



## Employee Benefits & Executive Compensation ADVISORY ■

**MARCH 20, 2020**

### Coronavirus Impact on Health Benefits: A Deeper Dive

The Families First Coronavirus Response Act (FFCRA), H.R. 6102, was signed into law on March 18, 2020. Among its many new provisions, the FFCRA imposes new requirements on health plans for coverage of COVID-19 testing. The following FAQs address questions about the FFCRA's requirements imposed on group health plans and health insurers to provide free testing, along with questions about other areas of health and welfare benefit administration that are impacted by COVID-19. Congress is working on a third coronavirus relief bill that may have a further impact on health benefits.

#### ***What does the FFCRA require health plans to cover?***

The FFCRA requires group health plans and health insurance issuers to provide the following services without cost sharing or imposition of prior authorization and other medical management limitations:

- In vitro, the FDA approved diagnostic products ("diagnostic testing") to determine if you have COVID-19 or the virus that causes the illness (SARS-CoV-2) and the administration of that diagnostic testing. This coverage includes both kits and lab-developed tests (LDTs) that are used to test—not just the physical kit itself.
- Services and items ("diagnostic services") provided to a covered individual in a physical office or telehealth (i.e., telephone consultation) setting, urgent care center, or emergency room that result in an order or administration of diagnostic testing, but only to the extent such diagnostic services relate to the furnishing or administration of diagnostic testing or the evaluation of such covered individual to determine the need for diagnostic testing.

#### ***Can the plan limit its coverage to in-network services?***

The FFCRA does not make a distinction between in and out of network services. In the absence of a distinction, we believe that the diagnostic testing and services provided by out of network providers must be covered as well. It is possible that the plan can limit the benefit to the plan's allowed amount for out of network services, but that is not clear. Hopefully, the agencies will issue clarifying guidance.

#### ***Are plans required to provide treatment with any cost share or medical management limitations?***

No. Plans are not required to cover treatment beyond diagnostic testing. Plan sponsors that wish to provide coverage for treatment of COVID-19 without cost sharing may do that. In some cases, if the plan is fully insured, state-law requirements may impose coverage requirements in addition to those required by the FFCRA.

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Plan sponsors should consult with their insurance carrier about what is required for fully insured plans. For self-insured plans with stop-loss insurance, plan sponsors should consult with their stop-loss insurance carrier before providing coverage beyond that required by the FFCRA.

***Will HSA eligibility be lost due to the extension of benefits for COVID-19 testing and treatment (including those required by the FFCRA) for employees who are otherwise eligible for an HSA?***

No, the IRS indicated in Notice 2020-15 that otherwise-eligible employees will not be disqualified from HSA eligibility solely because a plan provides benefits for COVID-19 testing and treatment before satisfaction of the deductible. It should be noted that while the FFCRA is limited to COVID-19 diagnostic testing and services, the HSA guidance would extend to treatment for COVID-19 as well. However, neither the FFCRA nor the IRS Notice provides for telehealth services unrelated to COVID-19 testing or treatment.

***When do the FFCRA's diagnostic testing and services requirements go into effect?***

On and after March 18, 2020.

***How long must plans provide the coverage required by the FFCRA?***

Until the end of the emergency period as determined by the Administration.

***Are all group health plans subject to the FFCRA's requirement?***

All group health plans that would otherwise be subject to the Affordable Care Act's (ACA) health insurance reforms in ERISA, the Internal Revenue Code, and the Public Health Service Act, including grandfathered plans, must comply (regardless of the size of the employer). Thus, the requirements apply to plans sponsored by private employers, governmental employers, and church plans. The requirements do not apply to excepted benefit plans. It is unclear whether retiree-only plans must comply. Further agency guidance on the application to retiree-only plans would be helpful.

***What other benefit-plan-related issues should plan sponsors consider?***

There are several other situations arising as a result of this pandemic that affect group health plans, such as:

- **Furloughed employees:** Check your plan to see if coverage eligibility is lost as a result of a furlough. If it is, furloughed employees would likely be eligible for COBRA. If you want to provide free or subsidized coverage to furloughed employees and your plan is fully insured or you have purchased stop-loss insurance, you should consult with the carrier before amending your plan to provide such coverage.
- **Impact on ACA employer responsibility requirements:** Employers should monitor the impact of any employment and coverage changes on compliance with the IRC 4980H "employer responsibility" requirements. In some cases, an extended furlough may result in a reduction in W-2 wages that could impact the affordability of coverage
- **Continued coverage during paid leave under the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act:** The FFCRA also requires paid sick leave and expands Family and Medical Leave Act (FMLA) protections for affected employees of employers with less than 500 employees. The employer's paid leave policies and the FMLA's benefit plan continuation requirements would presumably apply. Consequently, an employee taking an FMLA leave solely as a result of the FFCRA's provisions would appear to still be entitled to continued, active-like group health coverage during the leave even though the employee would not normally qualify for FMLA leave. For a summary of the FFCRA's paid sick leave and expanded FMLA provisions, see "[Employee Leave Requirements Under the Families First Coronavirus Response Act.](#)"

- **Health FSA election changes:** The IRS has not provided relief from the Section 125 election change requirements. Consequently, changes made to the health plan in response to the FFCRA's requirements or otherwise would not likely permit a health FSA election change; however, in many cases, an employment status change may trigger an election event. Other areas of health FSA administration should be analyzed as well. For example, employers may amend their plans to extend the run-out period for claims-filing purposes. An extension of the March 15 grace period or increase in the \$500 health FSA carryover would, however, take further agency action.
- **Dependent care FSA election changes:** During this time, many employees are required to work from home. Also, many daycare facilities may be closed temporarily. These events will impact the need for daycare funds, resulting in a need to change elections. The Section 125 election change rules provide significant flexibility for employees to change their dependent care FSA elections because of changes in work or daycare status.
- **Free telehealth regardless of condition:** Many employers and insurance carriers are considering temporarily providing free or subsidized coverage through the plan's telehealth program for any medical event. The purpose is to incentivize covered individuals to seek care when feasible from home to mitigate the spread of COVID-19. Employers who maintain HSA-qualifying high deductible health plans (HDHPs) should consult with counsel before adopting such programs because this could technically disqualify an otherwise-eligible employee from HSA eligibility. Neither Notice 2020-15 nor the FFCRA provides relief from the HSA rules for such coverage. If this does result in a temporary loss of eligibility, employees who regain HSA eligibility on December 1 (assuming the free/reduced cost telehealth services end before then) should still be able to make the full annual HSA contribution.
- **Commuter benefits:** Employees do not necessarily lose pre-tax salary reductions for parking or transit that were made before being required to work from home. The Section 132 regulations allow funds to carry over each month. Also, commuter salary reduction elections may be changed more frequently than under Section 125. Section 132 allows employees to reduce their pre-tax salary reductions to \$0 while working from home. This should enable most employees to use any unused salary reductions when they return without accruing a surplus.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

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