



Compliance Alert

President Signs Bill with Free COVID-19 Testing Coverage Mandate for All Group Health Plans

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President Trump signed into law the [Families First Coronavirus Response Act](#) (“FFCRA”) yesterday night.

The bill worked through Congress with amazing speed to match the country’s quickly broadening needs in response to the COVID-19 pandemic. After [passing the House last Friday](#), the Senate passed the bill earlier in the day Wednesday.

Despite the Republican Senate’s reservations about the bill, which originated from the Democratic House, Senate Majority Leader McConnell [directed his fellow Senate Republicans](#) to “gag and vote for it anyway.” They ultimately passed the bill by [a wide margin of 90-8](#).

The FFCRA’s passage now clears the path for a much larger ([potentially \\$1 trillion](#)) third round of COVID-19 legislation from a bill that is likely to come next out of the Senate.

The FFCRA includes several 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 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.

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 situated 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 law, presumably the regulators charged with implementation (DOL/IRS/HHS) will shortly provide guidance confirming that the FFCRA COVID-19 testing coverage mandate does not apply to group health plans that qualify as excepted benefits, such as dental, vision, or health FSA coverage.

Summary: The FFCRA requires that all employer-sponsored group health plans, including self-insured group health plans, immediately 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 qualifies 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 the standard 210 days after the end of the plan year outer deadline applies.

However, employers should always make efforts to distribute an 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 therefore 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.

Updated SPD Distribution Also Satisfies 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 *Gertjeansen 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 for COVID-19 purposes (under a federal, state, or local order, or upon the advice of a health care provider) or to stay home from work when experiencing symptoms related to COVID-19 (up to \$511/day and \$5,110 in aggregate); 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 the childcare provider is unavailable, due to COVID-19 (up to \$200/day and \$2,000 in aggregate).

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.
- A workplace poster describing these emergency paid sick leave rights to employees is required, with a model notice to be released within seven days.

This emergency paid sick leave requirement take effect no later than 15 days after enactment (April 2, 2020) and will sunset on December 31, 2020.

*Important Note: For private sector employers, this emergency paid sick leave rule applies only to employers **with fewer than 500 employees**.*

Emergency FMLA Expansion

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) for a **qualifying need related to a public health emergency**.

- **“Qualifying need related to a public health emergency” defined:** The employee is unable to work (or telework) due to a need for leave to care for the employee's child under 18 years old if the child's school or daycare has closed or is unavailable because of a COVID-19-related emergency declared by a federal, state, or local authority.

The first 10 days of this public health emergency leave can be unpaid. Employees may elect to use accrued vacation, sick, or PTO time during this period.

After the first 10 days of this public health emergency leave, employers must provide paid leave for the remainder of the (up to 12-week period) of the leave.

The period of paid leave after the first 10 days must be at least two-thirds of the employee's regular rate of pay and based on the number of hours the employee would otherwise be normally be scheduled to work—up to a maximum of \$200 per day and \$10,000 in the aggregate.

Key Differences from the Standard FMLA Rules:

- The standard FMLA rules apply to employers with 50 or more employees in a 75-mile radius. This new public health emergency FMLA leave applies to employers with **fewer than 500 employees**.
- The standard FMLA rules apply to employees who have been employed at least 12 months and at least 1,250 hours over the past 12 months. This new public health emergency FMLA leave applies to employees who have been **employed at least 30 days**.
- The standard FMLA rules provide for unpaid job-protected leave. This new public health emergency FMLA leave provides for **paid leave at two-thirds of the employee's regular rate of pay after the first ten days**.

This new public health emergency FMLA leave takes effect no later than 15 days after enactment (April 2, 2020) and will sunset on December 31, 2020.

*Important Note: For private sector employers, this emergency FMLA expansion applies only to employers **with fewer than 500 employees**.*

Tax Credits for Paid Sick and Paid FMLA Leave

Within certain limits, employers will be allowed a credit against their payroll tax responsibility to cover the emergency paid sick leave and the period of paid emergency FMLA leave required by the FFCRA.

Summary

The changes made by the FFCRA are significant and present a real compliance challenge for employers during an already very difficult period. We expect the DOL, IRS, and HHS to provide significant guidance to simplify these rules and assist employers in the coming days.

We will continue to provide updates on any further COVID-19 legislation as additional bills to address the pandemic work their way through Congress.

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