



# Compliance Alert

## How the CARES Act Affects Employee Benefits

March 26, 2020

By: Brian Gilmore, Lead Benefits Counsel, VP

Late last night, the Senate [unanimously passed](#) the massive [Coronavirus Aid, Relief, and Economic Security Act](#) (“CARES Act”). The House is expected to pass the CARES Act [as soon as Friday](#), which will send the bill to the White House for President Trump’s swift signature.

It’s almost impossible to overstate the size and scope of the bill. In short, it is roughly a \$2 trillion mega-bill designed to address the incredible fallout from the COVID-19 pandemic by immediately providing relief to public health, citizens, employers, and employees.

**For a running summary of all the issues related to COVID-19 and employee benefits, see our [ABD COVID-19 and Employee Benefits Guide](#).**

The following is a summary of the provisions in the CARES Act that affect employee benefits:

### FFCRA Free COVID-19 Testing Mandate Expanded

[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 during the emergency period. The mandate applies 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 can impose any deductibles, copays, coinsurance, or any other form of out-of-pocket expense for any covered individual who receives COVID-19 testing during the emergency period.

The CARES Act expands on the types of testing that plans must cover without cost-sharing to include other specific forms of tests or additional tests as may be specified by the Secretary of HHS in future guidance.

It also ensures that group health plans will reimburse providers for the testing costs at a rate negotiated before the public health emergency was declared, or at the amount posted by the provider on its website if no such negotiated rate exists with the provider. The CARES Act places

a new obligation for all providers of COVID-19 testing to make the cash price for testing public on their website.

Perhaps most significantly, the CARES Act expands upon the FFCRA coverage mandate to include free coverage of preventive services or vaccines for COVID-19, should items or services become available. To qualify, the item, service, or immunization designed to prevent or mitigate COVID-19 must be recommended by the US Preventive Services Task Force or the CDC. The coverage mandate will take effect 15 business days after such recommendation date.

We anticipate that insurance carriers and TPAs will make materials available shortly that employers can use to [satisfy the requirement](#) that employers provide a Summary of Material Modifications (SMM) to employees describing the FFCRA/CARES Act changes.

As a reminder, [the IRS has confirmed](#) that none of these first-dollar COVID-19 coverage mandates will affect HSA eligibility.

#### Clarifications and Minor Modifications to FFCRA Paid Sick Leave

The FFCRA imposes new emergency paid sick leave and emergency FMLA leave requirements on employers with fewer than 500 employees.

**For an update on the most recent DOL guidance on this issue, see our [ABD COVID-19 and Employee Benefits Guide](#).**

The CARES Act corrects a drafting error in the FFCRA to confirm that the \$200/day and \$10,000/aggregate paid leave maximums for employers subject to the emergency FMLA provisions, and the \$200/511/day and \$2,000/\$5,110 aggregate limits for employers subject to the emergency paid sick leave requirements, apply per employee taking leave.

The CARES Act also clarifies how the 30-day requirement applies for rehires to be eligible for emergency FMLA leave. If an employee was laid off by the employer on or after March 1, 2020, and had worked for the employer at least 30 of the last 60 calendar days prior to the layoff, the employee is eligible for the emergency FMLA leave immediately upon rehire.

The CARES Act also provides additional procedures for employers to take an advance refunding of the payroll tax credit to cover the cost of the emergency paid sick leave and the paid portion of the emergency FMLA leave.

**Important Note: In the private sector, the emergency paid sick leave and emergency FMLA leave provisions continue to apply only to employers with fewer than 500 employees.**

#### HDHPs Can Provide First-Dollar Telehealth Services

An individual must meet two primary requirements to be HSA-eligible (i.e., to be eligible to make or receive HSA contributions):

- 1) Be covered by an HDHP; and
- 2) Have no disqualifying coverage (any medical coverage that pays pre-deductible).

As a general rule, HDHPs cannot cover any non-preventive expenses before the minimum statutory deductible (\$1,400 individual, \$2,800 family) is satisfied.

The CARES Act provides that for plan years beginning on or before December 31, 2021 (i.e., for a calendar plan year, the 2020 and 2021 plan years), HDHPs can provide first-dollar coverage for telehealth or other remote care services. This means that individuals covered under a HDHP that waives the deductible for telehealth services or other remote care can maintain HSA eligibility.

This new provision is effective immediately, but it will be up to each HDHP to determine whether it will choose not to apply the deductible to telehealth and other remote care. Employers with fully insured plans will rely on the insurance carrier for this determination. Employers with a self-insured plan can work with their TPA and stop-loss provider to coordinate whether this new option will apply.

See our [ABD 2020 Go All the Way With HSA Guide](#) for full details on HSA issues.

### HSA/FSA/HRA: No Prescription Required for Over-the-Counter Medicines and Drugs

The CARES Act permanently eliminates the ACA rule that requiring that over-the-counter medicines and drugs (other than insulin) be prescribed to be eligible HSA/FSA/HRA expenses.

As a result, employees and qualifying dependents now may purchase any OTC medicines and drugs under an account-based plan without the need for a prescription.

The CARES Act also expands eligible expenses to include menstrual care products, including tampons, pads, liners, cups, sponges, or similar products.

These HSA/FSA/HRA OTC and menstrual care expense changes are effective for expenses incurred on or after January 1, 2020.

### Employer Student Loan Payments Excludible from Income

Employers can pay for up to \$5,250 of an employee's student loans on a tax-free basis from the date of the CARES Act enactment through the end of 2020.

The employer payment can be made to the employee or directly to the lender. It must be for principal or interest on a qualifying education loan incurred by the employee.

The \$5,250 limit mirrors the cap on a §127 [qualified educational assistance program](#).

### Retirement Plan Provisions

The CARES Act makes several significant changes to 401(k) and other retirement plans:

- The 10% early withdrawal tax will not apply to any "coronavirus-related distribution" ("CRD") up to \$100,000 for any year.
- A CRD includes a distribution made from a retirement plan between January 1, 2020 and December 31, 2020 for an individual meeting one of the following requirements:
  - o The individual, spouse, or dependent has been diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the CDC;

- The individual has experienced adverse financial consequences caused by the individual being quarantined, furloughed, laid off, or having hours reduced due to such virus or disease;
  - The individual has experienced adverse financial consequences caused by the individual being unable to work because of lack of child care due to such virus or disease;
  - The individual has experienced adverse financial consequences caused by the closing or reducing hours of a business owned or operated by the individual due to such virus or disease; or
  - Other factors determined by the Secretary of the Treasury.
- The administrator of the retirement plan may rely on an employee's certification of the factors required for a CRD.
  - The amount included in gross income from a CRD can be spread ratably over a three-year period beginning in the year of the distribution.
  - A CRD is considered a distributable event.
  - For individuals who are eligible for a CRD, the cap on 401(k) plan loans is increased from \$50,000 to \$100,000, and employees may take up to the full balance of their account within that limit (previously limited to half).
  - For individuals who are eligible for a CRD, any loan repayments due during the period from enactment to December 31, 2020 can be delayed for one year, and the five-year repayment period will disregard 2020 delayed period.
  - Required minimum distributions ("RMDs") are not be required for calendar year 2020. RMDs taken in 2020 are eligible for rollover (in the same manner as the 2009 rule).
  - These changes take effect as of January 1, 2020. Conforming plan amendments are not required until the last day of the first plan year beginning on or after January 1, 2022 (or a later date as set by the Secretary of the Treasury).

### Possible Postponement of ERISA-Related Deadlines

The CARES Act permits the Secretary of Labor to delay deadlines related to ERISA for a public health emergency declared by the Secretary of HHS. HHS Secretary Azar [declared a public health emergency](#) on January 31, 2020.

### Summary

The CARES Act provides yet another set of significant new employee benefits-related legal changes for employers to consider.

Stay tuned for more updates as new COVID-19-related legislation and guidance comes out.

**For a running summary of all the issues related to COVID-19 and employee benefits, see our [ABD COVID-19 and Employee Benefits Guide](#).**

*Disclaimer: The intent of this analysis is to provide the recipient with general information regarding the status of, and/or potential concerns related to, the recipient's current employee benefits issues. This analysis does not necessarily fully address the recipient's specific issue, and it should not be construed as, nor is it intended to provide, legal advice. Furthermore, this message does not establish an attorney-client relationship. Questions regarding specific issues should be addressed to the person(s) who provide legal advice to the recipient regarding employee benefits issues (e.g., the recipient's general counsel or an attorney hired by the recipient who specializes in employee benefits law).*