
# House Passes Free COVID-19 Testing Coverage Mandate for All Group Health Plans

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On Friday, the House passed H.R. 6201, the "Families First Coronavirus Response Act" or "FFCRA," overwhelmingly by a 363-40 vote.

- **Full text of the FFCRA is available here.**

- **House summary of the FFCRA is available here.**

Senate Majority Leader Mitch McConnell issued a press release on Saturday stating that he has cancelled this week's previously scheduled "state work period [Senators working in their home states] so the Senate can work on this urgent legislation."

He also stated that "Senators will need to carefully review the version just passed by the House," but added his belief that "the vast majority of Senators in both parties will agree we should act swiftly." The Senate generally must have a 60-vote supermajority to avoid the filibuster and ensure passage. That appears likely to occur in the coming days.

President Trump has already indicated his approval of the bill and intent to sign it into law if passed by the Senate, stating on Twitter: "Look forward to signing the final bill, ASAP!"

The FFCRA includes a number of provisions designed to address the emerging issues in the COVID-19 pandemic, including the following provisions directly relevant to employers:

Federal Group Health Plan Mandate to Cover COVID-19 Testing Without Cost Sharing

The FFCRA requires that all employer-sponsored group health plans—including fully insured, self-insured, and grandfathered plans—cover COVID-19 testing expenses without any cost sharing. The mandate would apply to diagnostic testing, including the cost of a provider, urgent care center, and emergency room visits in order to receive testing.

This means that no group health plan could impose any deductibles, copays, coinsurance, or any other form of out-of-pocket expense for any covered individual who receives COVID-19 testing.

This new FFCRA mandate comes in the wake of multiple states imposing state insurance mandates along the same lines for fully insured plans.

The IRS has also already confirmed that HDHPs will maintain HDHP status if they provide medical care services and items related to testing for and treatment of COVID-19 prior to satisfaction of the applicable minimum deductible. As a result, this new COVID-19 testing first-dollar coverage mandate will not affect HSA eligibility.

It is extremely rare for the federal government to impose a health plan coverage mandate applicable to all group health plans. Almost all coverage mandates are state insurance mandates that apply only to fully insured plans sitused in that state (and are preempted by ERISA for self-insured plans). Examples of other broadly applicable federal mandates include NMHPA, WHCRA, and the ACA preventive services coverage mandate.

- For more details on the interaction between federal and state coverage mandates, including other examples of federal coverage mandates, see our previous post: ERISA Preemption of State Insurance Mandates.

Although not specified in the bill, presumably regulators (DOL/IRS/HHS) would shortly provide guidance confirming that the FFCRA COVID-19 testing coverage mandate does not apply to excepted benefits, such as dental, vision, or health FSA coverage.

**Summary: The FFCRA would require that all employer-sponsored group health plans, including self-insured group health plans, cover COVID-19 testing without imposing any cost-sharing (deductible, copay, or coinsurance) on the covered employee or family member.**

Summary of Material Modifications (SMM) Required
Employers must provide an SMM whenever there is a material change to the plan. This FFCRA COVID-19 testing coverage mandate would qualify as a material modification.

**Timing Rules:**
Different SMM distribution timing rules apply depending on whether the type of material change:

- **Material Reduction in Covered Services (health plans only):** Within 60 days after adoption of the change.

- **All Other Material Changes:** Within 210 days after the end of the plan year.

This new FFCRA COVID-19 testing coverage mandate is not a reduction in covered services, and therefore standard 210 days after the end of the plan year outer deadline applies.

However, best practice is to provide the SMM much sooner than that outer deadline. Participants relying on outdated materials may have cause to bring a breach of fiduciary duty claim against an employer that failed to timely notify employees of important plan changes.

Best practice is always to provide the SMM as soon as possible following a change in plan coverage.

**Relying on Carrier/TPA Materials Recommended:**
The insurance carriers and TPAs for self-insured plans will likely be providing materials describing these FFCRA plan changes soon. These carrier materials are generally incorporated by reference in the wrap SPD, and therefore they will satisfy the employer's SMM requirement if properly and timely distributed.

We generally recommend against employers creating their own materials to describe this new COVID-19 coverage. Employers developing their own materials must take extra care to ensure there are no inconsistencies with the terms of the plan. Any inconsistency could give rise to an employee bringing an ERISA claim for benefits or breach of fiduciary duty against the employer.

**Important Note re SPD Distribution Satisfying SMM Requirement:**
There is no need to distribute an SMM if the changes are incorporated into an updated SPD that is distributed by the applicable SMM deadline above.

Therefore, if carriers or TPAs choose to update the entire EOC, policy, certificate of coverage, summary of benefits, or other document describing covered benefits under the plan to reflect the FFCRA COVID-19 testing coverage mandate, no separate SMM will be required as long as such document is timely and properly distributed to employees.

**Posting on Employer Intranet:**
For employees with work-related computer access that is integral to their job duties, posting the SMM to the employers' intranet, benefits portal, wiki, etc. is sufficient—as long as employers notify employees of the new ERISA materials that have been posted.

The ERISA electronic disclosure rules require that employers take appropriate and necessary means to ensure that the system for furnishing documents results in the actual receipt of the documents. There has been bad case law in the past of employers posting new ERISA documents to an intranet without notifying their employees, and the court therefore finding that the employees could rely on the prior documents. (See *Gertjejansen v. Kemper Ins. Cos., 274 Fed. Appx. 569* (9th Cir. 2008)).

Simply posting an SMM on an intranet site without notification to employees is therefore not a good practice. Nonetheless, there is no need to send the actual SMM or other ERISA documents via email—notifying employees that the documents are posted on the intranet is sufficient.

- For full details on SMM distribution generally, see our previous post: Distribution Timing Rules for SPDs and SMMs.

- For details on ERISA's electronic disclosure rules, see our previous post: ERISA Electronic Disclosure Rules.

**Summary: We recommend employers distribute to employees any new materials prepared by their group health plan's insurance carriers or TPAs describing the FFCRA COVID-19 testing coverage mandate as an SMM. Employers posting the materials to an intranet system should also notify employees that the new materials have been posted.**

Emergency Paid Sick Leave

This section requires employers with fewer than 500 employees and government employers to provide employees two weeks of paid sick leave, paid at:

a) the employee's regular rate, to quarantine or seek a diagnosis or preventive care for coronavirus; or

b) two-thirds the employee's regular rate to care for a family member for such purposes or to care for a child whose school has closed, or child care provider is unavailable, due to the coronavirus.

Additional provisions:

- Full-time employees are entitled to 2 weeks (80 hours) and part-time employees are entitled to the typical number of hours that they work in a typical two-week period.

- The bill ensures employees who work under a multiemployer collective agreement and whose employers pay into a multiemployer plan are provided with leave.

- Refundable payroll tax credits would be available to employers to cover the full cost of providing such paid sick leave each quarter, up to a cap of $511 per day for the employee's sickness, and $200 per day for the employee to care for a family member or child whose school or daycare has closed (both with a 10 day/quarter/employee cap). The credit would be taken against the employer portion of the Social Security FICA payroll taxes.

This emergency paid sick leave requirement would sunset on December 31, 2020.

Emergency Expansion of FMLA

This section provides employees of employers with fewer than 500 employees and government employers, who have been on the job for at least 30 days, with the right take up to 12 weeks of job-protected leave under the Family and Medical Leave Act (FMLA) to be used for any of the following reasons:

- To adhere to a requirement or recommendation to quarantine due to exposure to or symptoms of coronavirus;

- To care for an at-risk family member who is adhering to a requirement or recommendation to quarantine due to exposure to or symptoms of coronavirus; and

- To care for a child of an employee if the child's school or place of care has been closed, or the child-care provider is unavailable, due to a coronavirus.

After the two weeks of paid leave, employees will receive a benefit from their employers that will be no less than two-thirds of the employee's usual pay.

Summary

We will continue to provide updates on any revisions made to the FFCRA by the Senate, as well as the likely passage and enactment of the bill in some form by the end of the week.