

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

(enacted March 18, 2020)

Mandatory Coverage of COVID-19 Diagnostic Testing by Health Plans

The Act requires that self-funded group health plans and health insurance policies offering both individual and group health coverage (including grandfathered plans) cover the following without the imposition of any cost-sharing requirements (including deductibles, copayments, and coinsurance) or prior authorization or other medical management requirements, effective no later than March 18, 2020.

Mandated coverage includes:

1. FDA approved, cleared or authorized diagnostic (testing) products for the detection of SARS-CoV-2 or the virus that causes COVID-19.
2. Items and services furnished to an individual during health care provider office visits (including in-person visits and telehealth visits), urgent care center visits, and emergency room visits that result in an order for or administration of a diagnostic product described in number (1) above. These items and services must only be covered to the extent they relate to the furnishing or administration of the diagnostic product described above or to the evaluation of such individual for purposes of determining the need for testing.
3. Note that the Act does not mandate the use of telehealth services. Rather, if a self-funded group health plan or health insurance policy provides coverage for telehealth visits, the plan or policy may not impose any cost sharing on such telehealth services if they meet the requirements as stated above.
4. Also, be aware that some states may require that non-ERISA public employers provide coverage for COVID-19 testing, services and treatment differently than required under the Act. For instance, Ohio requires that non-ERISA, self-funded public employers consider COVID-19 testing and treatment as emergency medical services which must be covered without prior authorization at the in-network level of benefits even if provided out-of-network.

In addition, the mandated coverage of COVID-19 testing (without cost-sharing) applies to all levels of coverage in a group health plan, including all settings. That means that the waiver of cost sharing must be applied both in- and out-of-network (even if a plan has no out-of-network tier) and must waive the cost sharing in an office setting, if prescribed over the telephone, if testing is done in an urgent care setting, or an emergency room. If a charge is submitted to the plan for COVID-19 testing, the claim must be processed (without cost share) regardless of other restrictions listed in the group health plan document.

MedBen recommends that all group health plan sponsors amend their plans to include coverage of COVID-19 testing and any visit charges for same as described above from March 18, 2020 through December 31, 2020.

Coverage of COVID-19 Diagnostic Testing – High Deductible Health Plans

While not part of the *Families First Coronavirus Response Act (FFCRA)*, it is important to note that the Internal Revenue Service released Notice 2020-15 to address the payment of COVID-19 testing under qualified High Deductible Health Plans. In the Notice, the IRS confirms that a High Deductible Health Plan with a Health Savings Account will not lose its “qualified” status if it pays for COVID-19 related testing *or treatment* without a deductible, or with a deductible below the minimum required deductible.

When read in conjunction with the Families First Coronavirus Response Act, this means that HDHPs are required to pay for COVID-10 testing with no cost sharing. However, because the FFCRA does not require a group health plan to waive cost sharing for treatment of COVID-19, HDHPs will need to decide if they wish to extend benefits for treatment (i.e., beyond the mandate described in the FFCRA).

MedBen recommends that all high deductible health plan sponsors whose participants have qualified health savings accounts amend their high deductible health plans to include coverage of COVID-19 testing as described above from March 18, 2020 through December 31, 2020. A high deductible health plan sponsor also has the option of extending the waiver of cost sharing for COVID-19 treatment.

Mandatory Employer Paid Leave Provisions

The Act provides for two different types of additional paid leave for employees of private employers with fewer than 500 employees and public employers with at least one (1) employee (each considered a “Covered Employer”). The first requires a Covered Employer to provide up to twelve weeks of unpaid and paid leave under the Family and Medical Leave Act (“FMLA”) for certain employees unable to work due to a need to care for a child, as defined. The second requires Covered Employers to provide up to 80 hours of emergency paid sick leave related to certain specified coronavirus events. Both types of leave provisions are in effect until December 31, 2020.

Both the *Emergency Family and Medical Leave (“FMLA”) Expansion Act* and the *Emergency Paid Sick Leave Act* require that employers offer the additional leave as described below. In general, no amendment is required for MedBen client plans as both FMLA and paid sick time are defined as periods of time during which participants have plan coverage. However, MedBen recommends that all group health plan sponsors review their internal employment policies and amend those to allow temporary compliance with these provisions from April 2, 2020 through December 31, 2020.

Emergency Family and Medical Leave (“FMLA”) Expansion Act

From April 2, 2020 through December 31, 2020, the Act amends the FMLA to allow certain employees of Covered Employers to take 12 weeks of job-protected leave for a “Qualifying Need Related to a Public Health Emergency.” The first 10 working days (two weeks) of leave may be unpaid leave, while the remainder of the 12 weeks must be paid leave.

Several terms and conditions apply to this emergency FMLA expanded leave, including:

- “Qualifying Need Related to a Public Health Emergency” means the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the “Child Care Provider” of such son or daughter is unavailable due to a “Public Health Emergency.”
 - “Child Care Provider” means a provider who receives compensation for providing childcare services on a regular basis. It does not include family members who routinely watch or care for an employee’s dependents.
 - “Public Health Emergency” means an emergency with respect to COVID-19 declared by a Federal, State, or local authority.
- No other types of leave related to COVID-19 qualify under the expanded Emergency FMLA Expanded Act. For example, the Act does not require that a Covered Employer offer Emergency FMLA Expanded leave to an employee who becomes ill (whether or not related to COVID-19) if the employee has worked for the employer between 30 calendar days and one (1) year (when regular FMLA might be available). This also applies to recommended or mandated quarantine or caring for a broader definition of family member.
- The expanded emergency FMLA leave applies to employees who have been employed for at least 30 calendar days, rather than the 12-month period under the current FMLA.
- An employer of an employee who is a health care provider or an emergency responder is not required to provide this expanded, emergency FMLA leave to such employee.
- The Secretary of Labor has the regulatory authority to exempt employers with fewer than 50 employees (employers that, under normal circumstances, are not subject to the FMLA) if the provision of paid FMLA leave “would jeopardize the viability of the business as a going concern.”
- Employers are generally required to reinstate employees after their expanded emergency FMLA leave period ends, although the Act has exceptions for employers with fewer than 25 employees experiencing significant economic hardship.
- The first 10 working days (two weeks) for which an employee takes leave may be unpaid leave, or the employee may choose to substitute any accrued vacation, personal, or sick leave (or, in certain circumstances, the emergency paid sick leave discussed below). After the initial 10 working days, the employer *must* provide paid leave based on an amount that is *not less* than two-thirds (2/3rds) of an employee’s regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work. The amount of paid leave is capped at \$200 per day and \$10,000 in the aggregate. For employees whose schedule varies from week to week, special rules apply to calculate the average number of hours.
- Employers that are signatories to a multiemployer collective bargaining agreement can fulfill their obligations under the Act by making contributions to a multiemployer fund, plan, or program that provides paid leave based on hours worked under the agreement.
- The expanded emergency FMLA provisions are effective no later than April 2, 2020.

Emergency Paid Sick Leave Act

The Act requires Covered Employers to offer employees, regardless of how long they have been employed by the employer, paid sick leave in the following circumstances and subject to the following conditions, if the employee is unable to work (or telework) due to the need for leave as follows:

- The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis:
- The employee is caring for an individual who:
 - a. is subject to a Federal, State, or local quarantine or isolation order relate to COVID-19; or
 - b. has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- The employee is caring for a son or daughter if the child's school or place of care is closed, or the child-care provider is unavailable, due COVID-19 precautions.
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Several terms and conditions apply to this Emergency Paid Sick Leave, including:

- Full-time employees are entitled to 80 hours of paid leave and part-time employees are entitled to “a number of hours equal to the number of hours that such employee works, on average, over a 2-week period.”
- The paid leave mandated by the Act ends with the employee's next scheduled work shift following the end of the need for Emergency Paid Sick Leave under the Act.
- Paid sick time under the Act does not carry-over from one year to the next.
- An employer may not require and employee to use other paid leave provided by the employer before the employee uses the Emergency Paid Sick Leave available under the Act.
- The required sick pay is calculated based on the employee's regular rate of pay or, if higher, the applicable minimum wage rate. In the case of leaves to care for a family member or child, or an employee experiencing “any other substantially similar condition,” the required sick pay is based on two-thirds (2/3rds) of the regular rate of pay. For part-time employees whose schedule varies from week to week, special rules apply to calculate the average number of hours.

- There are also maximums applied to the emergency paid sick leave. If the sick leave is due to an official quarantine or isolation order, a health care provider's directive or self-quarantine, or because the employee is experiencing COVID-19 symptoms, the maximum amount of *required* sick pay per employee is \$511 per day and \$5,110 in the aggregate. If the sick leave is due any other reason, the maximum amount of *required* sick pay per employee is \$200 per day and \$2,000 in the aggregate. Tax credits are only available for these amounts.
- The Act provides that it shall be an unlawful act for an employer to "discharge, discipline, or in any other manner discriminate against" any employee who (1) takes a leave or (2) has instituted a complaint regarding the employer's failure to provide the requisite leave.
- An employer of an employee who is a health care provider or an emergency responder is not required to provide the paid sick leave to such employees.
- Employers must post and provide Notice to their employees regarding the Emergency Paid Sick Leave Act. The Secretary of Labor is to provide a model notice no later than March 25, 2020.

Once the Model Notice is published, MedBen will provide a copy to our clients. MedBen recommends posting the Notice in the places where the employer generally posts other required employment notices and sending copies to employees who may be working remotely.

- An employer is prohibited from requiring employees to look for or find replacement employees to cover the hours during which the employee is using the paid sick time. Violations are punishable under the Fair Labor Standards Act.
- Employers that are signatories to a multiemployer collective bargaining agreement can fulfill their obligations under the Act by making contributions to a multiemployer fund, plan, or program that provides paid leave based on hours worked under the agreement.
- The Emergency Paid Sick Leave provisions go into effect no later than April 2, 2010.

Employer Paid Leave Tax Credits

To assist employers in paying for the costs of the new mandated paid leave, the Act also provides a series of refundable tax credits to Covered Employers subject to the Act's emergency FMLA and emergency paid sick leave requirements. The refundable tax credits apply against the employer portion of Social Security taxes and are equal to 100% of the "qualifying" paid leave wages paid by the employer, up to the dollar limitations for the applicable paid leave types described above.

The Families First Coronavirus Response Act requires the Secretary of Labor to issue additional guidance to assist employers with compliance, including the FMLA and sick pay calculations required under the Act. Additional information will be forthcoming regarding filing for and obtaining tax credits.