Insurance & Financial Services

VIEW ON-DEMAND WEBINAR

FLIPBOOK VERSION

COVID-19 and Employee Benefits

The Pandemic's Effect on Your Plans

Updated: May 13, 2020

This Guide Will Be Updated for New Developments:

Click Here to Check for Latest Version

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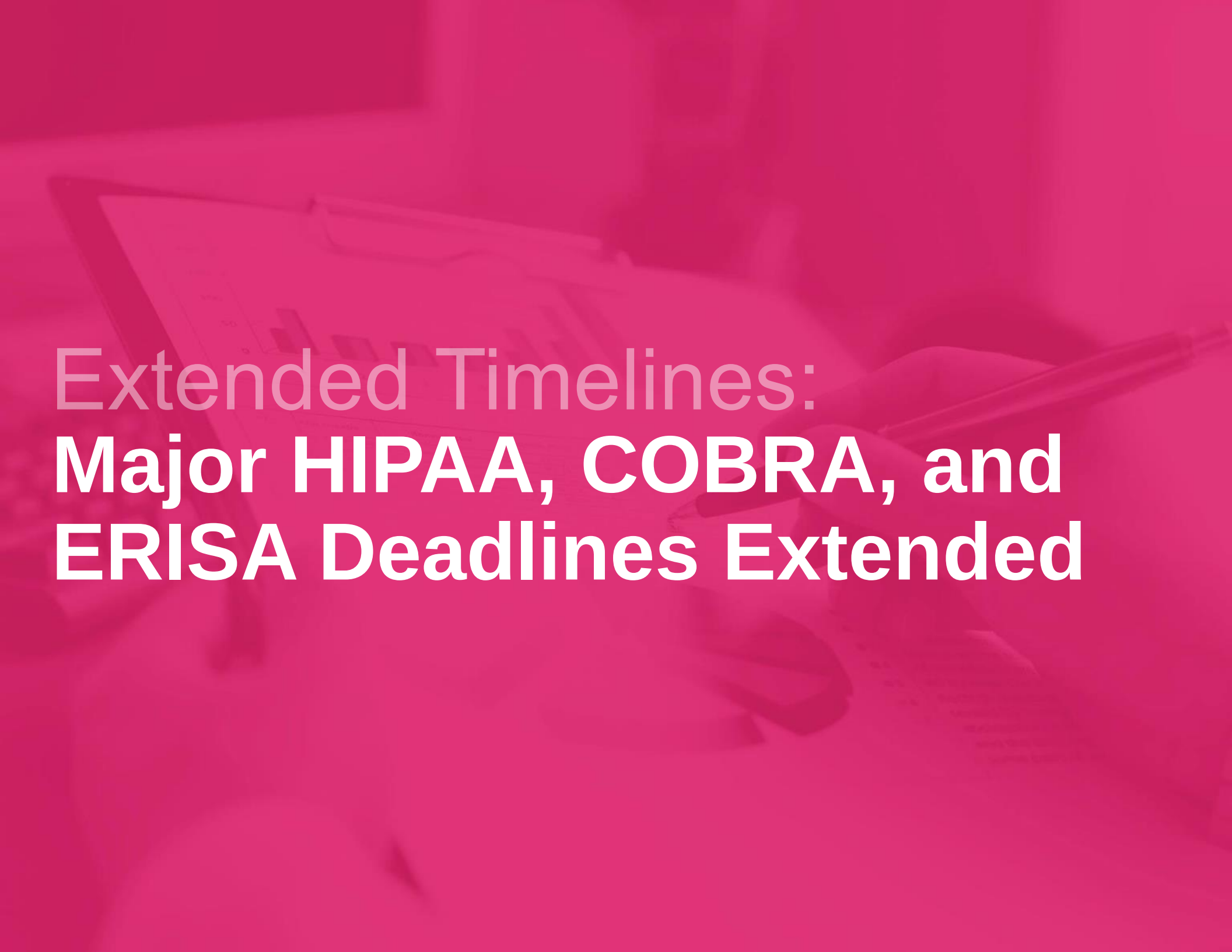


Extended Timelines:
Major HIPAA, COBRA, and ERISA Deadlines Extended

Extended Timelines:
Understanding the "Outbreak Period"

The Departments of Labor and the Treasury have extended multiple key employee benefits deadlines **by disregarding the "Outbreak Period"** from the timeline calculation.

The National Emergency:
From March 1, 2020 to TBD

President Trump has declared a national emergency and invoked a nationwide emergency determination under the Stafford Act related to COVID-19 effective March 1, 2020

- FEMA has also issued emergency declarations for every state, territory, and possession in the U.S.
- Collectively, this is referred to as the "National Emergency"

In light of the National Emergency, the Departments have extended multiple key employee benefits timelines

The Outbreak Period:
National Emergency + 60 Days

The Outbreak Period is defined as the National Emergency period through 60 days after the end of National Emergency period

- Means the Outbreak Period begins March 1, 2020 and ends 60 days after the announced end of the National Emergency period
  - No indication yet of the possible end date

Final Rules use April 30, 2020 as hypothetical National Emergency period end date for purposes of examples

- Realistically likely to last far longer—which will extend the Outbreak Period

Extended Timelines:
Extension of HIPAA Special Enrollment Period

The Departments of Labor and the Treasury have extended multiple key employee benefits deadlines **by disregarding the "Outbreak Period"** from the timeline calculation.

HIPAA Special Enrollment Rules:
30-Day and 60-Day Windows

30-Day Special Enrollment Period

- Loss of eligibility for group health coverage or individual health insurance coverage
- Acquisition of a new spouse or dependent by marriage, birth, adoption, or placement for adoption

60-Day Special Enrollment Period

- Loss of Medicaid/CHIP eligibility
- Becoming eligible for a state premium assistance subsidy under Medicaid/CHIP

The Outbreak Period:
Disregarded for Deadlines

The rules extend the 30-day and 60-day HIPAA special enrollment timeframes by disregarding the Outbreak Period

- *Example:* Employee has new child on March 31, 2020 and wants to use special enrollment to enroll child in health plan
- *Assume:* National Emergency period ends April 30, 2020, and therefore the Outbreak Period ends June 29, 2020
- *Result:* Employee would have until 30 days after the end of the Outbreak Period (by July 29, 2020) to enroll
  - No indication yet of actual Outbreak Period end date

Extended Timelines:
Extension of COBRA Election Notice

The Departments of Labor and the Treasury have extended multiple key employee benefits deadlines **by disregarding the "Outbreak Period"** from the timeline calculation.

COBRA Election Notice:
44-Day Timeframe to Provide

Election Notice to Qualified Beneficiary:

- 44 days from loss of coverage
  - 30 days from employer to plan administrator
  - 14 days from plan administrator to qualified beneficiary
  - DOL enforces as combined 44-day limit

Election by Qualified Beneficiary:

- 60 days from the date of the election notice

Initial Premium Payment Deadline:

- 45 days from the COBRA election date

Subsequent Monthly Premium Deadline:

- 30-day grace period starts at beginning of coverage month

The Outbreak Period:
Disregarded for Deadlines

The rules extend the plan's 44-day deadline to provide the COBRA election notice to a qualified beneficiary by disregarding the Outbreak Period

- *Example:* Terminated employee loses coverage as of April 1, 2020
- *Assume:* National Emergency period ends April 30, 2020, and therefore the Outbreak Period ends June 29, 2020
- *Result:* Employer would have until 44 days after the end of the Outbreak Period (by August 12, 2020) to provide the COBRA election notice
  - No indication yet of actual Outbreak Period end date

Extended Timelines:
Extension of COBRA Election Period

The Departments of Labor and the Treasury have extended multiple key employee benefits deadlines **by disregarding the "Outbreak Period"** from the timeline calculation.

COBRA Election Notice:
60-Day Timeframe to Elect

Election Notice to Qualified Beneficiary:

- 44 days from loss of coverage
  - 30 days from employer to plan administrator
  - 14 days from plan administrator to qualified beneficiary
  - DOL enforces as combined 44-day limit

Election by Qualified Beneficiary:

- 60 days from the date of the election notice

Initial Premium Payment Deadline:

- 45 days from the COBRA election date

Subsequent Monthly Premium Deadline:

- 30-day grace period starts at beginning of coverage month

The Outbreak Period:
Disregarded for Deadlines

The rules extend the 60-day deadline for employees/dependents to elect COBRA by disregarding the Outbreak Period

- *Example:* Reduced hour employee loses active coverage and receives COBRA election notice on April 1, 2020
- *Assume:* National Emergency period ends April 30, 2020, and therefore the Outbreak Period ends June 29, 2020
- *Result:* Employee would have until 60 days after the end of the Outbreak Period (by August 28, 2020) to make the COBRA election
  - No indication yet of actual Outbreak Period end date

Extended Timelines:
Extension of COBRA Premium Payment Period

The Departments of Labor and the Treasury have extended multiple key employee benefits deadlines **by disregarding the "Outbreak Period"** from the timeline calculation.

COBRA Premium Payment:
45-Day and 30-Day Deadlines

Election Notice to Qualified Beneficiary:

- 44 days from loss of coverage
  - 30 days from employer to plan administrator
  - 14 days from plan administrator to qualified beneficiary
  - DOL enforces as combined 44-day limit

Election by Qualified Beneficiary:

- 60 days from the date of the election notice

Initial Premium Payment Deadline:

- 45 days from the COBRA election date

Subsequent Monthly Premium Deadline:

- 30-day grace period starts at beginning of coverage month

The Outbreak Period:
Disregarded for Deadlines

The rules extend the 45-day initial premium and 30-day grace period for subsequent premium payment deadlines by disregarding the Outbreak Period

- *Example:* Qualified beneficiary fails to make timely premium payment by the end of the 30-day grace period for March, April, May, and June 2020
- *Assume:* National Emergency period ends April 30, 2020, and therefore the Outbreak Period ends June 29, 2020
- *Result:* Employee would have until 30 days after the end of the Outbreak Period (by July 29, 2020) to make premium payment
  - No indication yet of actual Outbreak Period end date

Extended Timelines:
Extension of COBRA Qualifying Event Notice

The Departments of Labor and the Treasury have extended multiple key employee benefits deadlines **by disregarding the "Outbreak Period"** from the timeline calculation.

COBRA Qualifying Event Notice:
60-Day Deadline to Notify

Divorce/Legal Separation (Causing Loss of Eligibility)

- The employee or dependent is responsible for notifying the plan within 60 days of the qualifying event

Loss of Dependent Status (Age 26)

- The employee or dependent is responsible for notifying the plan within 60 days of the qualifying event

Disability Extension (to 29 Months)

- The employee is responsible (among other requirements) for notifying the plan within 60 days of the SSA disability determination

The Outbreak Period:
Disregarded for Deadlines

The rules extend the 60-day employee notification deadlines by disregarding the Outbreak Period

- *Example:* Employee finalizes divorce from covered spouse effective April 1, 2020 (causing spouse to lose eligibility)
- *Assume:* National Emergency period ends April 30, 2020, and therefore the Outbreak Period ends June 29, 2020
- *Result:* The employee/spouse would have until 60 days after the Outbreak Period (until August 28, 2020) to notify the plan of the divorce qualifying event
  - No indication yet of actual Outbreak Period end date

Extended Timelines:
Extension of Additional Deadlines

More Details/Examples: https://covid-19.theabdteam.com/blog/employee-benefits-extensions-for-covid-19/

The Plan's Benefit Claim Filing Deadline

- The rules extend the ERISA plan's deadline to file a benefit claim under the plan's claims procedures by disregarding the Outbreak Period
  - Claim filing deadline is **set by the plan's terms**

ERISA Adverse Benefit Determination Appeal Deadline

- The rules extend the ERISA deadline to file an appeal of the plan's adverse benefit determination by disregarding the Outbreak Period
  - **180-day** timeframe to appeal a determination under a group health plan or disability plan
  - **60-day** timeframe to appeal an adverse benefit determination under any other type of plan

ERISA External Review Deadlines

- The rules extend the ERISA deadline to file an external review request or provide additional information to perfect a request by disregarding the Outbreak Period
  - **Four-month** timeframe to request external review upon receipt of adverse benefit determination involving medical judgment or rescission of coverage
  - **Same four-month** timeframe (or, if later, 48 hours following receipt of notification of incomplete request) to perfect request for external review upon incomplete notice

COVID-19 Testing Coverage

FFCRA Mandates Free Testing Without Cost-Sharing

Expanded by CARES Act

FFCRA COVID-19 Coverage Mandate: What it Does

The new mandate applies immediately as of enactment (March 18, 2020) and until the end of the declared emergency period

Extremely rare to have a federal coverage mandate applicable to all plans!

A

Applies to ALL Employer-Sponsored Major Medical Group Health Plans

- Fully insured (situsedin any state)
- Self-insured
- Grandfathered

B

Prohibits ANY Form of Cost-Sharing for COVID-19 Testing

- No deductibles, copays, coinsurance, or any other form of OOP expense
- Test likely must be referred by physician for mandate to apply

C

Covers COVID-19 Testing and Interaction with Health Care Provider

- In vitro diagnostic testing (e.g., nasal swab)
- Items and services related to office visit, telehealth session, urgent care visit, or emergency rooms visit for COVID-19 diagnostics that result in an order for or administration of a COVID-19 test
- Must be related to COVID-19 diagnostics/testing for mandate to apply

CARES Act COVID-19 Coverage Mandate: What it Does

Expands upon the existing FFCRA testing coverage mandate

Biggest addition is the coverage of preventive services/vaccine if made available

A

Adds Additional Forms of Testing to Types in FFCRA

- Includes ability of Secretary of HHS to include other specific forms of tests or additional tests in future guidance

B

Sets Rules Around Provider Reimbursement

- Must reimburse at rate negotiated before the public health emergency declared
- If no negotiated rate, must reimburse at amount posted by provider on website
- New obligation for providers to post cost of COVID-19 testing on public website

C

Preventive and Vaccine Costs Included

- Will include mandate for free coverage of preventive services or vaccines for COVID-19, should items or services become available
- To qualify, the item, services, or immunization designed to prevent or mitigate COVID-19 must be recommend by the USPSTF or CDC
- Coverage mandate takes effect 15 business days after the recommendation

FFCRA/CARES Act COVID-19 Coverage Mandate: HSA Eligibility Preserved and SMM Required

HSA Eligibility:
Not Affected by First-Dollar COVID-19 Coverage

- IRS Notice 2020-15 was the first piece of IRS guidance related to COVID-19!
- HDHPs will not fail to maintain HDHP status if they provide medical care services and items purchased related to testing for and treatment of COVID-19 prior to satisfaction of the applicable minimum deductible
- *Means all individuals covered by plans providing first-dollar (i.e., not subject to the deductible) coverage for testing and treatment of COVID-19 can maintain HSA eligibility*

SMM Required:
COVID-19 Mandate is a Material Modification to the Plan

Summary of Material Modifications (SMM):

- General Rule: Must be provided within **210 days after the close of the plan year** in which the modification was adopted (best practice is still to provide before)
- Exception for Material Reduction of Covered Services or Benefits for Group Health Plan: Must be provided **within 60 days after the date of adoption** (best practice is still to provide before)

What is a "Material" Modification?

- Any modification that would be considered by an average participant to be an important change in covered benefits or other terms of coverage under the plan
- *COVID-19 Coverage Mandate is a Material Modification*

FFCRA/CARES Act COVID-19 Coverage Mandate: SMM Action Items for Employers

Employers must provide an SMM whenever there is a material change to the plan. The FFCRA/CARES Act COVID-19 testing coverage mandate is as a material modification.

A

Provide As Soon As Possible

- Although the SMM rules provide that distribution is not required until 210 days after the end of the plan year, 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 notify employees of important plan changes as soon as possible

B

Relying on Carrier/TPA Materials for SMM Recommended

- Carriers and TPAs will provide materials describing the FFCRA/CARES plan changes
- Recommend against employer creating their own materials to describe FFCRA/CARES plan changes to ensure there are no inconsistencies with the plan terms
- Any inconsistency could give rise to ERISA claim for benefits or breach of fiduciary duty

C

How to Provide Carrier/TPA Materials as SMM

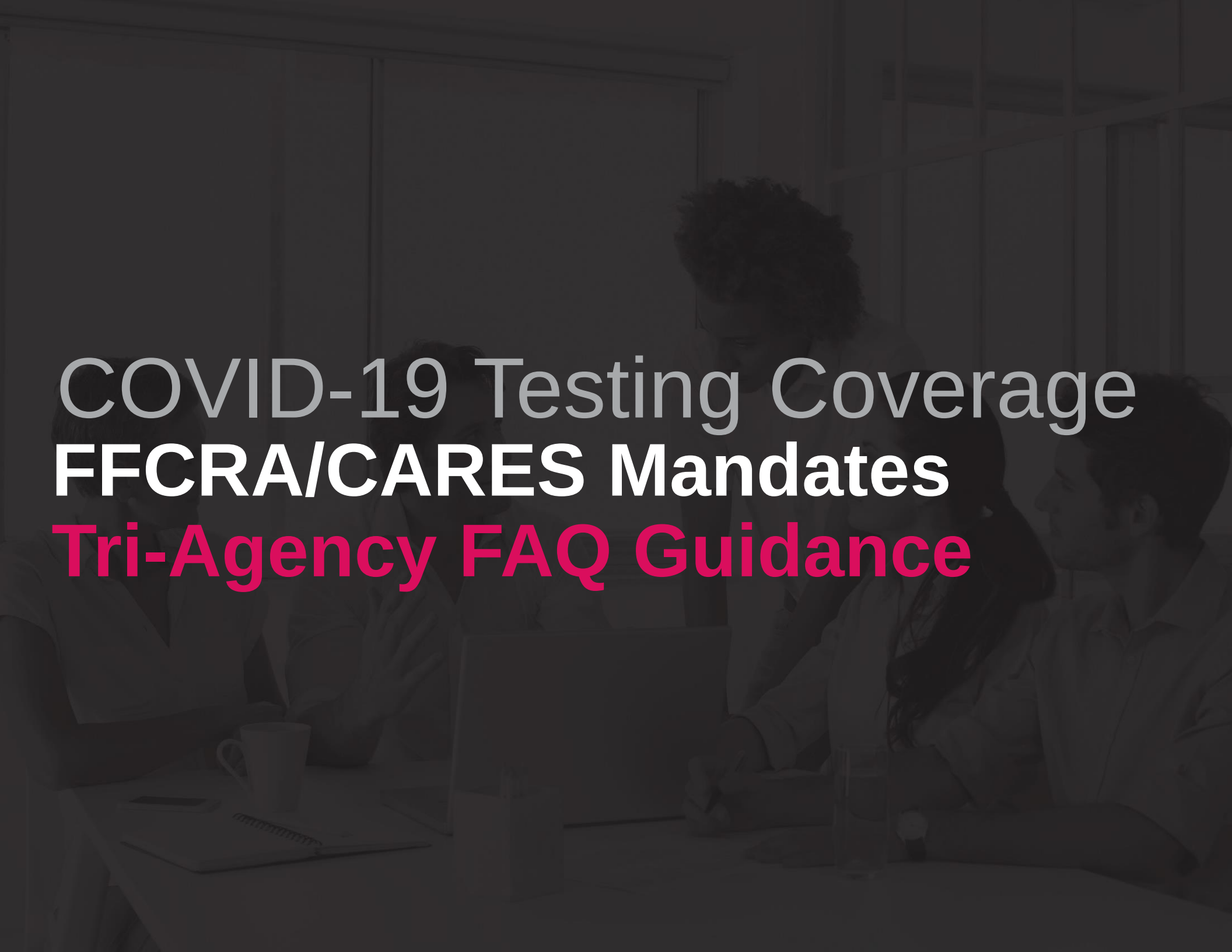
- Electronic distribution is always fine for employees with work-related computer access integral to their job duties (or employees who affirmatively consent to electronic disclosure)
- When posting to an intranet/ben admin, make sure to notify employees that the SMM has been posted (bad case law exists for failure to notify employees of new postings)
- *Note: Updated SPD material distribution would also satisfy SMM requirement*

FFCRA/CARES Act COVID-19 Coverage Mandate: SMM Action Items for Employers

Sample Cover Email/Letter for Distribution with FFCRA/CARES Act SMM Materials Provided by Carrier/TPA:

- **SUMMARY OF MATERIAL MODIFICATIONS TO THE**
- **[ENTER PLAN NAME]**

- *This document serves as a Summary of Material Modifications ("SMM") to the [ENTER PLAN Name] ("Plan").*
- *This SMM summarizes changes to the Plan as a result of the COVID-19 pandemic and two recent acts of Congress titled the "Families First Coronavirus Response Act" and the "CARES Act".*
- *You should review this information carefully and share it with your covered dependents. Keep this information with your Summary Plan Description ("SPD") for future reference. In the event of a conflict between the official Plan Document and this SMM, the SPD, or any other communication related to the Plan, the official Plan Document will govern.*



COVID-19 Testing Coverage
FFCRA/CARES Mandates
Tri-Agency FAQ Guidance

FFCRA/CARES Act COVID-19 Coverage Mandate: Tri-Agency FAQ Guidance

https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-42.pdf

For What Period Does the Mandate Apply?

- From March 18, 2020 (FFCRA enactment date) through the end of the public health emergency related to COVID-19
  - Public health emergency period determined by Secretary of HHS
  - *Will last until at least June 16, 2020 (may be extended for additional 90-day periods)*

Do Antibody Tests Also Qualify Under the Mandate?

- Yes, serological tests for COVID-19 used to detect antibodies against the disease also must be covered without cost-sharing

What Types of Associated Items and Services Apply?

- All items and services furnished to an individual during visit that result in an order for, or administration of, a COVID-19 diagnostic test
  - Must relate to the test or the evaluation of individual to determine need for the test
  - Includes test for other causes of respiratory illness (e.g., influenza) if recommended by health provider and medically appropriate to determine the need for COVID-19 testing

FFCRA/CARES Act COVID-19 Coverage Mandate: Tri-Agency FAQ Guidance

https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-42.pdf

Does the Mandate Apply to Out-of-Network Testing/Services?

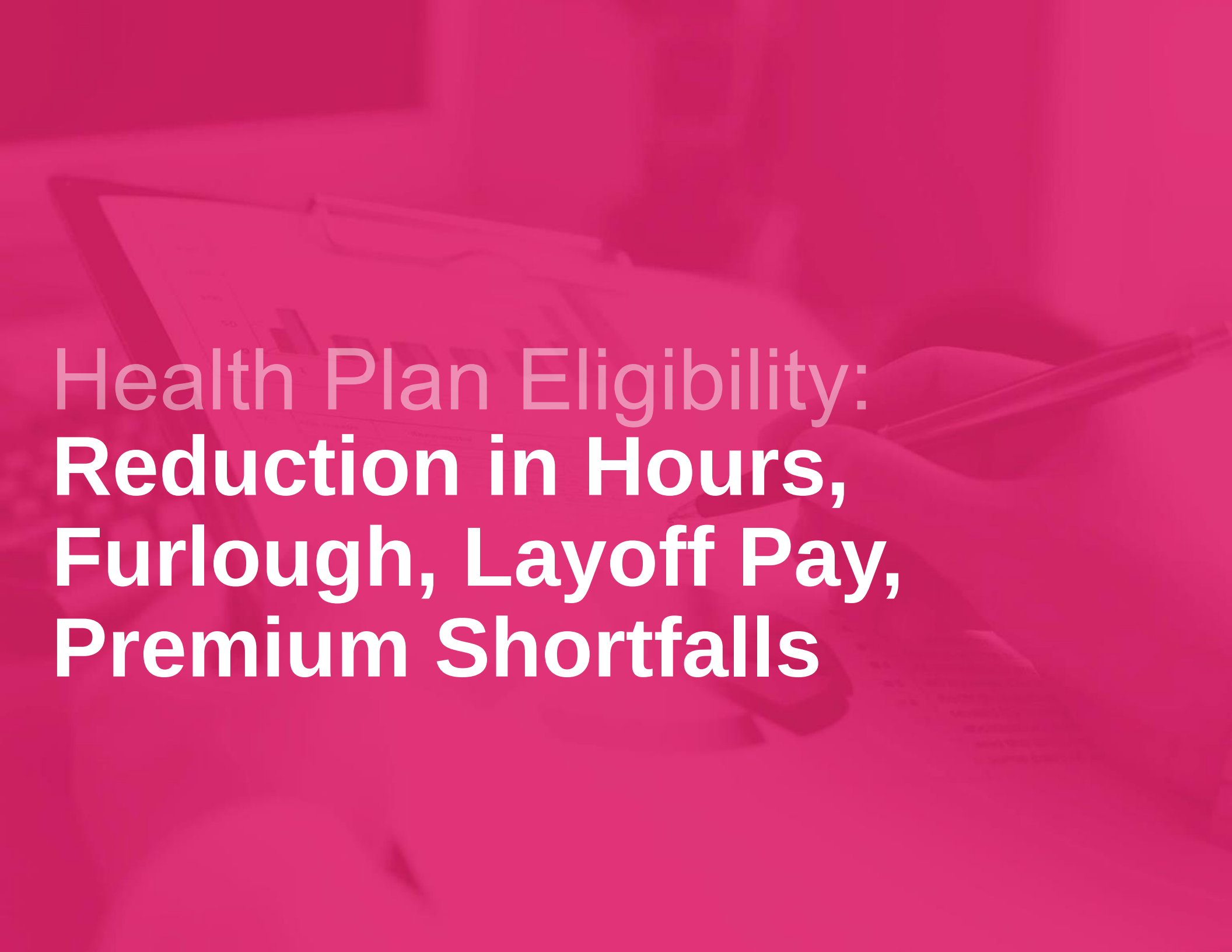
- Yes, the coverage must be free to the participant even out-of-network
  - Includes non-traditional care settings such as drive-through screening and testing sites
  - For plans with no negotiated rate, must pay provider the amount posted as the cash price for the service on its public website (or negotiate with the provider for a lower price)
  - CARES Act requires providers post the COVID-19 test cash provide on its public website

May States Impose More Generous Mandates?

- Yes, they will apply to fully insured plans sitused in that state
  - Summary of state mandates here

Does the Mandate Apply to Excepted Benefits?

- No, mandate excludes dental, vision, health FSA, LTC, EAP, and on-site clinics
  - EAPs and on-site clinics may offer COVID-19 diagnosis and testing without losing excepted benefit status
  - EAPs will not be considered to provide “significant benefits in the nature of medical care”
  - On-site clinics are considered an excepted benefit in all circumstances
  - Also excludes retiree-only plans



Health Plan Eligibility:
Reduction in Hours, Furlough, Layoff Pay, Premium Shortfalls

Health Plan Eligibility:
When Does Active Coverage End?

COVID-19 is forcing many employees to reduce hours or otherwise be moved out of regular full-time status. When will their active health benefits terminate?

Default Position:
Active Coverage Terminates

- Most plans provide the employees who work full-time (typically 30 hours/week) are eligible for coverage
- Regardless of the plan's eligibility hours threshold, the default position is that active coverage will terminate for employees not working sufficient hours to meet the plan's requirement
- **Remember:** All losses of health plan coverage caused by termination of employment or reduction of hours are COBRA qualifying events

Exceptions:
Four Situations Where Active Coverage Will Continue

- **Exception #1:** Protected Leave Under FMLA (or Similar State Law)
- **Exception #2:** ALE Subject to ACA Employer Mandate Utilizing Look-Back Measurement Method to Determine Full-Time Status
- **Exception #3:** Non-Protected Leave Policy to Continue Active Coverage
- **Exception #4:** Layoff Pay and LOA Pay as Hours of Service for ALEs
- **Remember:** Termination of employment always causes loss of active coverage

Exception #1: Protected Leaves
Maintaining Coverage

Employers Must Maintain Active Group Health Plan Coverage

- Protected leave includes FMLA, CFRA, PDL, and many other state equivalents
- Employers must maintain active health plan coverage for an employee on a protected leave
- Employee cannot be required to pay more than the active employee-share of the premium while on protected leave
- *Note: You cannot charge employees at the 102% COBRA rate!*
- Open enrollment rights apply in the same manner as active employee

Employee Right to Terminate Coverage

- FMLA requires that employees be provided the option to drop health plan coverage during the leave (*e.g.*, because employee does not want to pay)
- Section 125 rules permit election change to revoke coverage election during a period of unpaid leave
- Coverage will cease for the leave period if employee makes the election to terminate coverage
- Upon return, employee still has the right to be reinstated in coverage on same terms prior to leave (no waiting period etc.)

Exception #1: Protected Leaves
Employee Payment for Coverage

The Section 125 rules provide three ways for employers to administer collection of the employee-share of the premium for coverage during an FMLA leave:

A

Pre-Pay

- Employee pays for coverage in advance of the leave pre-tax through payroll
- Employee elects to pay all or portion of anticipated leave period on final or series of paychecks prior to the leave

  Two Limitations:
  - *Pre-pay cannot be the sole option offered (must offer at least one other)*
  - *Pre-pay not available to pay for coverage in subsequent year*

B

Pay-As-You-Go

- Employee pays for share of coverage in installments during leave
- Where leave is paid, employee can pay pre-tax through payroll
- Where leave is unpaid, employee will pay after-tax (similar to COBRA)

C

Catch-Up

- Employee agrees in advance to pay for coverage upon return from leave
- Payment is pre-tax via payroll on first or series of paychecks upon return
- Likely not an issue where the leave straddles two years, but unclear

Exception #1: Protected Leaves Terminating Coverage

Employers May Terminate Coverage if Employee Fails to Pay

- Employers can terminate coverage for an employee on FMLA leave if the employee is more than 30 days late paying the employee-share of the premium
- Must provide written notice to the employee that payment has not been timely received
- Written notice must be mailed at least 15 days before coverage will terminate, and it must advise that coverage will terminate on a specific date at least 15 days after the letter

Restoring Coverage Upon Return

- Upon return from protected leave, the employer must restore any benefits that were terminated during the leave (unless otherwise elected by the employee)
- Restoration requirement applies even if the employee lost coverage for failure to pay during the leave
- Employee cannot be required to satisfy the plan's waiting period (if any) again upon return
- However, the employer may recover the employee-share of the premium not paid by the employee during the period coverage was in effect

Exception #1: Protected Leaves
Failure to Return from Leave

COBRA Rights

- If the employee fails to return from protected leave, active coverage will generally terminate as of the end of the last day of the protected leave (absent a company leave policy to extend coverage beyond the protected leave period)
- Failure to return from FMLA leave is a COBRA qualifying event
- The employee (and any covered spouse/dependent) experiences a COBRA qualifying event as of the last day of the FMLA leave
- If coverage terminated prior to the end of the protected leave because the employee failed to timely pay, there will be a coverage gap from the loss of coverage until the last day of the FMLA leave when the qualifying event occurs

Recovery of Premiums

- Employers have the right to recover the employer-share of the premium if the employee does not return to work (plus any unpaid employee-share)
  - Excludes failure to return due to serious health condition, military issues, and other circumstances beyond employee's control
  - Employee is considered to "return" upon completing at least 30 calendar days
- Treated as a debt owed by the non-returning employee to the employer

Reality Check:

- In some cases, there will be ability to recover the debt from vacation/PTO
- Where that's not an option, rules suggest employer may "initiate legal action against the employee to recover the costs"
- Would many employers really do that?

Exception #1: Protected Leaves
Account-Based Plans

Health FSA: Group Health Plan with Employee Contributions

- Coverage (i.e., ability to incur reimbursable claims) remains in effect during the protected leave period unless the employee revokes coverage
- Contributions handled through one of the three methods outlined on Slide 14
- Employee on unpaid FMLA leave must have option to revoke health FSA coverage (unless catch-up option is offered—in which case employer may require it)

Employee Revokes Health FSA Coverage During Leave:

- Health expenses incurred during the leave period are not eligible for reimbursement
- Upon return, employee has two options:

1) Full Election: Employee resumes election amount in effect before leave and makes up the unpaid contributions during leave (but no coverage during leave period)
2) Reduced Election: Employee does not make up the unpaid contributions upon return, resulting in lower total election (i.e., coverage) amount available for the year

HRA: Group Health Plan without Employee Contributions

- Identical ability to incur/reimburse claims while on leave as if active employee

HSA: Not a Group Health Plan

- Not subject to leave laws—may discontinue contributions during leave period

Exception #1: Protected Leaves
A Situational Guide for Employers

ABD Federal/California/San Francisco Protected Leave Guide

- Click ***here*** for a summary overview of how protected leave laws apply to different situations!

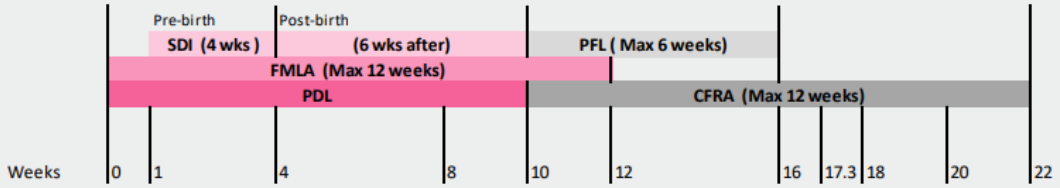
Leaves Comparison Chart

Example 1 – Pregnancy with Standard Delivery

Sally is a California based employee of XYZ Corp. and has been employed there for over a year. She has requested pregnancy leave and has asked how much time she will be able to take off from work and what pay she will receive. XYZ employs over 50 employees within a 75-mile radius.

Sally will be eligible for the following federal and state job-protected leaves: **FMLA, PDL and CFRA.**
Sally will be eligible for the following state wage replacement benefits: **SDI and PFL.**

Generally, an employee on pregnancy disability is eligible for up to four weeks disability prior to delivery and six weeks following for a standard delivery (8 weeks for cesarean). She will be eligible for 12 weeks of baby bonding protection thereafter.



Three Primary Job Protection Laws

1. **Family and Medical Leave Act (FMLA):** Up to 12 weeks (runs concurrently with PDL)
2. **Pregnancy Disability Leave (PDL):** Generally 4 weeks prior to birth, 6 weeks after birth (10 weeks total)
3. **California Family Rights Act (CFRA):** Up to 12 weeks (does not run concurrently with PDL)

Two Primary Partial Wage Replacement Laws

1. **California State Disability Insurance (SDI):** Provides 60% (or 70% depending on income) of employee's earnings, capped at $1,300 per week (based on a taxable wage limit of $122,909)
2. **California Paid Family Leave (PFL):** Paid at the same rate as SDI. Effective July 1, 2020, PFL maximum available increases to 8 weeks

SF PPLO Note: If the employee works in San Francisco and meets the requirements under PPL, the employee will receive up to 100% of her salary while on PFL capped at $2,167 per week in 2020 (60% from PFL and 40% from the employer). SF PPLO will also increase to 8 weeks effective July 1, 2020.

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Exception #2: Look-Back Measurement Method

General LBMM Rules

The look-back measurement method provides an alternative to the monthly measurement method. Under look-back, employers test whether an employee averages 30 hours of service per week in a measuring period to lock in full-time or part-time status for the associated stability period. Employers can also place new variable hour, seasonal, and part-time employees in an initial measurement period prior to reaching full-time status.

ONGOING EMPLOYEES

- Generally, if look-back measurement method is used for one employee to determine full-time status, it must be used for all employees
- Exception: Employer can choose separate measurement methods for:
  - Hourly vs. salaried
  - Employees in different states
  - Union vs. non-union
  - Employees in different union groups
- **Typical structure:**
  - **Measurement period: 11/1 – 10/31**
  - **Administrative period: 11/1 – 12/31**
  - **Stability period: 1/1 – 12/31**

  Note: 90-day administrative period limit prohibits measurement period running from 10/1. Many employers therefore use 10/15 or 11/1 as a starting point for the standard measurement period.

NEW HIRES

- New full-time employees must be offered coverage by the first day of the fourth full calendar month of employment to avoid potential penalties
- New variable hour, seasonal, and part-time employees may be placed in an initial measurement period before being treated as full-time
  - Combined duration of initial measurement period and initial administrative period cannot exceed 13 months (plus a partial month for mid-month hires)
- **Typical structure for new variable/seasonal/part-time employee:**
  - **Hired on March 15, 2020**
  - **Initial administrative period: 3/15/20 – 3/31/20 (front-end of split administrative period)**
  - **Initial measurement period: 4/1/20 – 3/31/21**
  - **Initial administrative period: 4/1/21 – 4/30/21 (back-end of split administrative period)**
  - **Initial stability period: 5/1/21 – 4/30/22**

  Note: Special rule permits 11-month initial measurement period, which would allow a two-month back-end initial administrative period. Many employers choose that approach.

Exception #2: Look-Back Measurement Method Stability Period Still Applies

Employers Utilizing Look-Back Measurement Method to Determine Employees' Full-Time Status

- The standard measurement and stability period rules will continue to apply to an employee who has experienced a reduction in hours, is furloughed, or is on a leave of absence
- The look-back measurement method will therefore preserve full-time status for at least the remainder of the current stability period (generally plan year) for those employees who tested as full-time during the prior measurement period

Key Points Under the Look-Back Measurement Method

- ***Key Point #1:*** An employee who is in a stability period as full-time and experiences a change in employment status to working part-time hours will nonetheless remain full-time for ACA purposes the duration of the current stability period. The employee's full-time status is kept "stable" for the entire stability period regardless of how many hours per week the employee is currently working.
- ***Key Point #2:*** Employees who do not average at least 30 hours of service over the full standard measurement period (i.e., generally do not reach 1,560 hours of service in the typical 12-month standard measurement period) can be removed from coverage as of the start of the new stability period (generally the start of the new plan year) because the employee will be treated as part-time for ACA purposes for the duration of that stability period. This will be a COBRA qualifying event as of the end of the plan year in which the employee loses coverage (loss of coverage caused by a reduction in hours).

Exception #2: Look-Back Measurement Method
Potential 2020 Employer Mandate Penalties

§4980H(a)—The "A Penalty"
Aka: The "Sledge Hammer Penalty"

- **Failure to offer MEC to at least 95% of all full-time employees (and their children to age 26)**
- The A Penalty is triggered by at least one such full-time employee who is not offered MEC enrolling in subsidized exchange coverage
- 2020 A Penalty liability is $2,570 annualized ($214.17/month) multiplied by all full-time employees
  - 30 full-time employee reduction from multiplier

§4980H(b)—The "B Penalty"
Aka: The "Tack Hammer Penalty"

- Applies where the employer is not subject to the A penalty
- **Failure to:**
- **1) Offer coverage that's affordable**
- **2) Offer coverage that provides MV**
- **3) Offer MEC to a full-time employee (where the employer has still offered at a sufficient percentage to avoid A Penalty liability)**
- The B Penalty is triggered by any such full-time employee enrolling in subsidized exchange coverage
- 2020 B Penalty liability is $3,860 annualized ($321.67/month) multiplied by each such full-time employee who enrolls in subsidized exchange coverage
  - Note that although the B Penalty amount is higher ($3,860 vs. $2,570), the multiplier is generally much lower (only those full-time employees not offered affordable/minimum value coverage who enroll in subsidized exchange coverage)

Exception #3: Non-Protected Leaves
The Big Picture

What are Non-Protected Leaves Traditionally?

- Any leave not protected by FMLA, CFRA, PDL (or other state equivalents)
- Many reasons employers may make non-protected leaves available:
  - Employer is not subject to FMLA/CFRA
  - Employee is not eligible for FMLA/CFRA
  - Leaves that extend beyond protected leave period (e.g., longer new child leaves)
  - Sabbatical leaves as a way to reward/retain long-term employees
- In many cases, employers will be very accommodating in these situations (i.e., provide some form of company leave, not terminate EE for job abandonment)

Non-Protected Leaves in the COVID-19 Landscape

- Employers can classify a furlough as a leave for these purposes and continue coverage under a non-protected leave policy
- Non-protected leave policies do not need to be formal written policies—can be limited to a standard administrative practice
- Can adopt or amend that practice to reflect these new realties without necessarily taking any formal written action
- Always make sure to have carrier approval for active coverage continuation

Exception #3: Non-Protected Leaves
Employer Leave Policy

Employers frequently have a leave policy to permit continuation of active health coverage during non-protected leaves. Within limits, carriers will generally permit this policy.

Typical Employer Leave Policy:
Continuing Active Coverage

Common approach will continue active coverage until the later of:

1) **The end of the protected leave period (if any); or**
2) **Six months following the start of the leave**

- Note: Protected leave period can extend up to seven months for extended pregnancy disability leaves followed by CFRA baby bonding
- COBRA rights at end of this period

Important Consideration:
Insurance Carrier Approval

- Insurance carriers (or stop-loss providers for self-insured plans) typically permit the employer to offer active coverage during a non-protected leave period pursuant to the employer's leave policy
- **Must be very careful not to extend active coverage beyond the period the carrier will permit**
- That could result in the need for employer to self-fund claims (or no stop-loss coverage)
- Most carriers permit employer policies that extend coverage up to six months

Exception #4: Hours of Service Rules

Inactive Payments Qualify

Employers may still be paying employees for sick time, layoff time, or leave of absence time related to COVID-19 issues. This will continue to qualify as hours of service under the ACA employer mandate for determining full-time status for active health plan eligibility.

(1) **Active Duties:** Each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and

(2) **Inactive Payments:** Each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to:

- *(a) Vacation,*
- *(b) Holiday,*
- *(c) Illness,*
- *(d) Incapacity (including disability),*
- *(e) Layoff,*
- *(f) Jury duty,*
- *(g) Military duty, or*
- *(h) Leave of absence.*

Hourly Employees:

Actual Hours: Employer must calculate actual hours of service from records of hours worked and hour for which payment is made or due

- Generally pretty straightforward data from payroll
- Special exceptions for hard to track hours

Non-Hourly Employees (e.g., Salaried):

1) **Actual Hours:** Use actual hours of service from records of hours worked and for which payment is made or due;
2) **Days-Worked Equivalency:** Employee is credited with eight hours of service for each day the employee is paid or entitled to pay; or
3) **Weeks-Worked Equivalency:** Employee is credited with 40 hours of service for each week the employee is paid or entitled to pay

Premium Shortfalls:

Insufficient Pay to Cover Employee Contributions

Where active coverage continues, employees may not have enough regular earnings to cover the employee-share of the premium through the paycheck.

COBRA Rules Apply:
Standard 30-Day Grace Period

- Employer can require that the employee pay the balance of the employee-share of the premium on an after-tax basis outside of payroll (e.g., by check)
- ACA employer mandate rules provide that employer must follow same rules as COBRA for collecting the remaining employee contribution
- Includes the standard 30-day grace period to make the payment
- Employer can terminate coverage for employees who fail to timely pay the balance outside of payroll with no ACA employer mandate consequences

Practical Considerations:
Addressing Real World Realities

What to do during the grace period?

a) Continue active coverage during the grace period and then retroactively cancel if employee fails to timely pay; or

b) Cancel coverage during grace period and retroactively reinstate upon timely payment

What if the missing amount is insignificant?

a) Employer may deem the premium as paid; or

b) Employer may notify the employee and provide a reasonable period for the employee to pay the remaining balance

- A premium shortfall is “insignificant” if it is less than or equal to the lesser of $50 or 10% of the required premium

When Active Coverage Ends
Subsidy Options for Employers and Employees

When Active Coverage Ends:
COBRA Subsidies

COBRA subsidies to cover all or a portion of the premium for a set period are very common as part of severance benefits and for extended non-protected leaves. They are also becoming a common form of assistance upon loss of active coverage in the COVID-19 era.

Fully Insured Plan:

COBRA Subsidies Permitted

Extended Period Caution

Tax-free direct COBRA subsidies are common because no nondiscrimination rules apply to fully insured plans

- The ACA added fully insured plan nondiscrimination rules originally to take effect in 2011
- IRS Notice 2011-1 indefinitely delayed until further notice from IRS/DOL/HHS
- Employer should consider stating in any materials communicating an extended subsidy (e.g., six months or longer) that it may convert the subsidy to taxable compensation if the nondiscrimination rules take effect during the subsidy term

Self-Insured Plan:

§105(h) Nondiscrimination

Taxable Compensation Alternative

§105(h) generally prohibits COBRA subsidies of greater amount or duration to HCIs than available to non-HCIs

- Violation of §105(h) could result in all HCIs being taxed on all or a portion of the benefits received (referred to as the "excess reimbursement")
- Taxable cash compensation avoids creating issues under the §105(h) rules (which apply only to self-insured plans)
- Can be based on the amount the COBRA subsidy would have been
- Employer may choose to gross up employees to make them whole

When Active Coverage Ends:
COBRA Subsidies

Sample Language—Recommended provision to include for any COBRA subsidy to extend six months or longer:

The Company reserves the right to discontinue any COBRA subsidies in the event the nondiscrimination provisions added by Section 10101(d) of the Affordable Care Act, as codified in Public Health Service Act §2716, take effect. Pursuant to IRS Notice 2011-1, such nondiscrimination provisions do not apply until after regulations or other administrative guidance of general applicability has been issued by the Internal Revenue Service under §2716. If such guidance is issued and takes effect during the period in which the Company intends to subsidize your COBRA coverage, such COBRA subsidies will cease as of the effective date of such guidance to avoid potential excise tax liability to the Company under Internal Revenue Code §9815.

If the Company discontinues your COBRA subsidies pursuant to application of the nondiscrimination provisions described above, the Company will make an additional payment to you in standard taxable compensation, subject to withholding and all applicable payroll taxes, intended to cover the amount of the discontinued COBRA subsidy for the remainder of your intended COBRA subsidy period.

[Optional: The Company will also pay you a "gross up" amount intended to cover the tax liability from this additional payment.]

When Active Coverage Ends:
Model Provision for Self-Insured

Sample Language—Recommended provision to describe taxable income alternative to direct COBRA subsidies:

The Company will pay you an additional amount of [Enter amount—can be in regular intervals or lump sum] in standard taxable compensation, subject to withholding and all applicable payroll taxes, intended to cover the cost of your [Optional: "major medical plan" to exclude all other coverage] COBRA premium for [Enter duration]. This amount is based on your full [Optional: "employee-only"] COBRA premium, including the 2% administrative fee.

[Optional: The Company will also pay you a "gross up" amount intended to cover the tax liability from this additional payment.]

When Active Coverage Ends:
Exchange Subsidies

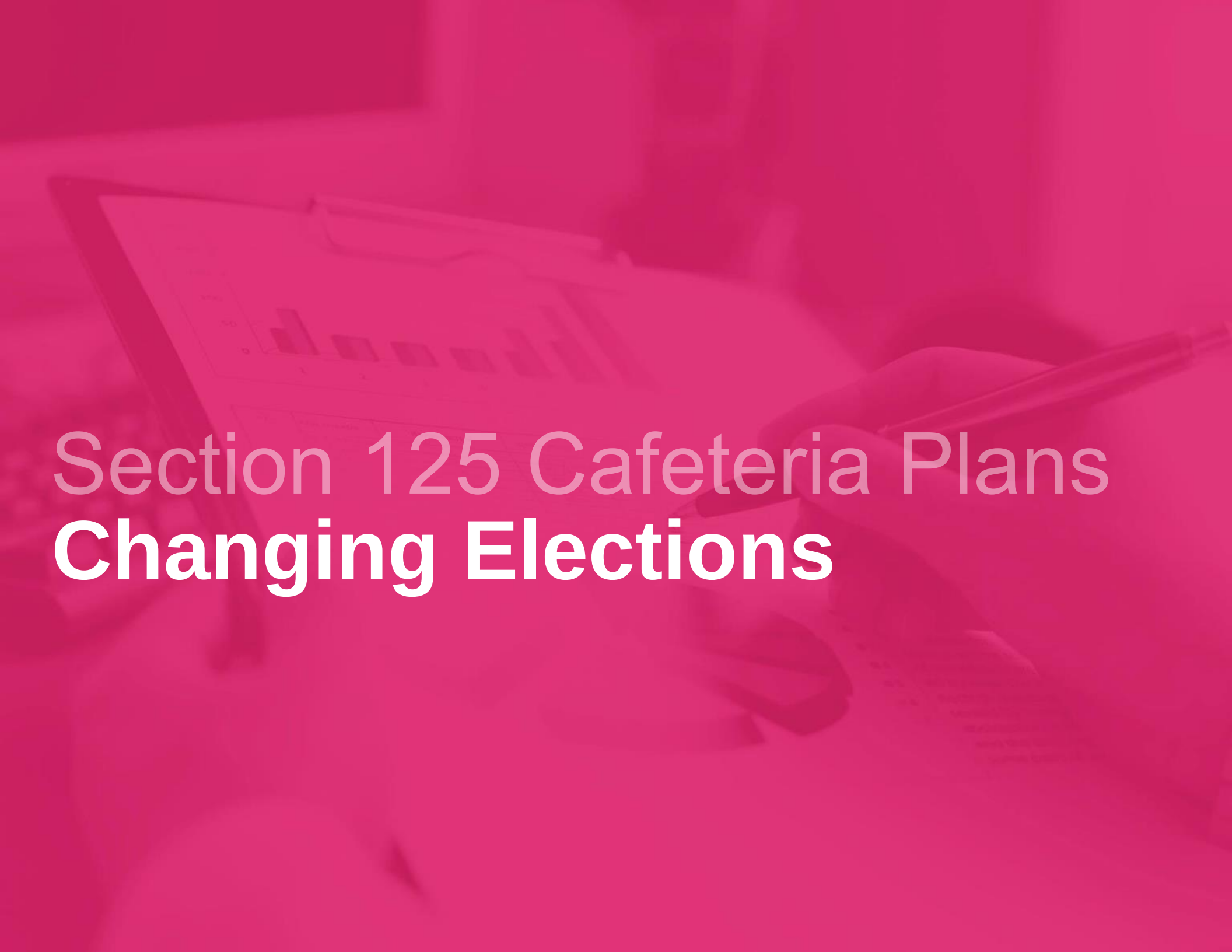
Many employees who are no longer able maintain active health plan coverage will have access to Exchange subsidies to assist with the cost of coverage and cost-sharing on the Exchange.

Exchange Subsidy Availability for Employees

- Employees who are no longer able to maintain active coverage may have access to subsidies (i.e., the §36B premium tax credit, cost-sharing subsidies) available on the Exchange.
- Exchange subsidies are generally available to individuals with household income up to 400% of the federal poverty line.
- That generally includes household income as high as $104,800 in 2020 for a family of four.
- For California residents, household income can be as high as $154,500 for a family of four in 2020 on Covered California.

Exchange Resources for Employees

- **Healthcare.gov: Subsidized Coverage Overview**
- **Helthcare.gov: Subsidies Calculator**
- **Healthcare.gov: Special Enrollment Events**
- **Covered California: Subsidy Eligibility Thresholds**
- **Covered California: Special Enrollment Events**



Section 125 Cafeteria Plans
Changing Elections

Making/Changing Elections: General Rules (Changed by COVID-19)

Section 125 Irrevocable Election Requirement

- The general rule under Section 125 for ongoing employees is that all elections (including an election not to participate) must be:
  1) ***Made prior to the start of the plan year; and***
  2) ***Irrevocable for the duration of the plan year unless the employee experiences a permitted election change event.***

Potential Consequences of Failure to Follow these Rules

- If an employer's cafeteria plan were to permit employees to make any mid-year (i.e., after the start of the plan year) election changes without experiencing a permitted election change event (or without making the election change within the plan's timing window, which is generally 30 days):
  - The plan would violate the irrevocable election rules described above
  - The Section 125 rules provide that the IRS could cause the entire cafeteria plan to lose its tax-advantaged status if discovered on audit
  - This would result in all elections becoming taxable for all employees

No Correction Program

- There is no formal IRS correction program for employers under Section 125!
  - The tax qualification rules for qualified retirement plans, which include correction procedures through the Employee Plans Compliance Resolution System (EPCRS), do not apply to cafeteria plans
  - Upon audit, IRS has discretion to impose full loss of tax-advantaged status in any non-compliance scenario—no matter how seemingly minor or commonplace

Making/Changing Elections:
General Rules (Changed by COVID-19)

Prop. Treas. Reg. §1.125-1(c)(7):

- *(7) Operational failure.*
- (i) In general. **If the cafeteria plan fails to operate according to its written plan or otherwise fails to operate in compliance with section 125 and the regulations, the plan is not a cafeteria plan and employees' elections between taxable and nontaxable benefits result in gross income to the employees.**
- (ii) Failure to operate according to written cafeteria plan or section 125. Examples of failures resulting in section 125 not applying to a plan include the following—
- (A) Paying or reimbursing expenses for qualified benefits incurred before the later of the adoption date or effective date of the cafeteria plan, before the beginning of a period of coverage or before the later of the date of adoption or effective date of a plan amendment adding a new benefit;
- (B) Offering benefits other than permitted taxable benefits and qualified benefits;
- (C) Operating to defer compensation (except as permitted in paragraph (o) of this section);
- (D) Failing to comply with the uniform coverage rule in paragraph (d) in §1.125-5;
- (E) Failing to comply with the use-or-lose rule in paragraph (c) in §1.125-5;
- **(F) Allowing employees to revoke elections or make new elections, except as provided in §1.125-4 and paragraph (a) in §1.125-2;**
- (G) Failing to comply with the substantiation requirements of § 1.125-6;
- (H) Paying or reimbursing expenses in an FSA other than expenses expressly permitted in paragraph (h) in §1.125-5;
- (I) Allocating experience gains other than as expressly permitted in paragraph (o) in §1.125-5;
- (J) Failing to comply with the grace period rules in paragraph (e) of this section; or
- (K) Failing to comply with the qualified HSA distribution rules in paragraph (n) in §1.125-5.

Making/Changing Elections:
General Rules (Changed by COVID-19)

Prop. Treas. Reg. §1.125-2(a):

(a) Rules relating to making and revoking elections.

(1) Elections in general. A plan is not a cafeteria plan unless the plan provides in writing that employees are permitted to make elections among the permitted taxable benefits and qualified benefits offered through the plan for the plan year (and grace period, if applicable). **All elections must be irrevocable by the date described in paragraph (a)(2) of this section except as provided in paragraph (a)(4) of this section.** An election is not irrevocable if, after the earlier of the dates specified in paragraph (a)(2) of this section, employees have the right to revoke their elections of qualified benefits and instead receive the taxable benefits for such period, without regard to whether the employees actually revoke their elections.

(2) Timing of elections. In order for employees to exclude qualified benefits from employees' gross income, benefit elections in a cafeteria plan must be made before the earlier of—

(i) The date when taxable benefits are currently available; or

(ii) The first day of the plan year (or other coverage period).

(3) Benefit currently available to an employee-in general. Cash or another taxable benefit is currently available to the employee if it has been paid to the employee or if the employee is able currently to receive the cash or other taxable benefit at the employee's discretion. However, cash or another taxable benefit is not currently available to an employee if there is a significant limitation or restriction on the employee's right to receive the benefit currently. Similarly, a benefit is not currently available as of a date if the employee may under no circumstances receive the benefit before a particular time in the future. The determination of whether a benefit is currently available to an employee does not depend on whether it has been constructively received by the employee for purposes of section 451.

(4) Exceptions to rule on making and revoking elections. If a cafeteria plan incorporates the change in status rules in §1.125-4, to the extent provided in those rules, **an employee who experiences a change in status (as defined in §1.125-4) is permitted to revoke an existing election and to make a new election with respect to the remaining portion of the period of coverage, but only with respect to cash or other taxable benefits that are not yet currently available.** See paragraph (c)(1) of this section for a special rule for changing elections prospectively for HSA contributions and paragraph (r)(4) in §1.125-1 for section 401(k) elections. Also, only an employee of the employer sponsoring a cafeteria plan is allowed to make, revoke or change elections in the employer's cafeteria plan. The employee's spouse, dependent or any other individual other than the employee may not make, revoke or change elections under the plan.

…

Making/Changing Elections:
General Rules (Changed by COVID-19)

ABD Section 125 Cafeteria Plan Permitted Election Change Event Chart

- Click ***here*** for a summary overview of all the permitted election change events!

2020 Section 125 Cafeteria Plan: Permitted Election Change Event Chart

Section 125 Cafeteria Plan Rules for Administering Mid-Year Employee Election Change Requests

According to IRS guidelines (Treas. Reg. §1.125-4), participants can change their employee benefits elections under a Cafeteria Plan either (1) during an open enrollment period; or (2) mid-year pursuant to a permitted election change event.

The purpose of this chart is to identify examples of employee, spouse, or dependent life events that may create a permitted election change event. This chart does not address plan changes (e.g., change in plan design, change in plan costs) that may also create a permitted election change event. Furthermore, this chart assumes that the organization's Section 125 Cafeteria Plan Document is drafted to allow all of the available permitted election change events recognized by the IRS. **You must make your election change request within 30 days of the event. The plan cannot accept any election change once the 30-day window has closed.**

Consistency Rule:

For certain life events referred to as a "change in status," the election change generally must be consistent with the event. This means that the election change must be on account of and correspond with the event. The six categories of change in status events subject to this consistency rule are:

- Change in employee's legal marital status
- Change in number of dependents
- Change in employment status
- Dependent satisfies (or ceases to satisfy) dependent eligibility requirements
- Change in residence
- Commencement or termination of adoption proceedings

Status Event	Medical	Dental	Vision	Flexible Spending Accounts
Marriage **Note:** Plans that cover domestic partners should generally follow the same guidelines. However, unless the domestic partner is a tax dependent, these Section 125 Cafeteria Plan rules technically do not apply because the employee pays for domestic partner coverage on an after-tax basis. See page 9 for additional provisions addressing termination of coverage for a non-tax dependent domestic partner.	***You may:*** • Enroll yourself, your new spouse and any eligible dependent children. • Add your new spouse and any eligible dependent children to your plan. • Cancel your coverage if you enroll in your new spouse's group plan. Coverage/Cancellation is generally effective as of the first of the month following your election change request. **HIPAA Special Enrollment Event: Permits you to change benefit plan options.**	***You may:*** • Enroll yourself, your new spouse and any eligible dependent children. • Add your new spouse and any eligible dependent children to your plan. • Cancel your coverage if you enroll in your new spouse's group plan. Coverage/Cancellation is generally effective as of the first of the month following your election change request.	***You may:*** • Enroll yourself, your new spouse and any eligible dependent children. • Add your new spouse and any eligible dependent children to your plan. • Cancel your coverage if you enroll in your new spouse's group plan. Coverage/Cancellation is generally effective as of the first of the month following your election change request.	***You may:*** **Health Care FSA** • Enroll/Increase your contributions for the remainder of the plan year. • Revoke/decrease your contributions if you or your dependent(s) enroll in the new spouse's health plan. **Dependent Care FSA** • Enroll if you gain an eligible dependent, and your spouse is employed/ disabled/ FT student. • Increase/decrease your contributions for the remainder of the plan year, if expenses increase/decrease as result of marriage • Stop participating if spouse is not employed, disabled or FT student. Coverage/Cancellation is generally effective as of the first of the month following your election change request.

Dependent Care FSA:
COVID-19 Reasons for Election Changes

Change in Use of Daycare or Change in Daycare Costs

- The dependent care FSA permitted election change event rules are very liberal
- **Any change in the employee's daycare costs, including change in use of daycare, change in a daycare provider, or change in an existing daycare provider's cost qualifies to change any election**
  - One small exception: Does not apply to a cost change imposed by a daycare provider who is the employee's relative

Common COVID-19 Request #1:
Daycare/Pre-School/After-School Closure

- Many employees are now at home with their kids whose daycare, pre-school, and/or after school programs are now closed for the quarantine
- This creates a permitted election change event that allows employees to revoke their dependent care FSA election on a prospective basis
- Means that the election change will discontinue all future dependent care FSA contributions
  - All dependent care FSA contributions YTD will remain available only for dependent care expenses

Dependent Care FSA: COVID-19 Reasons for Election Changes

Change in Use of Daycare or Change in Daycare Costs

- The dependent care FSA permitted election change event rules are very liberal
- **Any change in the employee's daycare costs, including change in use of daycare, change in a daycare provider, or change in an existing daycare provider's cost qualifies to change any election**
  - One small exception: Does not apply to a cost change imposed by a daycare provider who is the employee's relative

Common COVID-19 Request #2: New Daycare Costs

- In some situations, employees will have found new alternative daycare providers with new costs to address their standard daycare no longer being available
- This creates a permitted election change event that allows employees to modify their dependent care FSA election to reflect the new cost of care
- For example, a new in-home provider may be more expensive than the pre-COVID-19 daycare cost
  - The employee could enroll in the dependent care FSA or increase an existing election
- The new daycare cost might be part-time or intermittent and therefore less expensive than the pre-COVID-19 daycare cost
  - Could revoke the dependent care FSA election or decrease an existing election

Dependent Care FSA: COVID-19 Reasons for Election Changes

Change in Use of Daycare or Change in Daycare Costs

- The dependent care FSA permitted election change event rules are very liberal
- **Any change in the employee's daycare costs, including change in use of daycare, change in a daycare provider, or change in an existing daycare provider's cost qualifies to change any election**
  - One small exception: Does not apply to a cost change imposed by a daycare provider who is the employee's relative

Common COVID-19 Request #3: New Employer Offering

- Some employers are offering dependent care assistance programs as employer-paid or an employer reimbursement to assist employees working from home
- The standard $5,000 ($2,500 if married and filing separately) limit on tax-advantaged dependent care continues to apply
- The $5,000 limit applies on a combined basis to both employer-provided dependent care assistance and employee contributions to the dependent care FSA (Box 10)
- An employee that already elected $5,000 for the dependent care FSA may elect to reduce or revoke that election prospectively to address the new employer offering
  - Employers can always provide assistance in excess of the $5,000 tax-advantaged limit as standard taxable income to the employee (i.e., not in Box 10 of Form W-2)

Dependent Care FSA:
COVID-19 Reasons for Election Changes

ABD Section 125 Cafeteria Plan Permitted Election Change Event Chart

- Click ***here*** for a summary overview of all the permitted election change events!

Status Event	Medical	Dental	Vision	Flexible Spending Accounts
Change in Use of Daycare or Daycare Costs **Note:** Applies to any change in employee's daycare costs—including change in use of daycare, change in a daycare provider, or a change in an existing daycare provider's cost. *Exception: This event does not apply where the cost change is imposed by a dependent care provider who is a relative of the employee.*	***You may:*** • No changes permitted	***You may:*** • No changes permitted	***You may:*** • No changes permitted	***You may:*** **Health Care FSA** • No changes permitted **Dependent Care FSA** • Enroll/Increase your contributions for the remainder of the plan year if you have new daycare expenses (e.g., spouse begins to work, or you acquire a new dependent with eligible expenses) or your cost of daycare increases (e.g., existing daycare increases costs, or change to a new daycare that is more expensive). • Decrease/Revoke your contributions for the remainder of the plan year if your daycare expenses reduce or cease. For example, your dependent reaches age 13, you change to a new daycare that is more expensive, or your spouse stops working.

Making/Changing Elections: Documentation of Events Not Required

Generally No Requirement for Employee to Provide Documentation

- The Section 125 rules do not require any specific substantiation procedures for an employer to confirm that an employee has experienced a permitted election change event
  - Almost always fine for the employer to rely solely on the employee's certification that the event has occurred—without any form of documentation beyond the certification to support the event

Exception: Employer Suspects Fraud

- The only time the Section 125 rules specifically require supporting documents (beyond the employee's certification) to substantiate the event is where the employer has reason to believe that the employee's certification is fraudulent or otherwise incorrect
  - In those circumstances, the employer must request documentation to substantiate the event before implementing the requested election change

Best Practice: Be Consistent and Keep Records

- Regardless of which approach the employer takes, it should:
  a) Apply the approach consistently (i.e., require supporting documents or not consistently)
  b) Keep a record of the employee's certification of the event (e.g., the ben admin system's record of the employee verification of the event) for all election changes

Relevant Cite

- 66 Fed. Reg. 1837, 1838 (Jan. 10, 2001)
  - https://www.federalregister.gov/documents/2001/01/10/01-258/tax-treatment-of-cafeteria-plans
  - *"An example in the final regulations has been revised to make it clear that employers may generally rely on an employee's certification that the employee has or will obtain coverage under the other plan (assuming that the employer has no reason to believe that the employee certification is incorrect)."*

Making/Changing Section 125 Elections
New IRS Notice 2020-29 Relaxed Rules

New Election Change Option #1:
2020 Mid-Year Health Plan Enrollment for Waived Employees

- Employers may amend their Section 125 cafeteria plan to allow employees who originally waived health plan coverage to make a new election in calendar year 2020 for employer-sponsored health coverage on a prospective basis
- *Must first confirm option with insurance carrier (or stop-loss provider if self-insured)*
  - Requires cafeteria plan amendment no later than December 31, 2021
  - Requires eligible employees be informed of opportunity to enroll

Example:
Waived Employee Enrolls Mid-Year in 2020

- Employee waived coverage at open enrollment for 2020 coverage
- Employer confirms with insurance carriers and/or stop-loss providers that they will permit mid-year enrollment without a permitted election change event
- Employer informs employees of enrollment opportunity and will amend its cafeteria plan no later than December 31, 2021
- Within parameters established by the insurance carriers and/or stop-loss providers, the employee can in calendar year 2020 enroll in health plan without an event
  - Employee can pay employee-share of the premium on a pre-tax basis under Section 125

Making/Changing Section 125 Elections
New IRS Notice 2020-29 Relaxed Rules

New Election Change Option #2:
2020 Mid-Year Plan Option Change or to Add Dependents

- Employers may amend their Section 125 cafeteria plan to allow employees to change their health plan option or enroll dependents on a prospective basis
- *Must first confirm option with insurance carrier (or stop-loss provider if self-insured)*
  - Requires cafeteria plan amendment no later than December 31, 2021
  - Requires eligible employees be informed opportunity to make enrollment changes

Example:
Employee Moves from PPO to HMO Mid-Year in 2020

- Employee enrolled in employee-only PPO coverage at open enrollment for 2020
- Employer confirms with insurance carriers and/or stop-loss providers that they will permit mid-year enrollment changes without a permitted election change event
- Employer informs employees of enrollment opportunity and will amend its cafeteria plan no later than December 31, 2021
- Within parameters established by the insurance carriers and/or stop-loss providers, the employee can in calendar year 2020 change to family HMO coverage mid-year without experiencing a permitted election change event
  - Employee can pay employee-share of the premium on a pre-tax basis under Section 125

Making/Changing Section 125 Elections

New IRS Notice 2020-29 Relaxed Rules

New Election Change Option #3:

2020 Mid-Year Dropping of Health Plan Coverage

- Employers may amend their Section 125 cafeteria plan to allow employees to revoke their health plan election on a prospective basis
- *Employee must attest in writing that the employee is enrolled (or will immediately enroll) in other health coverage not sponsored by the employer*
  - Requires cafeteria plan amendment no later than December 31, 2021
  - Requires eligible employees be informed of opportunity to waive

Written Attestation Template from IRS:

Can Rely Upon Absent Actual Knowledge it is False

- *Name: _____ (and other identifying information requested by the employer for administrative purposes).*
- *I attest that I am enrolled in, or immediately will enroll in, one of the following types of coverage: (1) employer-sponsored health coverage through the employer of my spouse or parent; (2) individual health insurance coverage enrolled in through the Health Insurance Marketplace (also known as the Health Insurance Exchange); (3) Medicaid; (4) Medicare; (5) TRICARE; (6) Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA); or (7) other coverage that provides comprehensive health benefits (for example, health insurance purchased directly from an insurance company or health insurance provided through a student health plan).*
- *Signature: _____*

Making/Changing Section 125 Elections
New IRS Notice 2020-29 Relaxed Rules

New Election Change Option #4:
2020 Mid-Year Health FSA Election Changes

- Employers may amend their Section 125 cafeteria plan to allow employees to revoke, decrease, make, or increase a health FSA election on a prospective basis
- *Allows employees to change their health FSA election mid-year for any reason*
  - Requires cafeteria plan amendment no later than December 31, 2021
  - Requires eligible employees be informed of opportunity to make FSA election changes
  - Employer can limit revocation or decrease to no less than amounts already reimbursed

Example:
Employee Reduces Health FSA Election Mid-Year

- Employee elected to contribute $2,750 to the health FSA at 2020 open enrollment
- Employee now anticipates only $1,500 in health expenses because of inability to access elective surgery services during COVID-19 pandemic
- Employer informs employees of enrollment opportunity and will amend its cafeteria plan no later than December 31, 2021
- In calendar year 2020, employee can decrease his health FSA election to $1,500
  - Employee is no longer required to contribute $2,750 because of these new relaxed rules
  - Employer should coordinate implementation and communication with TPA

Making/Changing Section 125 Elections

New IRS Notice 2020-29 Relaxed Rules

New Election Change Option #5:

2020 Mid-Year Dependent Care FSA Election Changes

- Employers may amend their Section 125 cafeteria plan to allow employees to revoke, decrease, make, or increase a DC FSA election on a prospective basis
- *Allows employees to change their DC FSA election mid-year for any reason*
  - Requires cafeteria plan amendment no later than December 31, 2021
  - Requires eligible employees be informed of opportunity to make FSA election changes
  - Employer can limit revocation or decrease to no less than amounts already reimbursed

Example:

Employee Reduces Dependent Care FSA Election Mid-Year

- Employee elected to contribute $5,000 to the DC FSA at 2020 open enrollment
- Employee now anticipates only $3,500 in daycare expenses because of daycare, pre-school, and after-school closures during COVID-19 pandemic
- Employer informs employees of enrollment opportunity and will amend its cafeteria plan no later than December 31, 2021
- In calendar year 2020, employee can decrease his DC FSA election to $3,500
  - Employee is no longer required to contribute $5,000 because of these new relaxed rules
  - Employer should coordinate implementation and communication with TPA

Making/Changing Section 125 Elections
New IRS Notice 2020-29 Relaxed Rules

Extended Period to Incur FSA Claims in 2020:
Applies to Grace Periods and Non-Calendar Plan Years

- Employers may amend their Section 125 cafeteria plan to allow employees to incur reimbursable claims through the end of calendar year 2020 for any FSA plan year or grace period that ends in 2020
- *Does not apply to calendar plan year FSA with carryover*
  - Requires cafeteria plan amendment no later than December 31, 2021
  - Requires eligible employees be informed of extended period to incur claims

Grace Period Example:
Calendar Plan Year Health FSA and Dependent Care FSA

- Employer sponsors calendar year health FSA and DC FSA with grace period
- Many employees did not incur sufficient claims for the 2019 plan year by the end of the grace period ending March 15, 2020 to cover their full election
- Employer informs employees of extended period to incur claims and will amend its cafeteria plan no later than December 31, 2021
- Employees can incur 2019 FSA plan year expenses through December 31, 2020
  - The standard grace period ending March 15, 2020 is pushed out to December 31, 2020
  - Employer should coordinate implementation and communication with TPA

Making/Changing Section 125 Elections

New IRS Notice 2020-29 Relaxed Rules

Extended Period to Incur FSA Claims in 2020:

Applies to Grace Periods and Non-Calendar Plan Years

- Employers may amend their Section 125 cafeteria plan to allow employees to incur reimbursable claims through the end of calendar year 2020 for any FSA plan year or grace period that ends in 2020
- *Does not apply to calendar plan year FSA with carryover*
  - Requires cafeteria plan amendment no later than December 31, 2021
  - Requires eligible employees be informed of extended period to incur claims

Carryover Example:

July 1 Plan Year Health FSA

- Employer sponsors July 1 – June 30 plan year health FSA with the $500 carryover
- Many employees have more than $500 remaining in their health FSA at the end of the plan year ending June 30, 2020 because of the COVID-19 pandemic
- Employer informs employees of extended period to incur claims and will amend its cafeteria plan no later than December 31, 2021
- Employees more than $500 remaining in health FSA ending June 30, 2020 can incur expenses up to the full amount of remaining balance through December 31, 2020
  - Employer should coordinate implementation and communication with TPA

What About Commuter Benefits?
NOT Subject to Section 125

Section 132 Commuter Benefit Elections Can Be Changed Monthly

- The Section 125 cafeteria plan rules do not apply to commuter benefit elections
- The period of coverage under Section 132 is generally only one month
- Employees can change a pre-tax commuter mass transit or parking election each month before the month begins
  - Employees can freely join, increase, decrease, or revoke commuter benefit elections each month for any reason

Common COVID-19 Request:
No More Transit/Parking Expenses

- Many employees no longer have transit/parking expenses as they work from home
- Employees can make a change to their existing commuter elections to discontinue all future transit/parking contributions on a prospective basis
  - No refunds permitted (even on a taxable basis) for commuter amounts already contributed
  - Those amounts remain available only for their designed commuter purpose (transit/vanpool/parking)
- When normal commuting resumes, employees can change their commuter election to resume contributions for transit/parking

Section 139 Qualified Disaster Relief: Potential Tax-Free Reimbursement

IRC Section 139 Has Been Triggered

- President Trump made COVID-19 emergency declaration March 13, 2020
- IRS interpreted this as a federally declared disaster under the tax code
- This makes certain employer reimbursements available tax-free
- **Still much uncertainty in this area—will likely be IRS guidance soon**

What Does §139 Permit Employers to Reimburse Tax-Free? "Qualified Disaster Relief Payments":

- Any amount paid to or for the benefit of the employee to reimburse or pay **reasonable and necessary**:
  - **Personal, family, living, or funeral expenses incurred as a result of the disaster; or**
  - Expenses incurred for the repair or rehabilitation of a personal residence or its contents if attributable to the disaster
- This is the first time §139 is available for a pandemic—open questions remain
  - Could employer payment for daycare qualify? (Above and beyond §129 $5,000 limit)
  - Could education costs (e.g., homeschool costs, tutors, remote learning) qualify?
  - More details to come as guidance issued

CARES ACT
New HSA/FSA/HRA Rules

CARES Act:
First-Dollar HDHP Telehealth Permitted

HDHPs generally cannot cover any non-preventive services without being subject to the minimum statutory deductible ($1,400 individual, $2,800 family)

CARES Act Changes:
HSA Eligibility Preserved

HDHPs can provide first dollar coverage for telehealth or other remote care services

- Means that individuals covered under a HDHP that waives the deductible for telehealth services or other remote care can maintain HSA eligibility
- Includes non-preventive telehealth/remote care

Applies for plan years beginning on or before December 31, 2021

- For a calendar plan year, the 2020 and 2021 plan years

Practical Considerations:
Plan Design Issues

These are optional provisions

- HDHPs are not required to offer free telehealth and remote care
- These rules simply permit it without causing loss of HSA eligibility

Fully Insured Plan:

- Up to the insurance carrier to make the determination of whether to add first-dollar telehealth/remote care

Self-Insured Plan:

- Employers can work with TPA and stop-loss provider to make this plan design decision

CARES Act:
Changes to Eligible HSA/FSA/HRA Expenses

The CARES Act pairs a longstanding Republican priority with a longstanding Democrat priority for a bipartisan combo of changes to the list of eligible medical expenses for an HSA/FSA/HRA.

OTC Medicines and Drugs:
No Rx Required

CARES Act eliminates the requirement for a prescription to reimburse an over-the-counter medicine or drug

- Prior rule from the ACA restricted eligible account-based plan expenses to only OTC medicines and drugs (other than insulin) provided pursuant to a prescription
- No Rx required anymore for OTC medicines and drugs to qualify as eligible HSA/FSA/HRA expense

Effective for expenses incurred on or after January 1, 2020

Menstrual Care Products:
Now Eligible Expenses

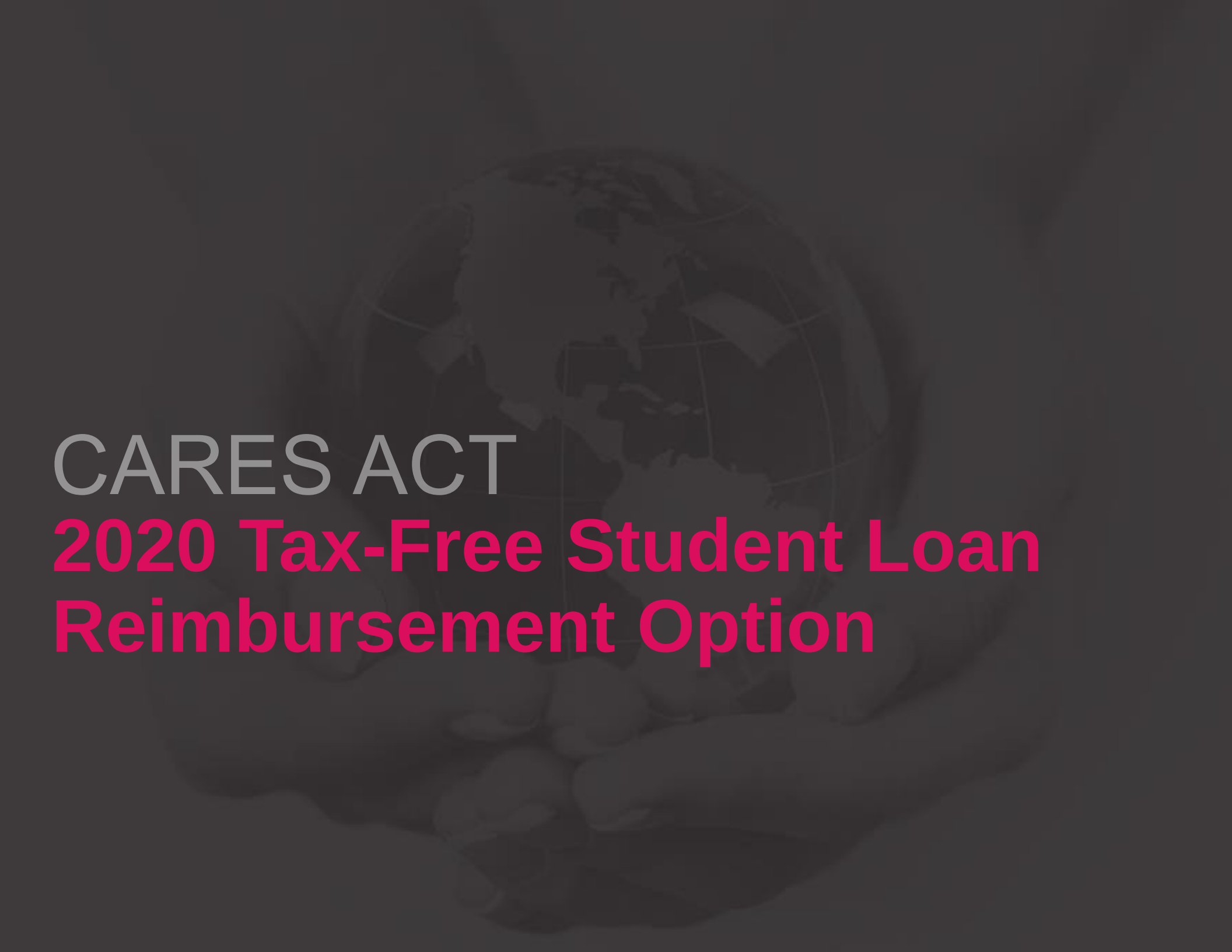
CARES Act adds menstrual care products to qualifying expenses

- Previously excluded as an item for general health
  - §213(d) applies only to expenses incurred for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body

Now HSA/FSA/HRA can reimburse these products tax-free

- Includes tampons, pads, liners, cups, sponges, or similar products

Effective for expense incurred on or after January 1, 2020



CARES ACT
2020 Tax-Free Student Loan Reimbursement Option

CARES Act:
Tax-Free Reimbursement in 2020

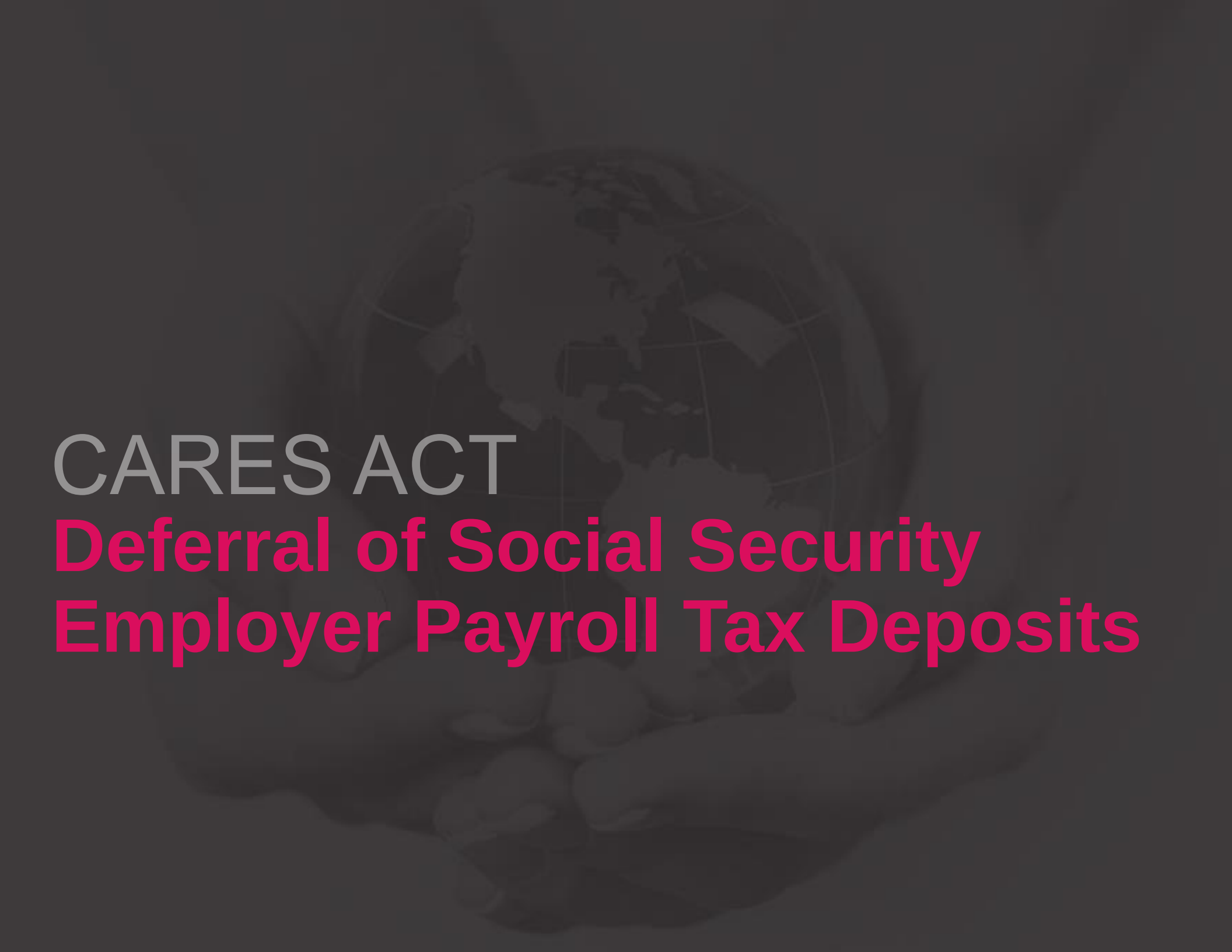
IRC Section 127 Permits Tax-Free Educational Assistance

- Allows employers to cover the cost of educational expenses for an employee tax-free—but not including student loan repayments until now
- Capped at $5,250 per calendar year

CARES Act Expands Upon Educational Assistance

Student Loan Repayment Tax-Free in 2020

- Employers can now pay for an employee's student loans on a tax-free basis
  - Payment can be made to the employee or directly to the lender
  - Must be for principal or interest on a qualifying education loan incurred by the employee
- Capped at $5,250 in the same manner as §127 programs
  - Applies from date of enactment (3/27/20) through the end of 2020



CARES ACT
Deferral of Social Security Employer Payroll Tax Deposits

CARES Act:
Deferral of Employer SS Payroll Tax

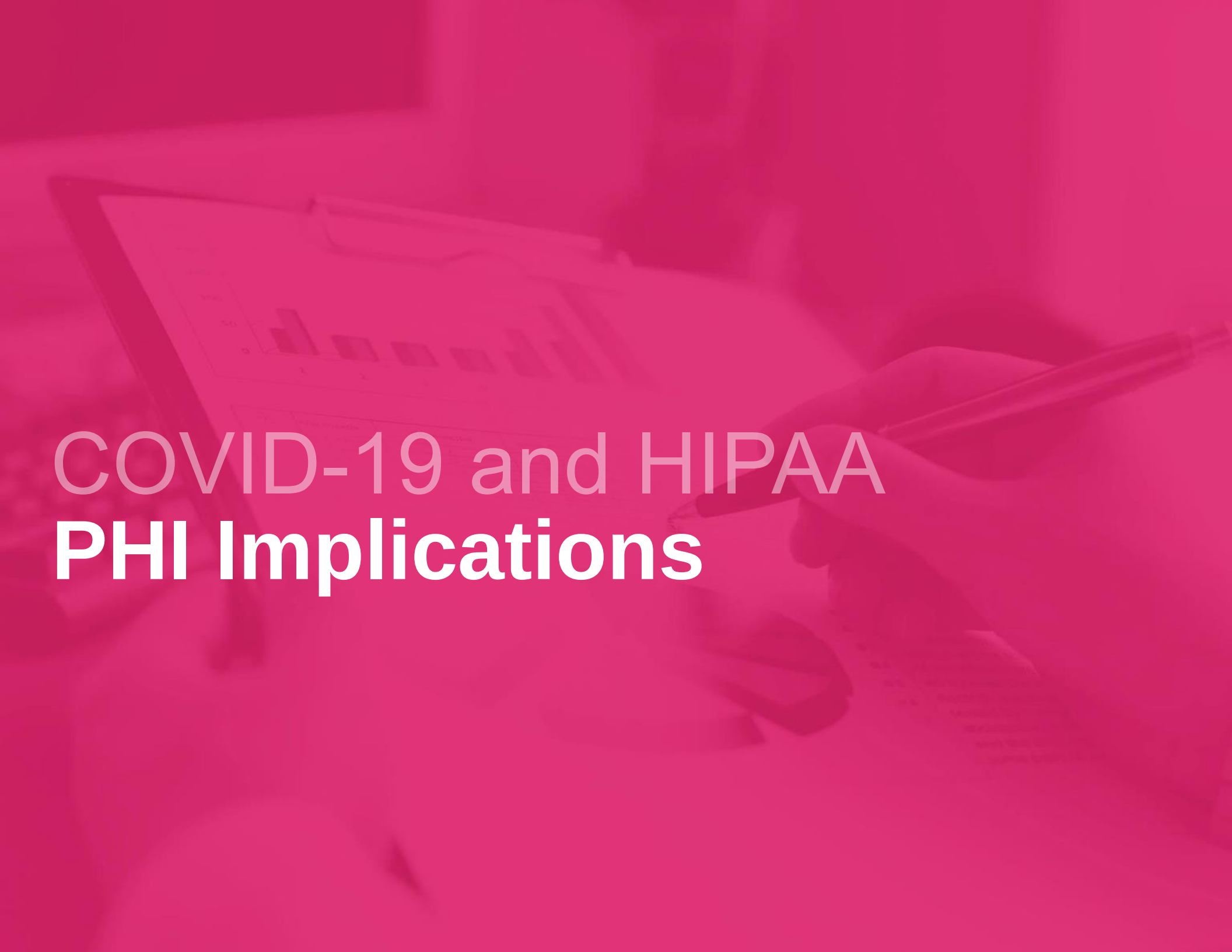
CARES Act Allows Employers to Defer Deposit/Payment

- Applies to the employer-share of the 2020 Social Security tax starting 3/27/20
  - Only the Social Security tax portion of FICA (6.2% up to $137,700) through 12/31/20
  - Does not apply to the Medicare tax portion of FICA (1.45%, with no cap)

IRS Issues FAQ Guidance

https://www.irs.gov/newsroom/deferral-of-employment-tax-deposits-and-payments-through-december-31-2020

- Applies to all employers (no size limit)
  - Form 941 quarterly payroll tax return will reflect deferral
- Employers taking PPP loan may not defer the deposit and payment after the employer receives loan forgiveness decision
  - Employers can defer the payroll tax amount up to the date the lender issues decision to forgive the loan
- Employers can still receive payroll tax credit for FFCRA leave
  - This deferral is in additional to the FFCRA payroll tax credits for paid leave
- The deferred Social Security employer taxes are spread over two years
  - **50% of the deferred amount: Due by December 31, 2021**
  - **The remaining deferred amount: Due by December 31, 2022**



COVID-19 and HIPAA
PHI Implications

Reminder: HIPAA Applies Only to Information Obtained from the Plan

- **Covered Entity**
  - Health Plan
    - Employer-sponsored group health plans
    - Health insurance carriers (including HMOs)
    - Medicare, Medicaid, VA, IHS, TRICARE, etc.
  - Health Care Clearinghouse
  - Health Care Provider (who transmits health information electronically)
    - Doctors, nurses, hospitals, clinics, psychologists, dentists, chiropractors, nursing homes, pharmacies, etc.
- **Business Associate**
  - An entity performs a listed function or activity on behalf of a covered entity; and
  - Creates, receives, maintains, or transmits PHI on behalf of the covered entity
    - Claims processing, data analysis, utilization review, billing, legal, actuarial, accounting, consulting, data aggregation
- **Protected Health Information (PHI)**
  - Individually identifiable health information maintained or transmitted by a CE
    - Excludes enrollment/disenrollment information used by the employer for employment purposes (that does not include any substantial clinical information)

HIPAA Generally Not at Play:
Employees Inform Employer of Test Results

COVID-19 Question: Employee informs employer of COVID-19 diagnosis. HIPAA issue?

Answer: No. This information did not derive from a covered entity or business associate.

A

HIPAA Does Not Apply to Employee Notification

- Employees generally are not a covered entity or business associate
- Individuals not acting as a representative of a covered entity or business associate are not subject to HIPAA's restrictions on use/disclosure of PHI
  - Employees are free to share their health information with anyone and for any reason
  - Includes in the public square, on social media, or with their employer

B

Potential HIPAA Issues to Still Keep in Mind

- Employers cannot ever use/disclose PHI derived from the plan for employment purposes
- HIPAA also prohibits conditioning the plan's treatment or payment upon an employee's HIPAA authorization
  - For example, employers could not require employees to authorize release of COVID-19 test results as a condition of the plan covering the test
- HIPAA does permit covered entity's disclosure of PHI to a public health authority (such as the CDC or a state or local health department) in certain situations
  - For example, the plan could disclose PHI to the CDC as needed to report cases of patients exposed to or suspected or confirmed to have COVID-19

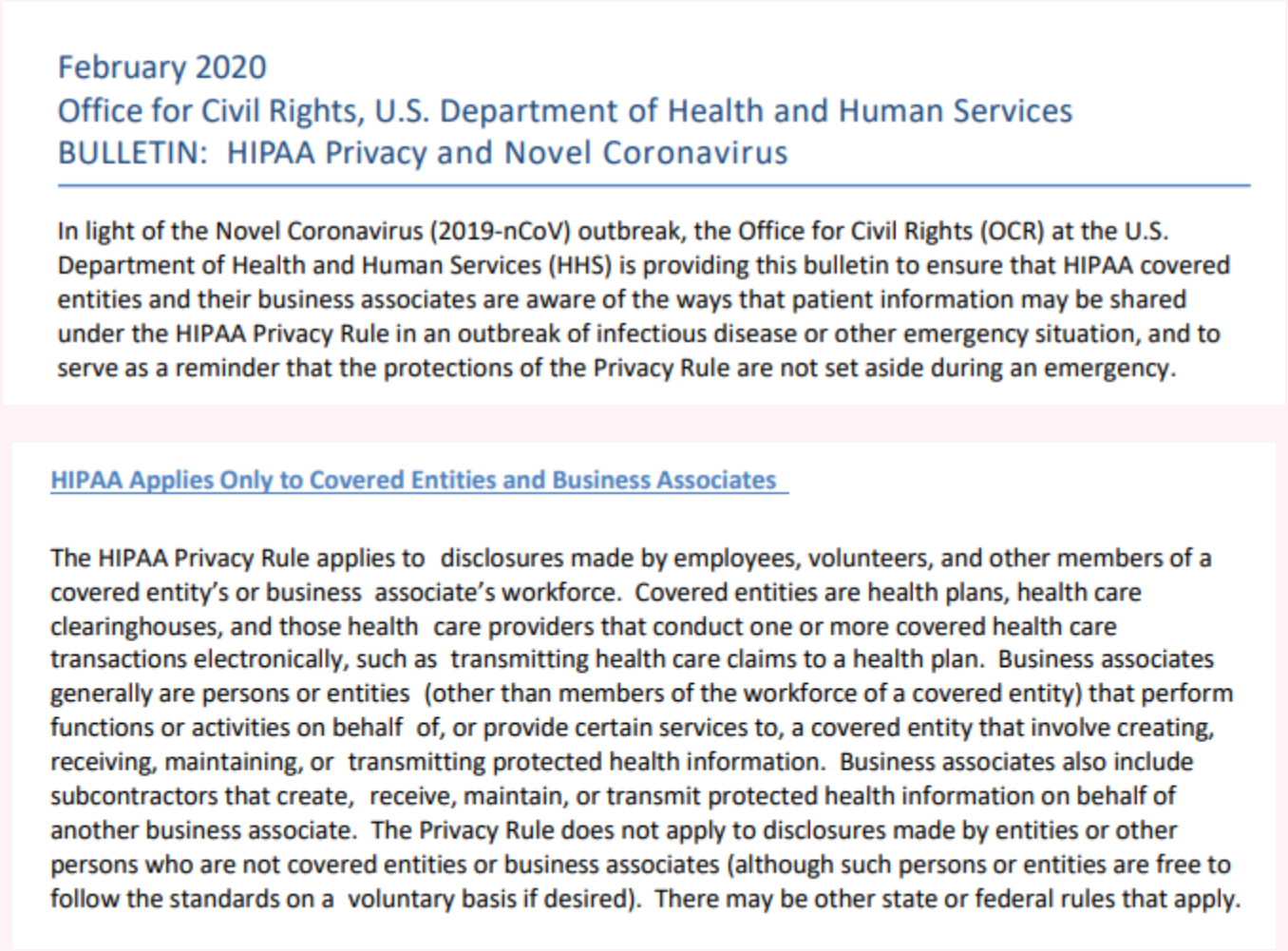
C

Keep in Mind: HIPAA is Not the End of the Analysis

- Once the employer receives the COVID-19 diagnosis information from the employee, the employer still has non-HIPAA legal constraints
  - Particularly under the ADA—see next section of slides

Official HIPAA Guidance:
COVID-19 HHS/OCR Bulletin

- https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf



February 2020
Office for Civil Rights, U.S. Department of Health and Human Services
BULLETIN: HIPAA Privacy and Novel Coronavirus

In light of the Novel Coronavirus (2019-nCoV) outbreak, the Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (HHS) is providing this bulletin to ensure that HIPAA covered entities and their business associates are aware of the ways that patient information may be shared under the HIPAA Privacy Rule in an outbreak of infectious disease or other emergency situation, and to serve as a reminder that the protections of the Privacy Rule are not set aside during an emergency.

HIPAA Applies Only to Covered Entities and Business Associates

The HIPAA Privacy Rule applies to disclosures made by employees, volunteers, and other members of a covered entity's or business associate's workforce. Covered entities are health plans, health care clearinghouses, and those health care providers that conduct one or more covered health care transactions electronically, such as transmitting health care claims to a health plan. Business associates generally are persons or entities (other than members of the workforce of a covered entity) that perform functions or activities on behalf of, or provide certain services to, a covered entity that involve creating, receiving, maintaining, or transmitting protected health information. Business associates also include subcontractors that create, receive, maintain, or transmit protected health information on behalf of another business associate. The Privacy Rule does not apply to disclosures made by entities or other persons who are not covered entities or business associates (although such persons or entities are free to follow the standards on a voluntary basis if desired). There may be other state or federal rules that apply.

What About Family Members?

Disclosing PHI to Family Members

- General rule is that the individual must authorize disclosure of PHI that is not to a covered entity or business associate for treatment, payment, or health care operations
- In some limited situations, the covered entity (e.g., the health plan) may disclose PHI to a family member or close personal friend **if the PHI is directly relevant** to their involvement to assist in the individual's care or payment
  - This issue often arises with parents assisting a pre-26 adult child with treatment/payment

Individual Has Capacity to Make Health Care Decisions

Covered entity may disclose if:

- Obtains agreement (written or oral) from the individual;
- Provides the individual with the opportunity to object to the disclosure (and the individual does not object); ***OR***
- Reasonably infers from the circumstances, based on exercise of professional judgment, that the individual does not object to the disclosure

Individual Not Present, Incapacitated, or Emergency

Covered entity may disclose if:

- In the exercise of professional judgment determines that the disclosure **is in the best interests** of the individual; **AND**
- Limits disclosure to only the PHI that is directly relevant to the person's involvement with the individual's care or payment related to the individual's health care or needed for notification purposes

What About Family Members?

Disclosing PHI to Family Members

https://www.hhs.gov/hipaa/for-professionals/faq/1067/may-a-health-plan-disclose-information-to-a-person-who-calls/index.html

May a health plan disclose protected health information to a person who calls the plan on the beneficiary's behalf?

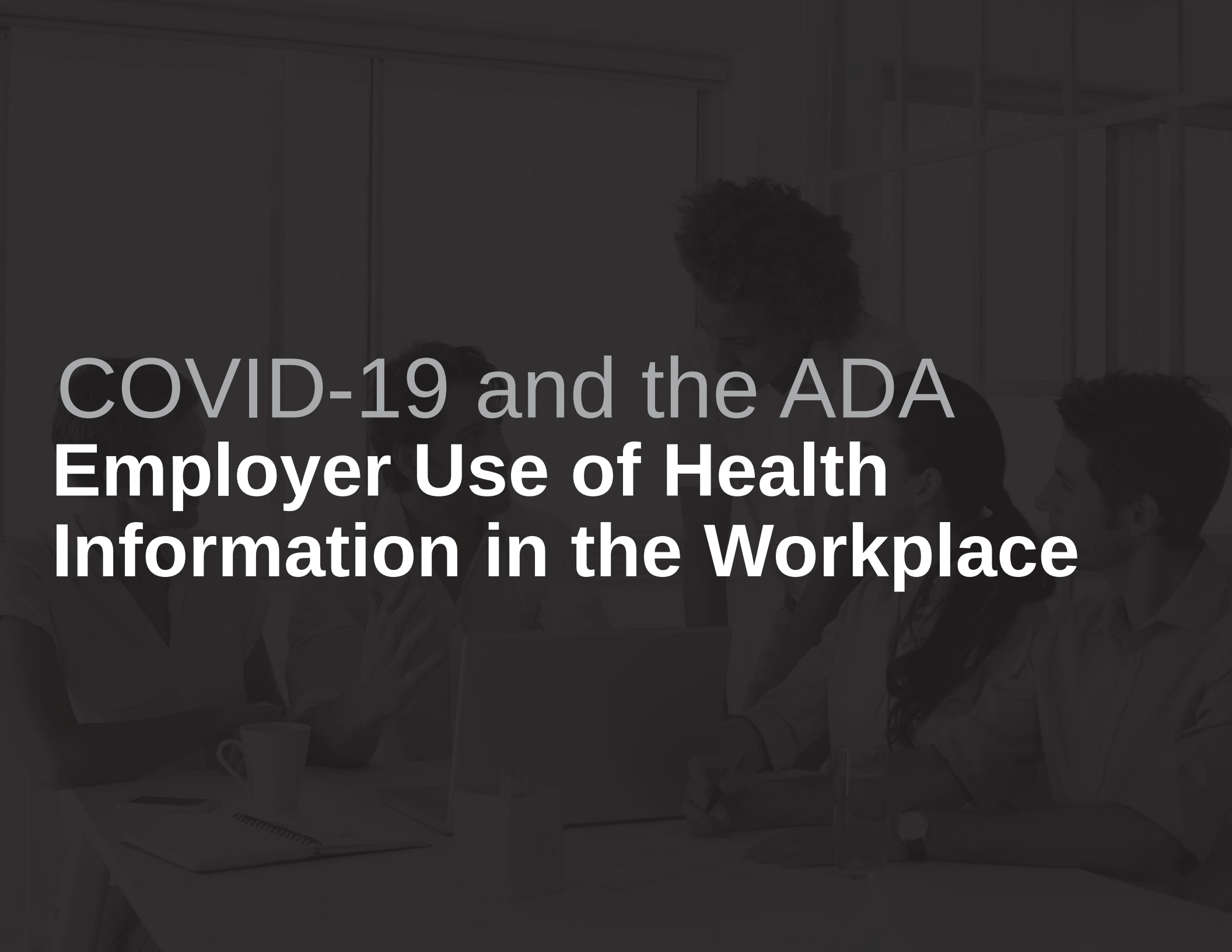
Answer:

Yes, subject to the conditions set forth in 45 CFR 164.510(b) of the HIPAA Privacy Rule. The Privacy Rule at 45 CFR 164.510(b) permits a health plan (or other covered entity) to disclose to a family member, relative, or close personal friend of the individual, the protected health information (PHI) directly relevant to that person's involvement with the individual's care or payment for care. A covered entity also may make these disclosures to persons who are not family members, relatives, or close personal friends of the individual, provided the covered entity has reasonable assurance that the person has been identified by the individual as being involved in his or her care or payment.

A covered entity only may disclose the relevant PHI to these persons if the individual does not object or the covered entity can reasonably infer from the circumstances that the individual does not object to the disclosure; however, when the individual is not present or is incapacitated, the covered entity can make the disclosure if, in the exercise of professional judgment, it believes the disclosure is in the best interests of the individual.

For example:

- A health plan may disclose relevant PHI to a beneficiary's daughter who has called to assist her hospitalized, elderly mother in resolving a claims or other payment issue.
- A health plan may disclose relevant PHI to a human resources representative who has called the plan with the beneficiary also on the line, or who could turn the phone over to the beneficiary, who could then confirm for the plan that the representative calling is assisting the beneficiary.
- A health plan may disclose relevant PHI to a Congressional office or staffer that has faxed to the plan a letter or e-mail it received from the beneficiary requesting intervention with respect to a health care claim, which assures the plan that the beneficiary has requested the Congressional office's assistance.
- A Medicare Part D plan may disclose relevant PHI to a staff person with the Centers for Medicare and Medicaid Services (CMS) who contacts the plan to assist an individual regarding the Part D benefit, if the information offered by the CMS staff person about the individual and the individual's concerns is sufficient to reasonably satisfy the plan that the individual has requested the CMS staff person's assistance.



COVID-19 and the ADA
Employer Use of Health Information in the Workplace

EEOC Applies Influenza Pandemic Guidance To COVID-19 Situation

New EEOC Guidance for COVID-19

- https://www.eeoc.gov/facts/pandemic_flu.html

PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT

UPDATED IN RESPONSE TO COVID-19 PANDEMIC – March 21, 2020

NOTE ABOUT MARCH 19, 2020 UPDATE: The EEOC is updating this 2009 publication to address its application to coronavirus disease 2019 (COVID-19). Employers and employees should follow guidance from the Centers for Disease Control and Prevention (CDC) as well as state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public. The ADA and the Rehabilitation Act do not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace. This update retains the principles from the 2009 document but incorporates new information to respond to current employer questions. For readers' ease the COVID-19 updates are all in bold.

Three Key Pieces to ADA Pandemic Analysis

1. ADA regulates employer's disability-related inquiries and medical examinations for all applicants and employees (including those who do not have disabilities)
2. ADA prohibits employers from excluding individuals with disabilities from the workforce for health or safety reasons unless they pose a **"direct threat" (see next slide)**
3. ADA requires reasonable accommodations for individuals with disabilities during a pandemic, unless it poses an undue hardship

"Direct Threat" Analysis:
No Surprise: COVID-19 Qualifies

New EEOC Guidance for COVID-19

- **Direct Threat Defined:** *A significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation*
- Note: Typical seasonal flu or even 2009 spring/summer H1N1 flu did not qualify

https://www.eeoc.gov/facts/pandemic_flu.html

DIRECT THREAT AND PANDEMIC INFLUENZA, COVID-19, AND OTHER PUBLIC HEALTH EMERGENCIES

Direct threat is an important ADA concept during an influenza pandemic.

Whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. By contrast, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.

During a pandemic, employers should rely on the latest CDC and state or local public health assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings. In addition, numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues, and schools in order to avoid bringing people together in close quarters due to the risk of contagion. These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists.

Employer Actions FAQ:
EEOC Provides COVID-19 ADA Guidance

May an employer send employees home if they have symptoms associated with COVID-19?

- Yes, employers can send home an employee with COVID-19 or symptoms associated with it

How much information may an employer request from employees who report feeling ill at work or call in sick?

- Employers may ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19
  - Symptoms currently include for example, fever, chills, cough, shortness of breath, or sore throat

May an employer take its employees' temperatures to determine whether they have a fever?

- Yes, employers may measure employees' body temperature during the pandemic
  - Because CDC and state/local health authorities have acknowledged community spread of COVID-19
  - Employers should be aware that some people with COVID-19 do not have a fever

May an employer ask employees questions about exposure to COVID-19 upon return from travel during the pandemic?

- Employers may ask whether employees are returning from specified locations with heightened risk
  - Even if the employee displays no symptoms, and even if the travel was personal

ADA Medical Information Confidentiality: Confidentiality Rules Still Apply

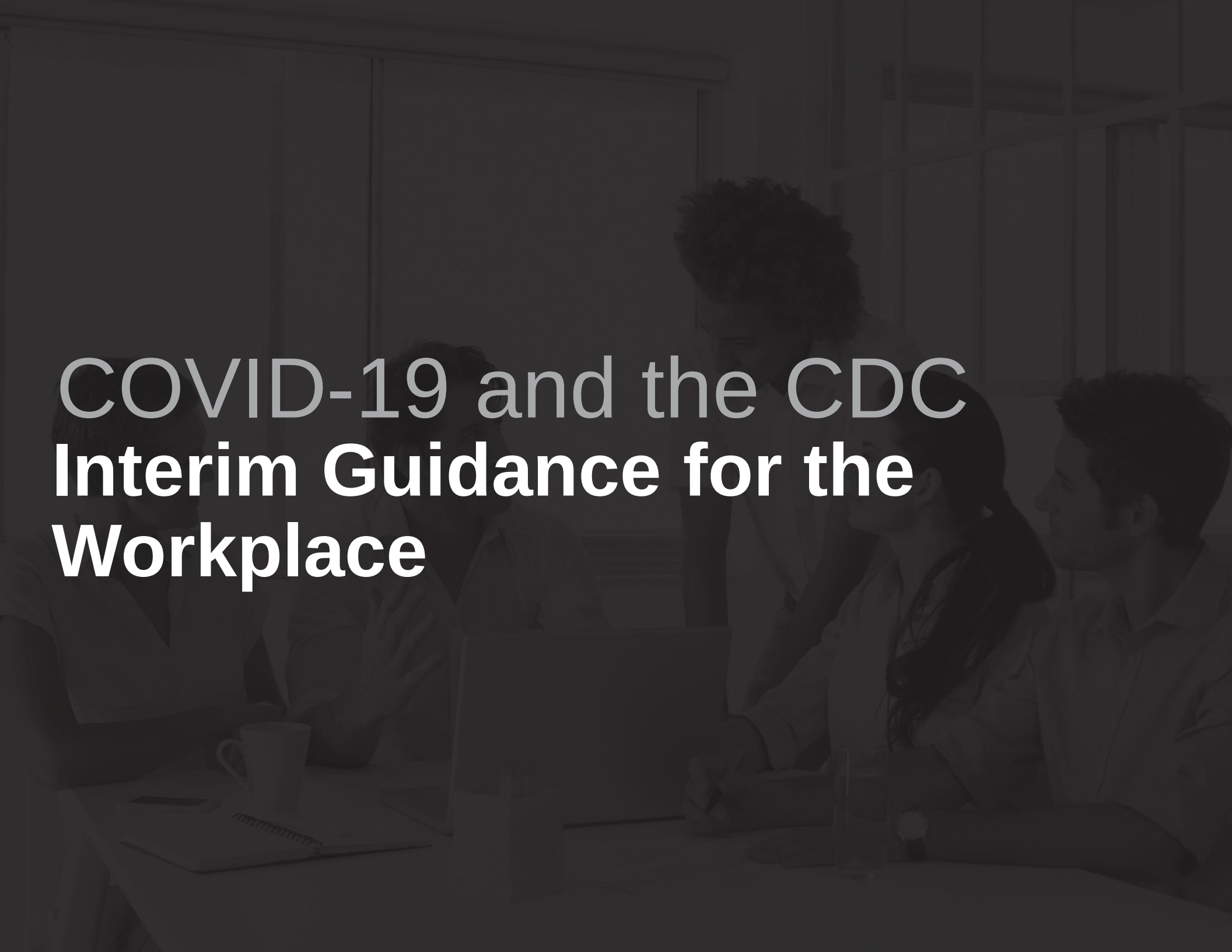
ADA Confidentiality Requirements

- All information about applicants or employees obtained through disability-related inquiries or medical examinations **must be kept confidential**
  - Information regarding the medical condition or history of an employee must be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record

Exceptions to Confidentiality Requirements

Medical information on employees (or applicants) is confidential with the following five exceptions:

1. Supervisors and managers may be told about necessary restrictions on work duties and about necessary accommodations
2. First aid and safety personnel may be told if the disability might require emergency treatment
3. Government officials may access the information when investigating compliance with the ADA
4. Employers may give information to state workers' compensation offices, state second injury funds, or workers' compensation carriers in accordance with law
5. Employers may use the information for insurance purposes



COVID-19 and the CDC
Interim Guidance for the Workplace

Employer Guidance from the CDC: Recommended Strategies

CDC Interim Guidance for Businesses and Employers

- https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

Actively Encourage Employees to Stay Home

- Employees who have symptoms of acute respiratory illness are recommended to stay home and not come to work until they are free of fever (100.4° F [38.0° C] or greater using an oral thermometer), signs of a fever, and any other symptoms for at least 24 hours, without the use of fever-reducing or other symptom-altering medicines (e.g. cough suppressants). Employees should notify their supervisor and stay home if they are sick.
- Ensure that your sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.
- Talk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies.
- Do not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.
- Employers should maintain flexible policies that permit employees to stay home to care for a sick family member. Employers should be aware that more employees may need to stay at home to care for sick children or other sick family members than is usual.

Employer Guidance from the CDC: Recommended Strategies

CDC Interim Guidance for Businesses and Employers

- https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

Separate Sick Employees

- CDC recommends that employees who appear to have acute respiratory illness symptoms (i.e. cough, shortness of breath) upon arrival to work or become sick during the day should be separated from other employees and be sent home immediately. Sick employees should cover their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available).

What If An Employee or Family Member Has COVID-19?

- If an employee is confirmed to have COVID-19, **employers should inform fellow employees of their possible exposure to COVID-19 in the workplace but maintain confidentiality as required by the Americans with Disabilities Act (ADA)**. Employees exposed to a co-worker with confirmed COVID-19 should refer to CDC guidance for how to conduct a risk assessment of their potential exposure.
- Employees who are well but who have a sick family member at home with COVID-19 should notify their supervisor and refer to CDC guidance for how to conduct a risk assessment of their potential exposure.

Employer Guidance from the CDC: Critical Infrastructure Workers

Implementing Safety Practices for Critical Infrastructure Workers Who May Have Been Exposed to COVID-19

- CDC advises such workers be permitted to continue work after potential exposure
  - Such employees **must remain asymptomatic and there must be additional precautions**
  - Potential exposure means being a household contact or having close contact within six feet of an individual with confirmed or suspected COVID-19
  - Timeframe for contact includes 48-hour period before the individual became symptomatic

Five Key Considerations for Potentially Exposed Employees

Critical infrastructure workers who have had an exposure but remain asymptomatic:

1. **Pre-Screen:** Employers should measure the employee's temperature prior to work, ideally before entering the facility
2. **Regular Monitoring:** Employee with no temperature or symptoms should self-monitor under supervision of employer's occupational health program
3. **Wear a Mask:** Employee should wear face mask at all times (issued or approved by the employer) in the workplace for at least 14 days after last exposure
4. **Social Distance:** Employee should maintain six feet and practice social distancing as work duties permit in the workplace
5. **Disinfect and Clean Workspaces:** Routinely clean and disinfect all areas such as offices, bathrooms, common areas, and shared electronic equipment

Employer Guidance from the CDC: Critical Infrastructure Workers

Additional Considerations

- Employees should not share headsets or other objects that are near mouth or nose
- Employers should increase frequency of cleaning commonly touched surfaces
- Employees and employers should consider pilot testing the use of face masks first
- Employers should work with facility and maintenance staff to increase room air exchanges
- Employees should physically distance when they take breaks together

Don't Forget…

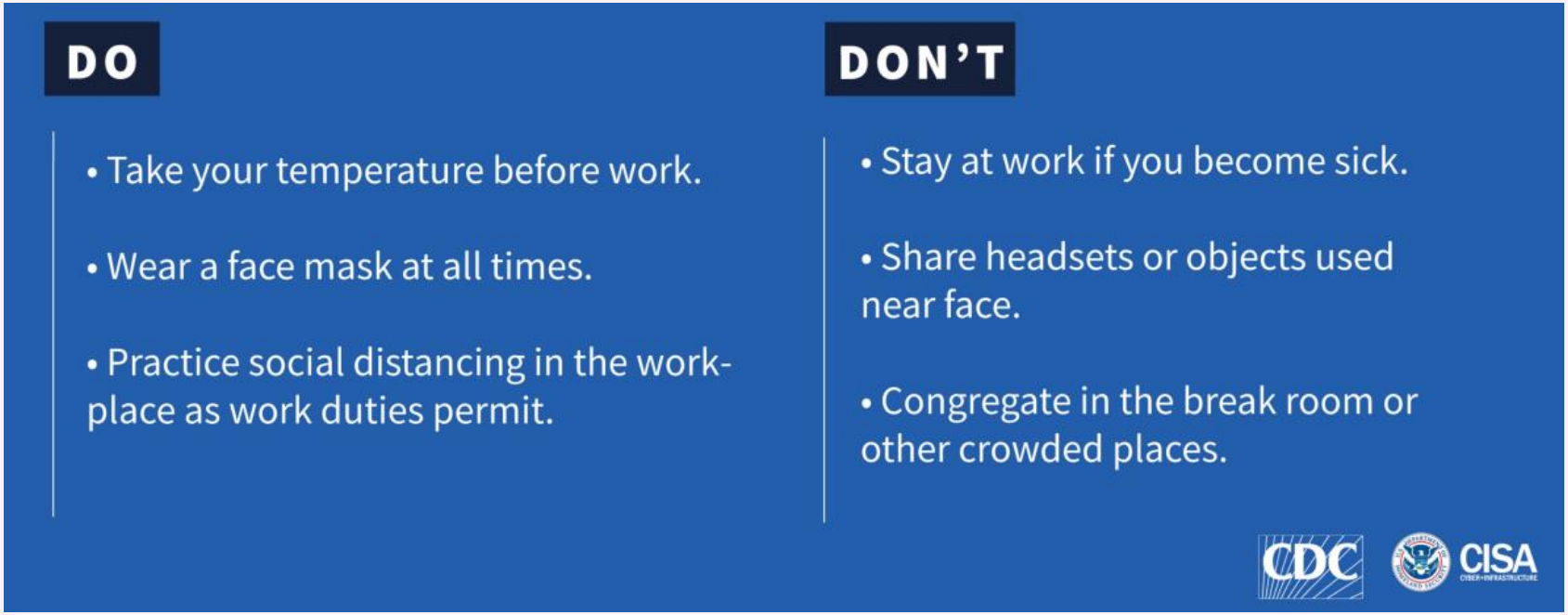
- If the employee becomes sick during the day, they should be sent home immediately
  - https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html
- Surfaces in the workplace should be cleaned and disinfected
  - https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html
- Information on the persons who had contact with the sick employee during the time the employee had symptoms and two days prior should be compiled
  - Anyone at the facility with close contact within six fee of the employee during this time would be considered exposed

Employer Guidance from the CDC: Critical Infrastructure Workers

Where to Find More Information

- Standard website: https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html
- Printable One-Page PDF: https://www.cdc.gov/coronavirus/2019-ncov/downloads/critical-workers-implementing-safety-practices.pdf

Exposed Employee Overview

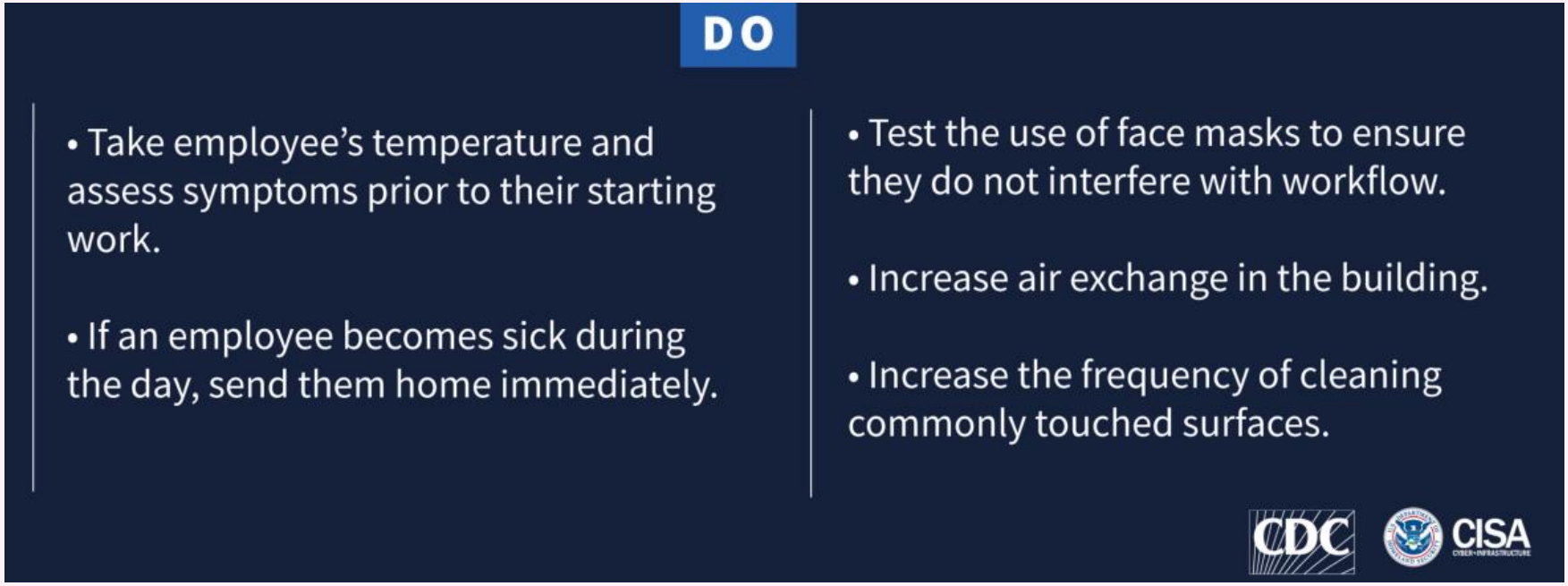


Employer Guidance from the CDC: Critical Infrastructure Workers

Where to Find More Information

- Standard website: https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html
- Printable One-Page PDF: https://www.cdc.gov/coronavirus/2019-ncov/downloads/critical-workers-implementing-safety-practices.pdf

Employer of Exposed Employee Overview



The FFCRA
Emergency Paid Sick Leave

FFCRA: Emergency Paid Sick Leave

Employers with Fewer than 500 Employees

Effective April 1, 2020, and sunsets on December 31, 2020.

Important Note: Does not apply to private employers with 500 or more employees.

Full Pay:

Employee's Own Condition

Two Weeks Paid Sick Leave

Two weeks (up to 80 hours) of paid sick leave at **100% of the employee's regular rate of pay** where employee is unable to work because:

1. Employee is subject to a federal, state, or local quarantine order related to COVID-19;
2. Employee has been advised by a health care provider to self-quarantine related to COVID-19; or
3. Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis

Maximums:

a) $511 per day

b) $5,110 in the aggregate

Two-Thirds Pay:

Care for Family Member

Two Weeks Paid Sick Leave

Two weeks (up to 80 hours) of paid sick leave at **two-thirds of the employee's regular rate of pay** where employee is unable to work because:

4. The employee is caring for an individual who is quarantined per items #1 or #2;
5. The employee is caring for a child whose school is closed or the childcare provider is unavailable due to COVID-19 precautions; or
6. The employee is experiencing any other substantially similar condition (to be specified by HHS)

Maximums:

a) $200 per day

b) $2,000 in the aggregate

The FFCRA
Emergency FMLA Leave

FFCRA: Emergency FMLA Expansion

Employers with Fewer than 500 Employees

Effective April 1, 2020, and sunsets on December 31, 2020.

Important Note: Does not apply to private employers with 500 or more employees.

Covered Employers:
Fewer than 500 Employees

The new emergency FMLA expansion applies to employers with **fewer than 500 employees**

- *Key Difference from Standard FMLA:*
  - Standard FMLA applies to employers with 50 or more employees in a 75-mile radius

What about employers under 50 employees?

- Small Business Exemption:
  - Small businesses with fewer than 50 employees will be eligible for an exemption from the emergency FMLA expansion
  - Available where requirements would jeopardize ability of business to continue
  - See later slide for details

Covered Employees:
30 Calendar Days

Employee must have been on the job for at least **30 calendar days**

- *Key Difference from Standard FMLA:*
  - Standard FMLA applies to employees who have been at least 12 months and at least 1,250 hours in the past 12 months

FFCRA: Emergency FMLA Expansion

Employers with Fewer than 500 Employees

Effective April 1, 2020, and sunsets on December 31, 2020.

Important Note: Does not apply to private employers with 500 or more employees.

Qualifying Leave:

Must be for Care of Child

The new emergency FMLA expansion provides job-protected leave for a "qualifying need related to a public health emergency"

- Public Health Emergency Need 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 daycare provider is unavailable**
  - **Because of a COVID-19 emergency declared by a federal, state, or local authority**

Standard 12-week FMLA period applies

Paid Leave:

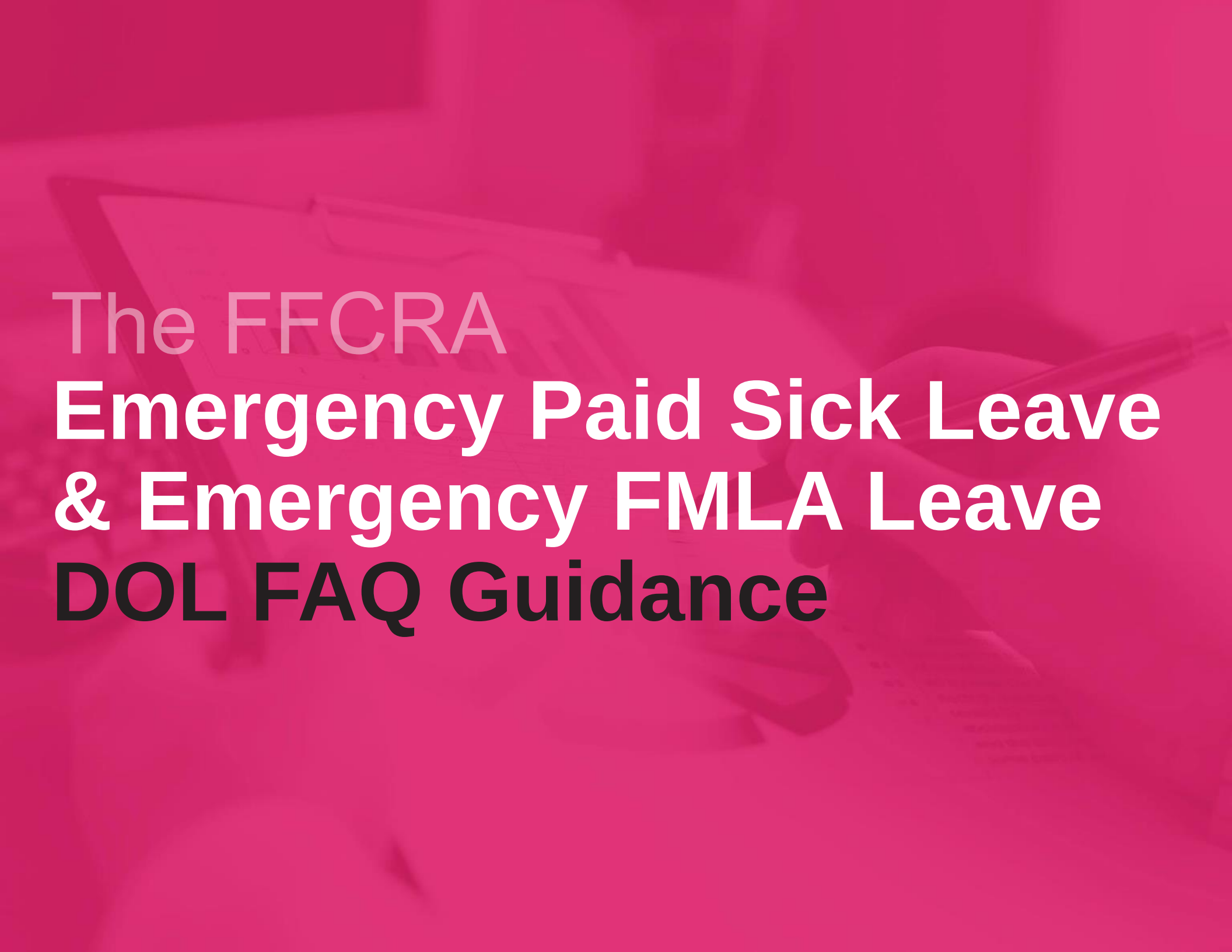
Two-Thirds After First 10 Days

First 10 Days: Unpaid

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

After First 10 Days: Paid

- Employee must be paid **at least two-thirds of the employee's regular rate of pay** based on the number of hours the employee would otherwise be normally scheduled to work
  - **Maximum: $200/day, $10,000 Aggregate**
- *Key Difference from Standard FMLA:*
  - Standard FMLA is always unpaid



The FFCRA

Emergency Paid Sick Leave & Emergency FMLA Leave DOL FAQ Guidance

FFCRA: New DOL Guidance
Where Do I Find It?

The DOL released new materials for employers and employees on March 25

Press release: https://www.dol.gov/newsroom/releases/whd/whd20200324

A

Where Can I Find A Short Summary of These New Rights for Employees?

- *DOL Fact Sheet for Employees:*
  - https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave

B

Where Can I Find A Short Summary of These New Rights for Employers?

- *DOL Fact Sheet for Employers:*
  - https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave

C

Where Can I Find Answers to My Questions About the New Laws?

- *DOL Questions and Answers Guidance:*
  - https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

FFCRA: New DOL Guidance
Where Do I Find It?

The DOL released new materials for employers and employees on March 25

Press release: https://www.dol.gov/newsroom/releases/whd/whd20200324

D

Where Can I Find The Required Employee Workplace Notice Poster?

- *DOL Employee Rights Poster:*
  - https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

E

Where Can I Find Answers to Questions About the Required Poster?

- *DOL FFCRA Workplace Notice Poster FAQ:*
  - https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions

F

Where Can I Find Information on the 30-Day Non-Enforcement Policy?

- *DOL Field Assistance Bulletin 2020-1:*
  - https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1

FFCRA: FAQ Guidance Summarized

Key Takeaways from DOL FAQs

When are the Emergency Paid Sick Leave and Emergency FMLA Requirements Effective?

- April 1, 2020 through December 31, 2020
  - Applies to any qualifying leave taken between those dates

How is the Under 500-Employee Threshold Determined?

- Determined at the time the employee's leave is taken
  - An employer fluctuating above and below 500 employees will have to monitor based on each particular employee's leave initiation date
  - Include all employees in the United States (full-time, part-time, union, temps, etc.)
  - "Integrated employer test" applies for employers with multiple entities, see top of page 8 here for a summary

Is a Private Sector Employer with 500 or More Employees Subject to These New Leave Requirements?

- No.
  - These new requirements apply only to private sector employers with fewer than 500 employees

FFCRA: FAQ Guidance Summarized

Key Takeaways from DOL FAQs

How do Employers with Fewer than 50 Employees Qualify for the Small Business Exemption?

- Employer should document why its business meets the required criteria
  - Generally available where requirements would jeopardize ability of business to continue
  - Regulations clarify in more detail
  - No materials will be sent to the DOL when seeking the small business exemption

Can Employees Take Two Weeks of Paid Sick Leave for Self-Quarantine and then More Paid Sick Leave for Another Qualifying Reason?

- No.
  - The two-week limit (10 days, 80 hours) applies for paid sick leave for any combination of qualifying reasons
  - The total number of hours of paid sick leave is capped at 80 hours

Can Employers Deny Paid Sick Leave if the Employee Already Received Paid Sick Leave for a Qualifying Reason Prior to this New Law?

- No.
  - The new emergency paid sick leave law will impose a new requirement on employers effective April 1, 2020

FFCRA: FAQ Guidance Summarized

Key Takeaways from DOL FAQs

For Employees Caring For Children, How do the Emergency Paid Sick Leave and Emergency FMLA Leave Rules Interact?

- Employees may be eligible for both types of leave, but only for a total of 12 weeks of paid leave combined
  - Emergency paid sick leave will provide for an initial two weeks of paid leave
  - This is the first 10 workdays of leave, which are unpaid under the EFMLA rules
  - After the first 10 workdays, employees can receive 2/3 of their pay for the remaining 10 weeks of EFMLA

Are the Emergency Paid Sick Leave and Emergency FMLA Leave Rules Retroactive in Effect?

- No.

How does the 30-Day Requirement for Employees to Be Eligible for Emergency FMLA Leave Apply?

- An employee must have been on the employer's payroll for the 30 calendar days immediately prior to the date the employee's leave would begin
  - An employee taking leave on April 1, 2020 must have been on the employer's payroll as of March 2, 2020

FFCRA: Additional FAQs Posted Teleworking

How is an Employee Able to Telework under the FFCRA?

- When the employer permits or allows the employee to perform work while at home or any other location other than the employee's normal workplace
  - Telework is work for which normal wages must be paid
  - Where an employee is teleworking, the FFCRA paid leave provisions do not apply

What Does it Mean to be Unable to Work or Telework?

- One of the qualifying COVID-19-related reasons prevents the employee from being able to perform their work at the normal worksite or by means of teleworking
  - If the employer and employee agree that the employee can work different hours, the employee is able to work, and leave is not necessary unless a qualifying COVID-19 reason prevents the employee from working that schedule (e.g., early morning/late night)

What if the Employee Offers Teleworking But the Employee is Unable to Telework?

- The employee is entitled to take paid sick leave if the employee is unable to telework for one of the qualifying reasons
  - For example, employees may need to take care of a child whose school or daycare has closed, or the child's care provider is unavailable, because of COVID-19-related reasons
  - If employee is able to telework while caring for child, paid sick leave and expanded FMLA is not available

FFCRA: Additional FAQs Posted
Intermittent Leave

Can Employees take Intermittent Leave While Teleworking?

- Yes, if the employer allows it and the employee is unable to work for one of the qualifying reasons
  - Employer and employee may agree on intermittent paid sick leave while teleworking
  - Employer and employee may also agree on intermittent expanded FMLA to care for a child
  - Any increment of intermittent leave is permitted, provided employer and employee agree

What About Intermittent Paid Sick Leave at the Worksite?

- Intermittent leave is generally not available unless the employee is teleworking
  - Leave related to COVID-19 generally must be taken in full-day increments and continue until exhausted or the qualifying reason for the leave no longer exists
  - Exception is intermittent leave to care for a child on days school/daycare not available

What About Intermittent FMLA Leave at the Worksite?

- This is up to the employer to permit
  - Employer and employee need to agree upon a schedule to make this an option
  - For example, employee might take expanded FMLA leave intermittently on Monday, Wednesday, and Friday when daycare is not available
  - DOL is encouraging employers and employee to “collaborate to achieve flexibility”

FFCRA: Additional FAQs Posted

Coordination

Can Employees Use Vacation/Sick/PTO with FFCRA Leave?

- Generally, no.
  - Employee must generally choose one type of leave to take (can't simultaneously take both)
  - *Exception: Employer agrees to allow employee to supplement with vacation/sick/PTO*

Can an Employer Require Use of Vacation/Sick/PTO?

- No. Employee may decide whether to use vacation/sick/PTO to supplement
  - Employee would have to agree to supplement or adjust FFCRA paid leave available
  - *Note: Employer may require use of PTO during FMLA leave portion (after first 10 days)*

Are Employers Required to Offer Vacation/Sick/PTO Supplement to Employees on Paid Sick/FMLA Leave?

- No. Employers are not required to permit an employee to supplement the amount the employee receives from paid sick leave or expanded FMLA

Can Employers Claim the Payroll Tax Credit for Supplemental Pay or Pay in Excess of the Maximums?

- No. *(But it's still fine to pay amounts in excess of the FFCRA maximums!)*
  - No payroll tax credit available for vacation/sick/PTO supplemental pay
  - No payroll tax credit available for employer payments in excess of paid leave maximums

FFCRA: Additional FAQs Posted

Qualifying for Leave

Which Employees Qualify for Leave?

- Emergency Paid Sick Leave
  - All U.S. employees
- Expanded FMLA Leave
  - All U.S. employees who have been employed for 30 calendar days

Who is a Qualifying Child (Son or Daughter)?

- Biological child
- Adopted child
- Foster child
- Stepchild
- Legal ward
- In loco parentis (day-to-day responsibilities to care for or financially support child)
- Disabled children age 18+ meeting specific requirements

What if Employees Already Took FMLA Leave Recently?

- All prior weeks of FMLA leave in the 12-month period count toward eligibility for expanded FMLA leave under the FFCRA, too
  - For example, an employee who already used 2 weeks has only 10 weeks remaining
  - Note that this does not affect eligibility for emergency paid sick leave (which is non-FMLA)

FFCRA: Additional FAQs Posted
Employer Records (Updated FAQs)

What Records do Employers Need to Keep?

- For any grant or denial of a request for paid sick leave or expanded FMLA leave, employers must document the following:
  - The name of the employee requesting the leave;
  - The date(s) for which the leave is requested;
  - The reason for leave; and
  - A statement from the employee that he or she is unable to work because of that reason
- Additional Records Required for Leave Related to Quarantine or Isolation Order or to Care for an Individual Subject to Such an Order:
  - The name of the government entity that issued the order
  - If the employee requests leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, document the name of the health care provider who gave the advice
- Additional Records Required for Leave to Care for Child Whose School or Place of Care is Closed, or Child Care Provider is Unavailable:
  - The name of the child being cared for;
  - The name of the school, place of care, or child care provider that has closed or become unavailable; and
  - Statement from the employee that no other suitable person is available to care for the child

FFCRA: Additional FAQs Posted
Quarantine and Isolation Orders

Which Government Orders Qualify?

- Any federal, state, or local quarantine or isolation order related to COVID-19
  - **Includes shelter-in-place and stay-at-home orders related to COVID-19**
  - Compilation of state stay-at-home orders available here: https://www.finra.org/rules-guidance/key-topics/covid-19/shelter-in-place
  - *Reminder:* Must cause employee to be unable to work (or telework)
  - *Reminder:* Employer must have work the employee could perform but for the order (sick leave not available if employer does not have work for employee as a result of the order)

When Does Self-Quarantine Qualify?

- A health care provider directs or advises the employee to stay home or otherwise quarantine because the employee may have COVID-19 or is particularly vulnerable
  - *Reminder:* The quarantine must prevent the employee from working (or teleworking)

What About Care for a Self-Quarantining Individual?

- Employees may take paid sick leave to care for an immediate family member or someone who regularly resides in the employee's home
  - Also applies where relationship creates expectation of care and individual depends on employee for care during the self-quarantine

FFCRA: Additional FAQs Posted
Other Leaves/Enforcement

Can Employees on Disability Leave Take FFCRA Leave?

- No, unless the employee was able to return to light duty before taking leave
  - Employees receiving workers' compensation or state or employer-sponsored disability benefits may not take paid sick leave or expanded FMLA leave

Can Employees on an Employer-Approved Leave Take FFCRA Leave?

- It depends whether the leave of absence is voluntary or mandatory
  - Voluntary: Employee may end the leave of absence and begin taking FFCRA leave
  - Mandatory: The employee is not eligible for FFCRA leave because it is the mandatory leave that prevents the employee from being able to work (not a FFCRA reason)
  - Employees on mandatory leave may be eligible for unemployment insurance benefits

Will the DOL Begin Enforcing the FFCRA Immediately?

- The DOL will not bring enforcement actions through April 17, 2020 for employers making reasonable, good faith efforts to comply
  - See "Non-Enforcement Policy" slide for full details on non-enforcement policy
  - DOL will enforce retro to April 1, 2020 if employers do not remedy violations after April 17

FFCRA: Non-Enforcement Policy

First 30 Days from FFCRA Enactment

Effective through April 17, 2020

https://www.dol.gov/agencies/whd/field-assistance-bulletins/2020-1

The Policy:

No Enforcement Actions in First 30 Days (Through 4/17/20)

No enforcement actions against any employer for violations of the FFCRA occurring within 30 days of enactment

- Expires April 17, 2020

Employer must make reasonable, good faith efforts to comply during this period

- DOL may exercise enforcement authority if:
  - **Employer willfully violates the FFCRA**
  - **Fails to provide a written commitment to future compliance with the FFCRA**
  - **Fails to remedy a violation upon notification by the DOL or an employee seeking payment by making employees whole as soon as possible**

Requirements to Qualify:

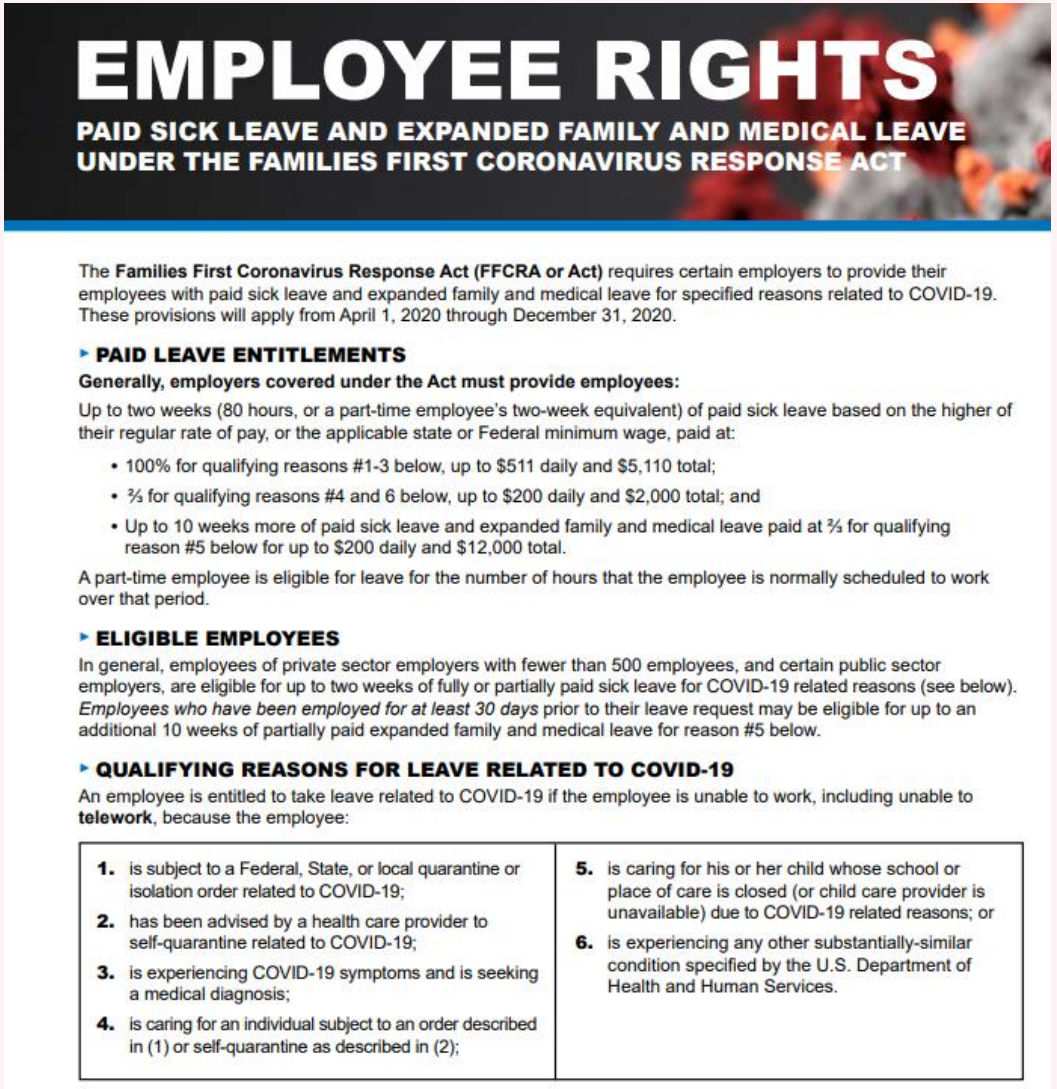
Good Faith Standard

Employer satisfies "reasonable" and "good faith" standard when:

1. The employer remedies any violations by making employees whole as soon as practicable
2. The violations of the FFCRA are not willful (the employer can't show reckless disregard for the requirements); and
3. The DOL receives a written commitment from the employer to comply with the FFCRA moving forward

FFCRA: Workplace Notice
DOL Model Poster Available

- https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf



EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▸ PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to $511 daily and $5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to $200 daily and $2,000 total; and
- Up to 10 weeks more of paid sick leave and expanded family and medical leave paid at ⅔ for qualifying reason #5 below for up to $200 daily and $12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

▸ ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). *Employees who have been employed for at least 30 days* prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

▸ QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to **telework**, because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

FFCRA: Workplace Notice
Key Takeaways from DOL FAQs

Where Do Employers Post the Notice?

- Employers with fewer than 500 employees must post the notice in a conspicuous place on its premises by April 1, 2020

What About Employees Teleworking?

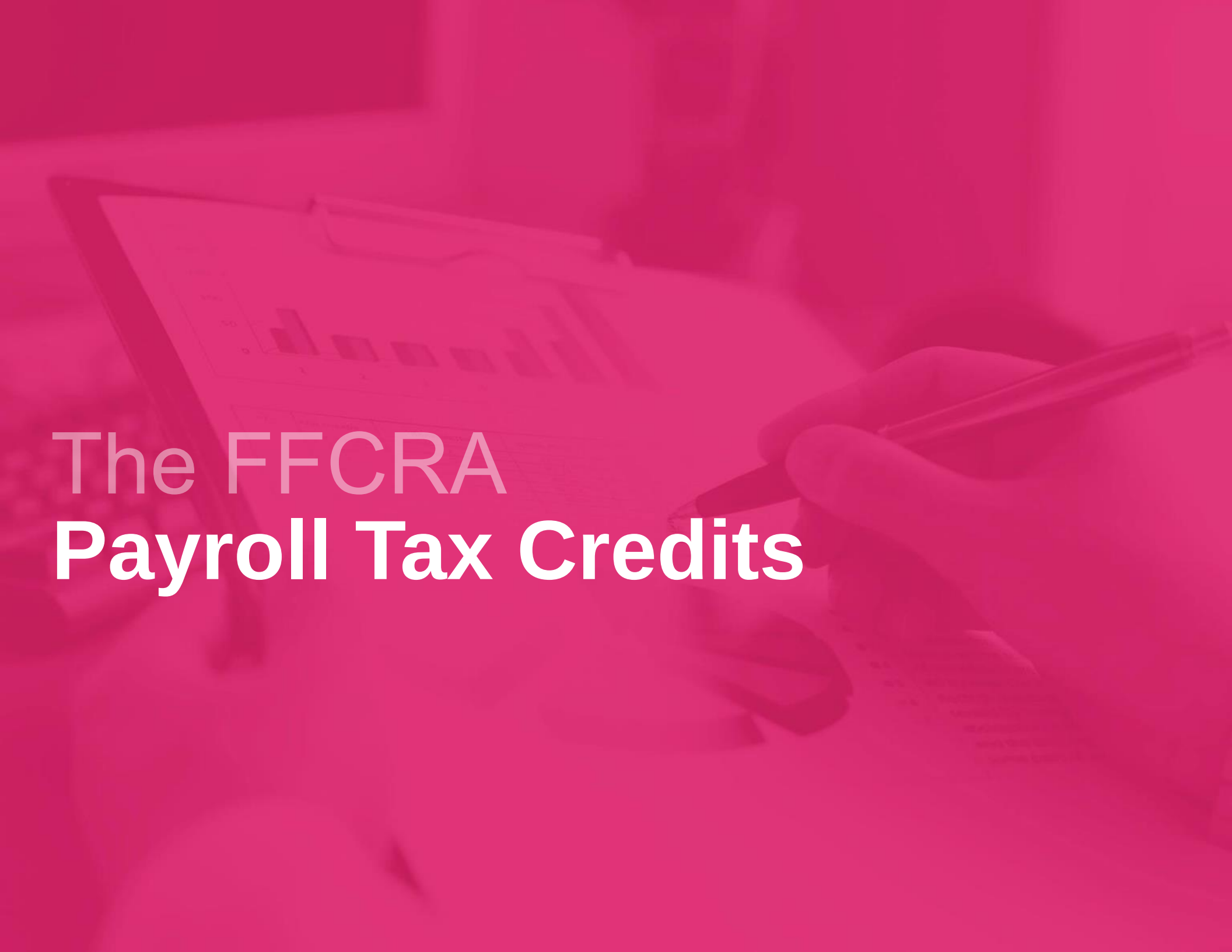
- Employers can also satisfy the poster requirement by:
  - Emailing the notice to employees;
  - Direct mailing the notice to employees; or
  - Posting the notice on an employee information internal or external website

What if the Employer has Multiple Break Rooms?

- Post the notice in the break rooms on each floor or in another location where it can easily be seen by employees on each floor

What if the Employer is Running Out of Wall Space?

- The poster must be displayed in a conspicuous place easily visible to all employees
  - Putting the notice in a binder is not sufficient



The FFCRA
Payroll Tax Credits

FFCRA: Payroll Tax Credits
Covering the Employer's Costs

Emergency Paid Sick Leave Payroll Tax Credit

- Employee's Own Condition:
  - For an employee who is unable to work because of COVID-19 quarantine or self-quarantine or has COVID-19 symptoms and is seeking a medical diagnosis, employers may receive a refundable sick leave credit for sick leave at the employee's regular rate of pay, up to $511 per day and $5,110 in the aggregate, for a total of 10 days.
- Care for Family Member:
  - For an employee who is caring for someone with COVID-19, or is caring for a child because the child's school or child care facility is closed, or the child care provider is unavailable due to the COVID-19, employers may claim a credit for two-thirds of the employee's regular rate of pay, up to $200 per day and $2,000 in the aggregate, for up to 10 days.

Employers are also entitled to an additional tax credit based on costs to maintain health insurance coverage for the eligible employee during the leave period.

Emergency FMLA Expansion Leave

- To Care for Child:
  - In addition to the sick leave credit, for an employee who is unable to work because of a need to care for a child whose school or child care facility is closed or whose child care provider is unavailable due to COVID-19, employers may receive a refundable child care leave credit.
  - This credit is equal to two-thirds of the employee's regular pay, capped at $200 per day or $10,000 in the aggregate.
  - Up to 10 weeks of qualifying leave can be counted towards the child care leave credit.

Employers are entitled to an additional tax credit based on costs to maintain health insurance coverage for the eligible employee during the leave period.

FFCRA: Payroll Tax Credits
The Mechanics of the Relief

Prompt Payment for Cost of Providing Leave

- When employers pay their employees, they are required to withhold from their employees' paychecks federal income taxes and the employees' share of Social Security and Medicare taxes. The employers then are required to deposit these federal taxes, along with their share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series) with the IRS.
- Employers who pay qualifying sick or child care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child care leave that they paid, rather than deposit them with the IRS.
- The payroll taxes that are available for retention include withheld federal income taxes, the employee share of Social Security and Medicare taxes, and the employer share of Social Security and Medicare taxes with respect to all employees.
- If there are not sufficient payroll taxes to cover the cost of qualified sick and child care leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests in two weeks or less.

FFCRA: Payroll Tax Credits
Examples

Effective April 1, 2020, and sunsets on December 31, 2020.

Important Note: Does not apply to private employers with 500 or more employees.

Example #1:
Deposits Cover Full Costs

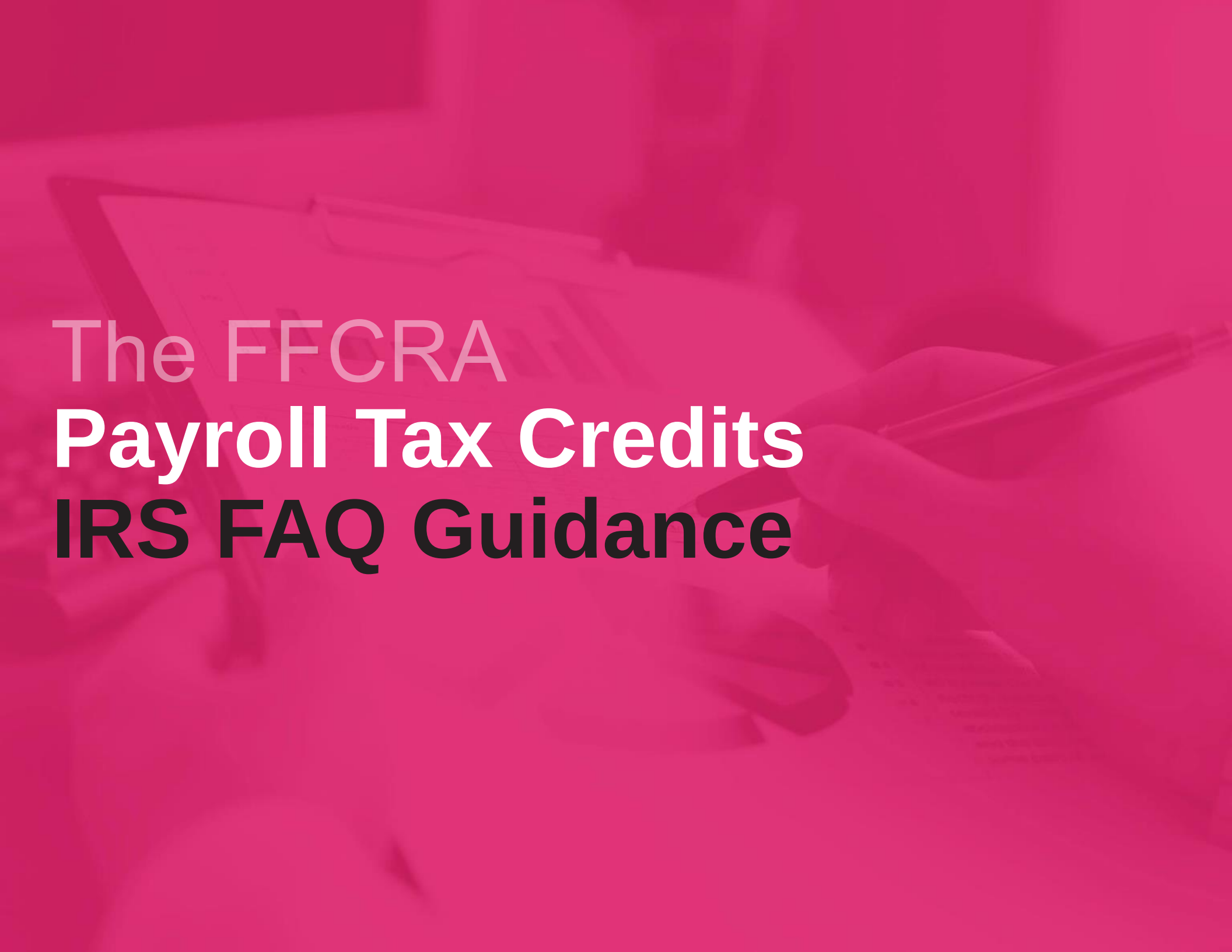
Example #1:

- 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
  - **Employer could use up to $5,000 of the $8,000 of taxes it was going to deposit for making qualified leave payments**
  - **Employer would only be required under the law to deposit the remaining $3,000 on its next regular deposit date**

Example #2:
Accelerated Credit for Balance

Example #2:

- Employer paid $10,000 in sick leave and was required to deposit $8,000 in payroll taxes, including taxes withheld from all its employees
  - **Employer could use the entire $8,000 of taxes it was going to deposit for making qualified leave payments**
  - **Employer can also file a request for an accelerated credit for the remaining $2,000 not covered by payroll taxes and withholding**



The FFCRA
Payroll Tax Credits
IRS FAQ Guidance

Payroll Tax Credits: New IRS FAQs

Basic FAQs

Where Can I Find the IRS FAQs?

- https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs

What Amounts Can Employers Claim As the Tax Credits?

- The full 10 days of required FFCRA paid sick leave
- The full 10 weeks of required FFCRA paid FMLA leave
  - Any qualified health plan expenses allocable to those wages
  - The employer-share of the Medicare taxes on those wages (1.45% of wages)

Can Employers With 500+ Employees Claim the Tax Credits?

- No.
  - The credits are available only for qualified sick leave wages and qualified family leave wages required by the FFCRA (fewer than 500 employees at the start of the leave)

May Employers Also Receive the CARES Act Employee Retention Credit or Small Business Interruption Loan?

- Yes, the FFCRA payroll tax credit does not foreclose the CARES Act credits/loans
  - Employee retention credit may not be for the same wage payments
  - FFCRA tax credits are not eligible payroll costs for purposes of loan forgiveness provisions

Payroll Tax Credits: New IRS FAQs
Qualified Health Plan Expenses

What Are Qualified Health Plan Expenses?

- Group health plan expenses incurred by the employer during a FFCRA leave

Why Do Qualified Health Plan Expenses Matter?

- The tax credits for leave pay are increased by qualified health plan expenses allocable to each FFCRA leave payment
  - Allocation must be made on a pro rata basis for covered employees and pro rata for the period of time to which the FFCRA leave wages relate

Can Employers Include the Employer and Employee Share?

- Yes, the employer-share of the premium and the employee-share qualify
  - Note that amounts paid after-tax by employees (e.g., for domestic partners) do not qualify

What Type of Coverage is included in "Group Health Plan"?

- Any plan meeting IRC §5000(b)(1) definition (and excluded under §106(a))
  - Medical, dental, vision, health FSA, EAP, HRA (including ICHRA but not QSEHRA)
  - Does not include HSA (but does include the HDHP)
  - For employees enrolled in multiple group health plan options, the employee's allocated expenses are the aggregated sum of all lines combined

Payroll Tax Credits: New IRS FAQs
Qualified Health Plan Expenses (Cont'd)

How Do Employers Determine Allocable Qualified Health Plan Expenses Under a Fully Insured Plan?

- Employers may use any reasonable method, including:
  - The COBRA rate
  - One average premium rate for all employees; or
  - Another substantially similar approach that is determined separately for employee-only and non-employee-only coverage
- Employers choosing to use one average premium rate for all employees must follow a prescribed calculation method set forth in FAQ #33

How Do Employers Determine Allocable Qualified Health Plan Expenses Under a Self-Insured Plan?

- Employers may use any reasonable method, including:
  - The COBRA rate
  - Any reasonable actuarial method used to determine estimated annual plan expenses
- Employers choosing to use the reasonable actuarial method option must follow rules similar to the fully insured plan average premium rate calculation set forth in FAQ #33

Payroll Tax Credits: New IRS FAQs
How to Claim the Credits

What Form Does the Employer Use?

- Expenses qualifying for the tax credit will be reported on the quarterly Form 941
  - Employers can use all withheld federal employment taxes to fund the leave wages now in anticipation of receiving the credits (or by requesting an advance from the IRS)

How Can Employers Get an Advance of the Credits?

- Employers must first reduce its remaining federal employment tax deposits for wages in the quarter to zero
- If the reduction in deposits does not cover the FFCRA leave wages, the employer can file Form 7200, “Advance Payment of Employer Credits Due to COVID-19”
  - Will cover amounts for which employer does not have sufficient employment tax deposits

How Do Employers Access the Form 7200 for the Advance?

- IRS Form 7200 & Instructions:
  - https://www.irs.gov/pub/irs-pdf/f7200.pdf
  - https://www.irs.gov/pub/irs-pdf/i7200.pdf

How Do Employers File the Form 7200?

- By Fax: 855-248-0552

Payroll Tax Credits: New IRS FAQs Documentation

What Records Do the Employers Need from Employees?

- Must receive a written request from the employee providing:
  - The employee's name;
  - The dates for which leave is requested;
  - A statement of the COVID-19-related reason for the leave and support for the reason; and
  - A statement that the employee is unable to work (including telework) for such reason.

What Records Do Employers Need to Retain?

- The employer must maintain records including the following information:
  - Documentation to show how the employer determined the amount of FFCRA leave wages;
  - Documentation to show the amount of qualified health plan expenses allocated to wages;
  - Copies of any completed Forms 7200 the employer submitted to the IRS; and
  - Copies of the Forms 941 the employer submitted to the IRS.

How Long Do Employers Need to Retain These Records?

- At least 4 years after the date the tax becomes due or paid, whichever is later
  - These documents need to be available for IRS review upon request

CARES ACT
New 401(k) Plan Rules

CARES Act: 401(k) Plans
Multiple Forms of Relief

The Coronavirus-Related Distribution Option

- 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:
  - 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 and can be repaid within three years in the same manner as a rollover.

CARES Act: 401(k) Plans
Multiple Forms of Relief

Loans and Required Minimum Distributions

- 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 (otherwise limited to half) for loans made from March 27, 2020 through September 23, 2020.
- 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 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).

Content Disclaimer

COVID-19 and Employee Benefits

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).

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Thank you!

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