health care provider and emergency responder exceptions (56-57)
- Small business exemptions (58-59)

KEY ITEMS
ABOUT THIS RESOURCES

1. We received guidance that, in the case of plan years beginning on or before December 31, 2021, a plan shall not fail to be treated as a qualified high deductible health plan for HSA contribution purposes by failing to have a deductible for telehealth and other remote care services.
2. This document is a summary of the new DOL guidance for the FFCRA (the Families First Act).
3. This document is a summary of the relevant portions of the new federal CARES Act (Coronavirus Aid, Relief, and Economic Security Act), including information regarding FSA reimbursement for over-the-counter medicines and drugs.

The CARES Act (Coronavirus Aid, Relief, and Economic Security Act)

Among many other areas, the Act impacts FMLA, paid leave, unemployment insurance, and healthcare (including HFSAs and HRAs). Summaries of the impact on each area are below:

FMLA

The Act amends FMLA to include a rule regarding FMLA eligibility for rehired employees. The FFCRA authorized FMLA leave for employees who were employed for at least 30 days (a temporary amendment of the typical 12-month requirement under the FMLA). Under the CARES Act, "Employed for at least 30 calendar days" includes an employee who was laid off by that employer not earlier than March 1, 2020, had worked for the employer for not less than 30 of the last 60 calendar days prior to the employee's layoff and was rehired by the employer."

Paid Leave

Creates a limitation stating an employer (with less than 500 employees) shall not be required to pay more than $511 per day and $5,100 in the aggregate for sick leave or more than $200 per day and $2,000 in the aggregate to care for a quarantined individual or child for each employee.

Through September 30, 2020, authorizes federal agencies to pay contractors whose employees are required to provide services at government facilities and are denied access to those facilities due to COVID-19.

Unemployment Insurance

The Act creates a temporary Pandemic Unemployment Assistance program through December 31, 2020. This program will provide payment to those not traditionally eligible for unemployment benefits (self-employed, independent contractors, those with limited work history, and others).

Provides payment to states to reimburse nonprofit organizations, government agencies, and Indian tribes for half of the costs they incur through December 31, 2020, to pay for unemployment benefits.

Includes an additional $600 per week payment, on top of state benefit levels, to each recipient of unemployment insurance or Pandemic Unemployment Assistance for up to four months, through July 31. (Laid-off workers currently qualify for up to 26 weeks of unemployment insurance. Benefit levels vary by state with most replacing about half of an individual's wages during that time.)

Provides an additional 13 weeks of federally funded unemployment insurance benefits beyond the normal 26 weeks through December 31, 2020, to help those who remain unemployed after state unemployment benefits are no longer available. The amount provided would be the same as the regular benefit paid by the state.

Provides funding to support "short-time compensation" programs, where employers reduce employee hours instead of laying off workers, and the employees with reduced hours receive a prorated unemployment benefit. Under the bill, the federal government would pay 100% of a state's short-time compensation benefits for up to 26 weeks of benefits.

Not all states have short-time compensation programs, but they can choose to develop one in order to take advantage of the federal assistance. If they choose to establish a program after the passage of this bill, the federal government will pay up to 50% of the state's benefit costs.

Provides states with temporary, limited flexibility to hire temporary staff, re-hire former staff, or take other steps to process unemployment claims quickly.

Includes funding for Labor Department Inspector General oversight of the program.

Healthcare (Including HFSAs and HRAs)

Clarifies all testing for COVID-19 is to be covered by private insurance plans (without cost-sharing).

Provides free coverage of a COVID-19 vaccine (without cost-sharing) within 15 days.

Strikes the last sentence of IRC Section 223(d)(2) and adds menstrual care products to the definition of "qualified medical expenses." The last sentence of IRC Section 223(d)(2) previously states that "qualified medical expenses" were limited to "an amount paid for medicine or a drug only if such medicine or drug is a **prescribed** drug (determined without regard to whether such drug is available without a prescription) or is insulin. Because the Act struck that provision, it appears that over-the-counter medications are now considered to be qualified medical expenses for purposes of HSAs, HFSAs and HRAs.

Employer-Sponsored Student Loan Repayment Programs

Employers can now institute a student loan repayment program whereby an employer can make student loan payments to or on behalf of an employee on a pre-tax basis up to $5,250.

Section 2206. Exclusion for certain employer payments of student loans (federal and private), as long as the loan applies to the employee's education.

The provision enables employers to provide a student loan repayment benefit to employees on a tax-free basis. Under the provision, an employer may contribute up to $5,250 annually toward an employee's student loans, and such payment would be excluded from the employee's income. The $5,250 cap applies to both the new student loan repayment benefit as well as other educational assistance (e.g., tuition, fees, books) provided by the employer under current law. The provision applies to any student loan payments made by an employer on behalf of an employee after date of enactment and before January 1, 2021.

- Under Section 2206 – all employer provided payments to an employee's student loan debt will be made on a federal tax-free basis to that employee, provided that employee doesn't receive in excess of $5,250 in a single year including any tuition reimbursement benefit they may receive. This provision is essentially enacting H.R.1043/S.460 – Employer Participation in Repayment Act – that has gained significant bi-partisan support in both the House and Senate over the past year.
- State payroll and income taxes may still need to be withheld. It remains to be determined how each state will treat this.
- This does not apply to Parent Plus loans or spousal loans.

Section 3513. Temporary Relief for Federal Student Loan Borrowers: Requires the Secretary to defer student loan payments, principal, and interest for 6 months, through September 30, 2020, without penalty to the borrower for all federally owned loans. This provides relief for over 95 percent of student loan borrowers.

- Under Section 3513 – borrowers will be allowed to put their student loan payments on-hold for the next 6 months and no interest will accrue during this period on the outstanding loan balance(s). This legislation is specific to Federal student loan debt held by the US Dept of Education and therefore has no effect on student debt held by private lenders. During this period, for each month a loan payment was due and not made the borrower of the loan, the borrower will be given credit for purposes of any loan forgiveness program or loan rehabilitation program.

All reporting to Consumer Reporting Agencies during this time will reflect that the loan borrower had continued to make their Minimum Monthly Payment due. Also, all Involuntary Collection of delinquent loans, including wage garnishment, will be put on hold during this period.

What does that mean?

- For Americans struggling to make payments against their student loan debt during this crisis, Section 3513 provides significant relief for those individuals and their families by removing that burden for the next 180 days, while at the same time maintain those individuals credit ratings and loan forgiveness options.
- Section 2206 removes a major barrier for employers who have been planning to offer a student loan repayment benefit once the IRS tax code is changed to treat those employer contributions in an identical pre-tax manner as retirement contributions and tuition reimbursement benefits. While the Stimulus Plan enacts a pre-tax treatment through the end of this year (12/31/2020), we do still expect Congress to permanently enact the IRS tax code change through passage of H.R.1043/S.460 later in 2020.

For the most updated information regarding these and other Coronavirus-related changes, please visit the Department of Education website at studentaid.gov/announcements-events/coronavirus.

Please be advised that any and all information, comments, analysis, and/or recommendations set forth above relative to the possible impact of COVID-19 on potential insurance coverage or other policy implications are intended solely for informational purposes and should not be relied upon as legal advice. As an insurance broker, we have no authority to make coverage decisions as that ability rests solely with the issuing carrier. Therefore, all claims should be submitted to the carrier for evaluation. The positions expressed herein are opinions only and are not to be construed as any form of guarantee or warranty. Finally, given the extremely dynamic and rapidly evolving COVID-19 situation, comments above do not take into account any applicable pending or future legislation introduced with the intent to override, alter or amend current policy language.