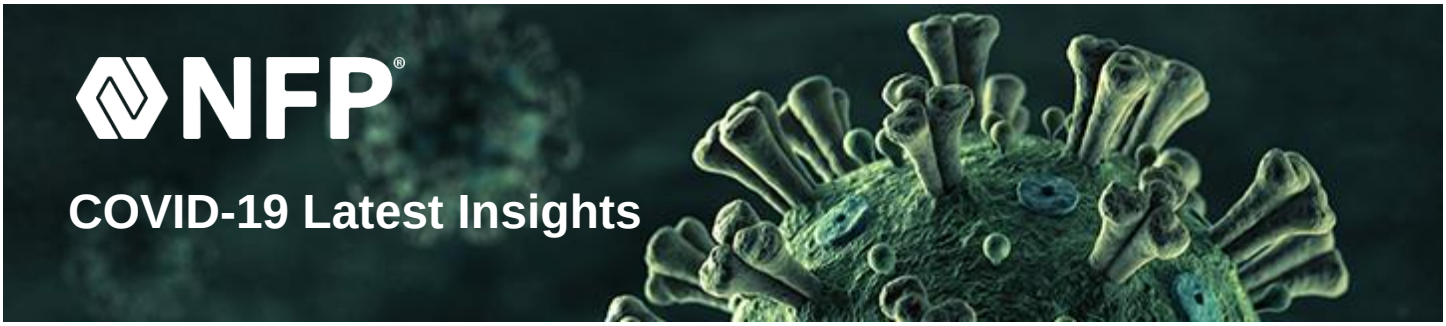


Frequently Asked Questions: Benefits Compliance and COVID-19

DISCLAIMER: Information presented in this FAQ is subject to change pending additional guidance from the Department of Labor, the Internal Revenue Service, and other regulatory agencies.

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

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

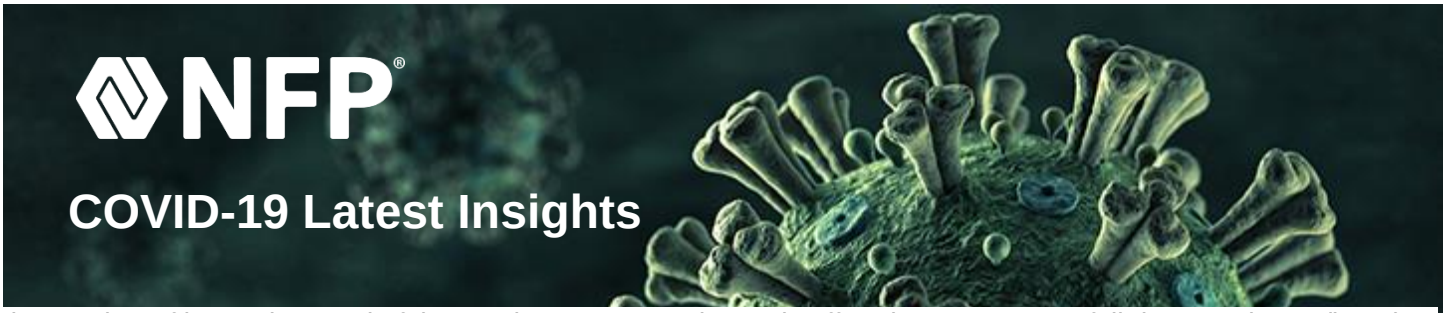
Generally speaking, the impact to benefits administration will depend on employer policies and plan documentation. More specifically, whether benefits can be extended during a furlough would depend upon the eligibility terms of the group health plan. The employer will also need to consider the employer 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 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.

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.

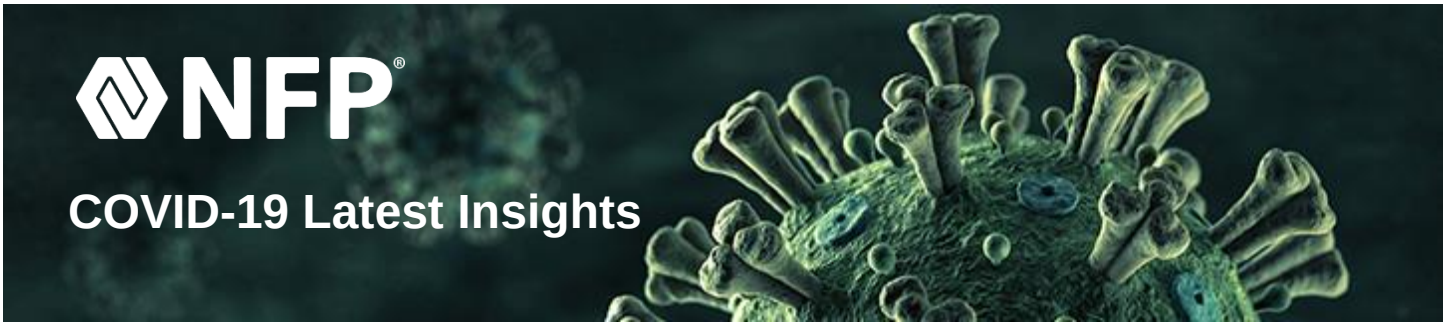
Section 125 Cafeteria Plan Document and Reinstatement

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 employers return to work after 30 days but before 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.

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.

If eligibility during 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.

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.

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.

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

What is the Families First Coronavirus Response Act (FFCRA)?

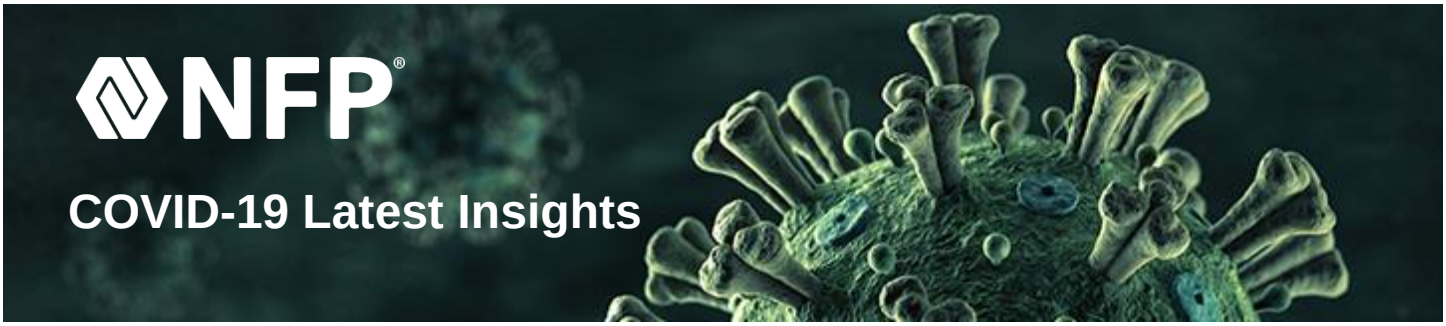
On March 18, 2020, the FFCRA was signed into law. Importantly, the FFCRA has a significant impact on employer benefits and leave policies, particularly for those employers with fewer than 500 employees. The FFCRA:

- 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.

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.

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.

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 will provide future guidance outlining how small businesses may claim the exemption. Until such guidance is provided, 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.

How does FFCRA apply to non-profit organizations?

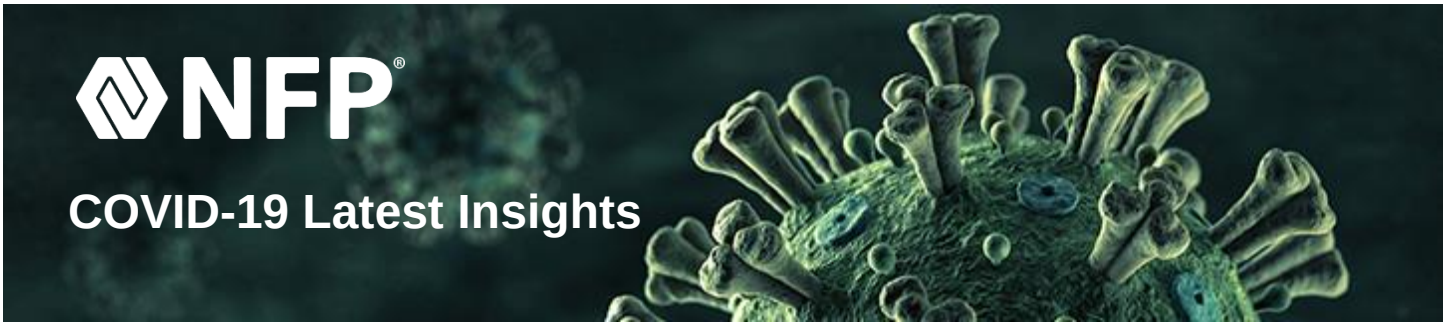
There is no exemption generally, and non-profit and other tax-exempt organizations can claim the related refundable tax credits as well (since those are an offset to employment taxes, which non-profits and tax-exempt organizations must pay).

Does FFCRA apply to union employees?

Yes, union employees would still be eligible for leave under 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 the required contributions to a multiemployer fund, plan, or program that allows the employees to receive this pay pursuant to the collective bargaining agreement.

Are there definitions of "full time" and "part time" for purposes of FFCRA?

The FFCRA does not define these terms. Absent additional regulatory guidance, the ACT does seem to reflect that "full-time" means working 40 hours a week and that "part-time" is any number of hours less than that during a week. We base this assumption on the fact that the Act pro-rates the amount of paid sick leave due to part-time employees based on their average hours over two weeks. As such, it seems that the Act, which provides 80 hours, would equate full-time status to 40 hours per week.



How does an employee qualify for expanded FMLA?

Employees can take 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 daycare has closed because of a COVID-19 emergency declared by a federal, state or local authority.

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 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.

Can emergency FMLA be used intermittently?

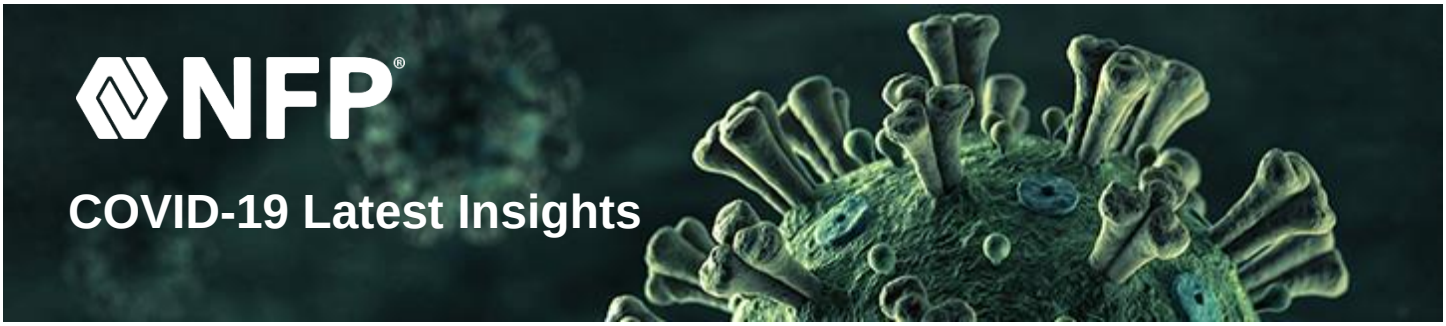
Yes. Since the emergency FMLA leave is an expansion of FMLA leaves generally, the standard FMLA rules regarding the taking of leave would appear to apply, including the ability to take that emergency FMLA leave on an intermittent basis.

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

Absent additional regulatory guidance, we believe that 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 it appears that he or she will not be able to use the expanded FMLA leave.

Will FMLA forms be updated to reflect the new leave?

The answer is unclear, particularly since the emergency FMLA extension is only temporary. We will have to wait for additional DOL guidance to see if the FMLA forms will be formally updated.



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". The legislation does not explain what is "practicable" under these circumstances, and the statute is also silent regarding what documentation an employee must provide in order to obtain the expanded FMLA leave. We are hopeful that there will be additional regulatory guidance on this issue.

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 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)

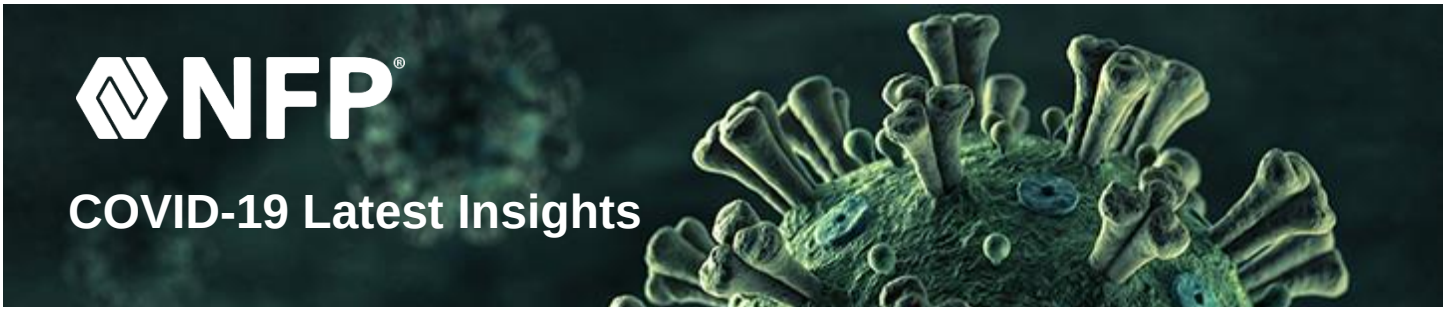
How does an employee qualify for the Emergency Paid Sick Leave?

This provision requires employers to provide up to 80 hours of paid sick time to employees who are:

- 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
- 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
- Experiencing any other substantially similar conditions specified by HHS (in consultation with the DOL and Treasury)

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 works 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.

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.

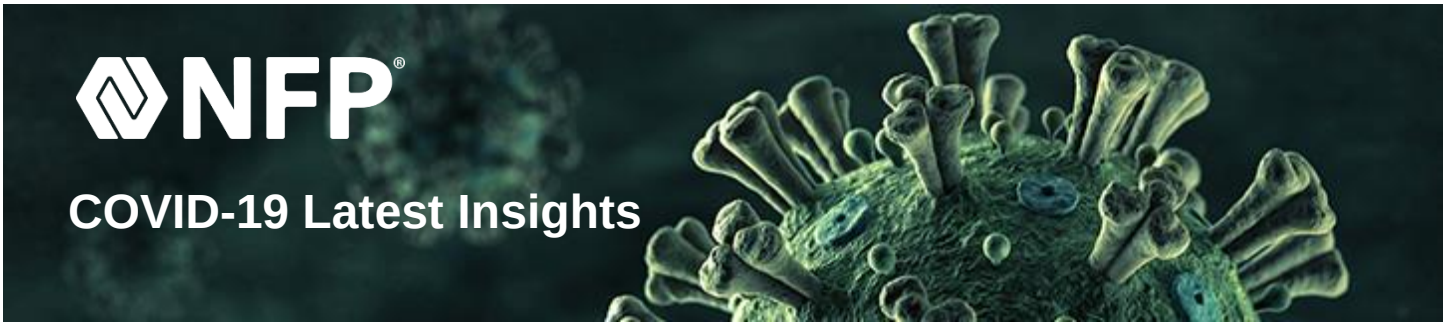
May an employee use emergency paid sick leave for 10 days before their paid emergency FMLA extension leave kicks in, if they are unable to work or telework because they are caring for a son or daughter who is out because school or daycare is closed?

Yes, assuming the employee is unable to work or telework. Employees could also choose to use employer PTO time (vacation, PTO, or other accrued sick leave) during that 10-day period.

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 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. The statute is silent regarding what documentation an employee must provide in order to obtain the Emergency Paid Sick Leave. It appears that any documentation requirements imposed by employer sick leave policy would apply here, although there may be additional regulatory requirements issued on this matter.



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.

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).

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 or prior authorization requirements. Excepted benefits and retiree-only plans are exempt from this requirement.

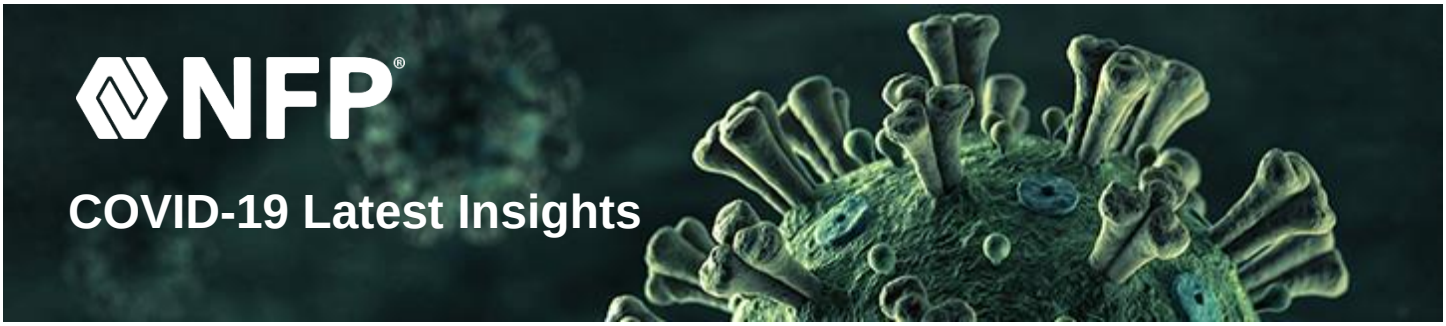
The tests and services include in vitro diagnostic tests (cleared by the FDA) and items and services furnished during an in-office visit, telehealth, urgent care visit or emergency room visit that result in an order for an in vitro diagnostic test. Thus, an individual visiting an ER who is given several 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.

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 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, 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.

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.

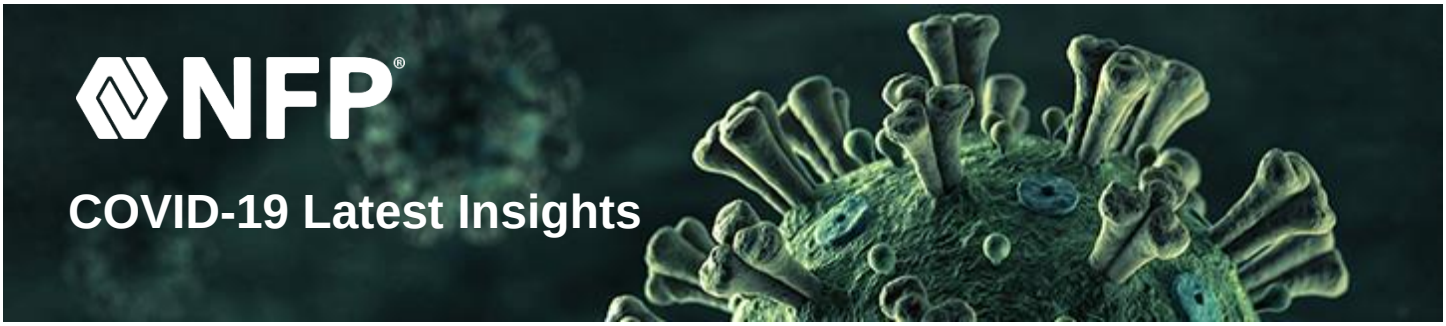
What are employers doing for employees that are ineligible for or previously waived group health plan coverage?

a. 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, 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.

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

Generally speaking, an employer could make telehealth services available to non-benefit eligible employees, but they would need to consult with legal counsel about whether doing so establishes another group health plan that would need to comply with the different benefits-related laws.



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

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.

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.

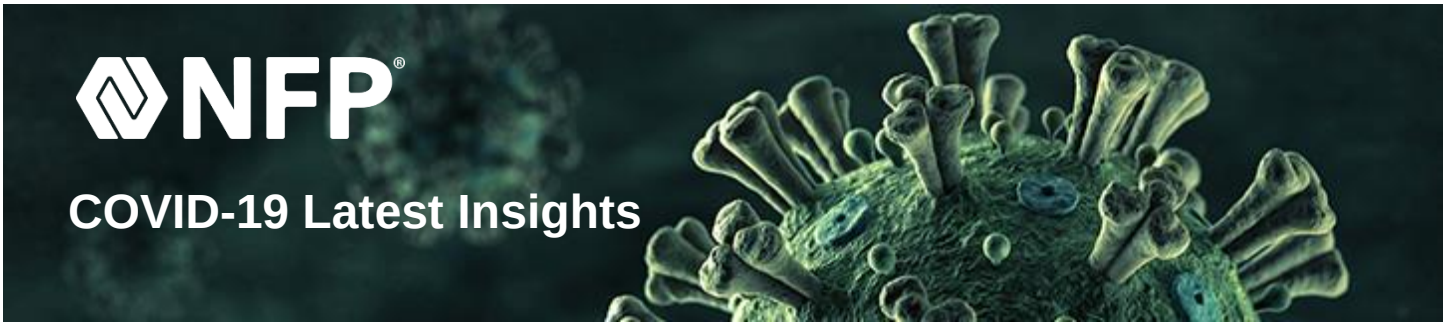
What are the employer tax credits provided by the FFCRA?

To help with any tax burden caused by the FMLA expansion, employers (and self-employed individuals) may claim a tax credit against the employer's share of the payroll tax equal to 100% of qualified FMLA wages paid to employees, capped at $200 per day and $10,000 per quarter per employee. The credit is refundable if it exceeds the amount the employer owes in payroll tax.

The paid sick time payroll tax credit can be claimed on a quarterly basis. It is equal to 100% of qualified sick leave wages paid to employees capped at $200 per day ($2,000 total) or $511 per day ($4,110 total), depending on the qualifying leave event. The credit is refundable (meaning employers can claim and receive the credit even if it exceeds the amount the employer owes in payroll tax).

These credits are increased by specified health expenses (e.g., employer-paid health plan premiums), but limited to qualified health plan expenses that are excluded from employees' income as coverage under an accident or health plan.

These tax credits effectively offset the amount of federal employment taxes that must be deposited with the IRS, usually within a few days of the payroll date. This is intended to provide the funds needed to pay sick and family leave benefits under the FFCFRA.



The credit may not exceed the Social Security tax imposed on the employer, reduced by any credits allowed for the employment of qualified veterans and research expenditures of qualified small businesses. Further, no credit is allowed with respect to wages for which a credit is already allowed under Section 45S (i.e., the Paid Family Leave Credit, enacted in 2017).

As an example of how the credits will work, if an eligible employer paid $5,000 in sick leave and is otherwise required to deposit $8,000 in payroll taxes, including taxes withheld from all its employees, the employer could use up to $5,000 of the $8,000 of taxes it was going to deposit for making qualified leave payments. The employer would only be required under the law to deposit the remaining $3,000 on its next regular deposit date.

If an eligible employer paid $10,000 in sick leave and was required to deposit $8,000 in taxes, the employer could use the entire $8,000 of taxes in order to make qualified leave payments and file a request for an accelerated credit for the remaining $2,000. The IRS will publish a form for that request, to be available on their website.

Other than a requirement that self-employed persons maintain documentation in order to claim tax credits, the FFCRA leaves documentation requirements to the Department of the Treasury to describe in regulation. Employers should work with their CPAs or outside tax counsel for specific advice and guidance on claiming the tax credit. More information is available through IR 2020-57: https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus

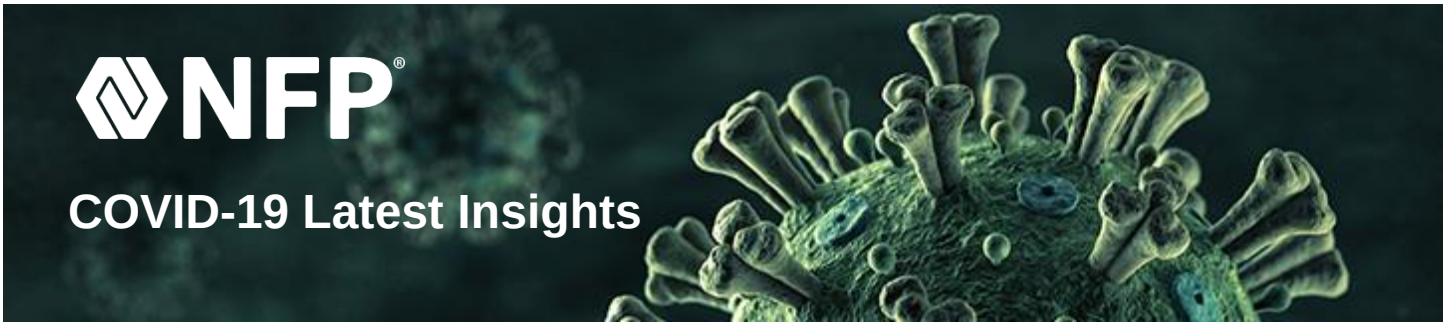
Are there state and/or local laws mandates that apply?

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

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.

During the COVID-19 pandemic, what types of health disclosures are allowed under HIPAA?

Per the EEOC, during a pandemic, employers may ask employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the Americans with Disabilities Act (ADA).

Another consideration is the Genetic Information Nondiscrimination Act (GINA). GINA prohibits employers from asking their employees about the manifested diseases of the employee's children/family members. Employers should be mindful of GINA when asking employee's about potential exposure to COVID-19.

If an employee tests positive for COVID-19 or is otherwise quarantined, what information can be shared with the workforce (i.e. who can the information be shared with)?

While employers can generally inform their workforce to take necessary precautions, employers should not specifically identify the employee and should speak in general terms.

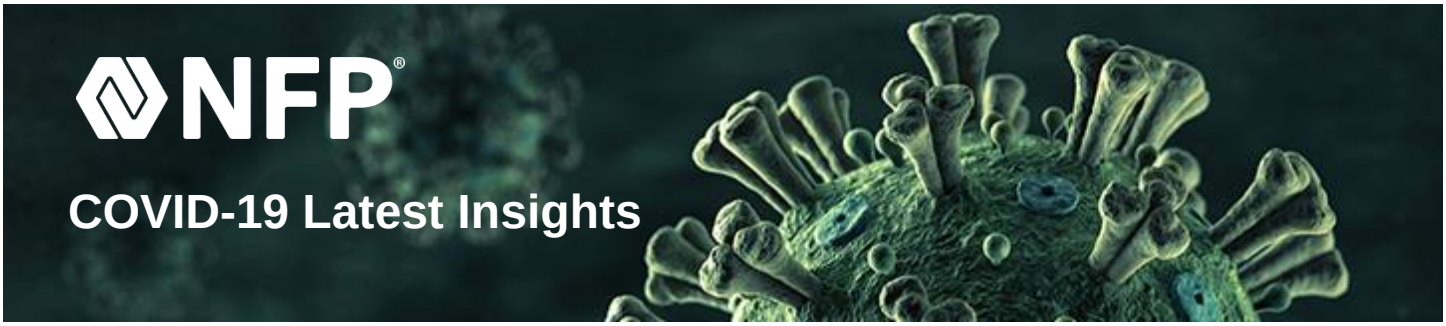
Other Frequently Asked Questions

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. In the current COVID-19 environment, with daycares and other childcare options temporarily closing, a decrease in (or cancelation of) a DCAP election would likely be permitted. In addition, when the daycare re-opens, participants are able to increase their DCAP elections accordingly.

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

There is no direct guidance on this issue yet. IRS Notice 2020-15 only addressed the HDHP/HSA implications of COVID-19 diagnosis and treatment. However, if the IRS guidance in Notice 2020-15 were broadly applied, then HSA-eligibility would not be impacted. We hope the agencies will provide further clarifications on this issue—



particularly in the environment we are in with expanded and immediate use of telehealth services in the social distancing environment. Employers that would like to waive the cost of telemedicine services that are not related to COVID-19 should consider the risks associated with the IRS taking a different position (employees could all lose HSA eligibility)—and should work with outside counsel in determining the actual level of risk.

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.

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.

This information has been provided as an informational resource for NFP 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. If you have questions, please reach out to your NFP contact.