

Employee Benefits Questions and Answers Related to COVID-19

As a growing number of the workforce is being affected by the COVID-19 virus, employers are being asked to respond to benefit-related questions from employees. In the coming days, the Employee Benefits Group at Hanson Bridgett will be providing updated information on possible issues arising in the benefits area through Benefits Alerts and postings on Hanson Bridgett's [Online COVID-19 Resource Center](#). Regulatory and legislative changes are occurring rapidly, and we will make every effort to keep our clients informed of new developments occurring in this area as they occur. Below are some of the most frequent questions (and answers) received thus far. We have included questions applicable to all employers, as well as some questions only affecting governmental employers. Of course, your particular benefit plan provisions may impact the answer to some of these questions. Please feel free to reach out to your contact in the Employee Benefits Group with more specific questions about your benefits issues.

Additional resources for employee benefit plan sponsors regarding COVID-19 related issues can be found at the following websites:

[IRS Coronavirus Tax Relief](#)

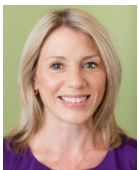
[U.S. Department of Labor Coronavirus Resources](#)

[CalPERS COVID-19 Webpage](#)

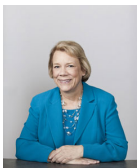
Questions Applicable to All Employers

Question 1: Is an **employer health plan** required to provide testing for and treatment of COVID-19 without a deductible or at a reduced cost?

Answer 1: With the enactment of the Families First Coronavirus Response Act (FFCRA) on March 18, 2020, group health plans, including grandfathered health plans, and health insurance issuers must cover without cost-sharing COVID-19 testing, as well as items and services provided during visits to health care provider offices (including telehealth visits), urgent care centers and emergency rooms that result in an order for or administration of COVID-19 testing, to the extent the item or service relates to the testing, or evaluation of the patient's need for a test. These requirements do not apply to group health plans that provide only



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“excepted” benefits or cover only retirees, although COVID-19 testing now must be covered with no cost-sharing under Medicare, Medicaid and CHIP. The law does not include any requirement with respect to costs for treatment of COVID-19. The new COVID-19 testing coverage requirements took effect on March 18, 2020.

On March 12, 2020, the Centers for Medicare & Medicaid Services (CMS) of the U.S. Department of Health and Human Services (HHS) issued a [set of FAQs](#) about “essential health benefits” (EHB) coverage under the Patient Protection and Affordable Care Act (ACA) and COVID-19. Under the ACA, self-insured and insured large group health plans are not required to cover all EHB, but cannot impose annual or lifetime dollar limits on any category of EHB that is covered. Non-grandfathered health plans in the individual and small group markets must provide coverage for EHB. The recent CMS guidance provides that EHB generally includes coverage for the diagnosis and treatment of COVID-19, and medically necessary isolation and quarantine required by and under the supervision of a medical provider during a hospital admission. Quarantine outside of a hospital setting is not a medical benefit, nor is it required as EHB. Other medical benefits that occur in the home that are required by and under the supervision of a medical provider, such as home health care or telemedicine, may be covered as EHB, but may require prior authorization or be subject to cost-sharing or other limitations.

For fully-insured plans subject to state regulation, a growing number of states, including California, are requiring insurers of health plans to waive copays and other out-of-pocket expenses for COVID-19 testing to make sure cost does not impede public health efforts to control the spread of the virus. On March 5, under the direction of Governor Gavin Newsom, the California Departments of Managed Health Care and Insurance directed all commercial and Medi-Cal health plans and insurance carriers regulated by the Departments to immediately reduce cost-sharing to zero for all medically necessary screening and testing for the COVID-19. This includes waiving cost-sharing for emergency room, urgent care or provider office visits when the purpose of the visit is to be screened and tested for COVID-19. The need for COVID-19 testing is based on medical necessity, a clinical determination made on a case by case basis by medical professionals.

The California Departments of Managed Health Care and Insurance also urged health plans and insurance carriers to work with their contracted providers to use telehealth services to deliver care when medically appropriate, as a means to limit individuals’ exposure to others who may be infected with COVID-19, and to increase the capacity of insurers’ contracted providers and facilities. On March 17, 2020, the Office for Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS) announced that, effective immediately, [OCR will exercise its enforcement discretion](#) and will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency.

Employers sponsoring insured health plan coverage will want to coordinate with their insurer to provide appropriate information to employees, including, where applicable, information about using telehealth services.

CalPERS has announced that state and local agency employees who have health coverage under the Public Employees’ Medical and Hospital Care Act (PEMHCA) [will not have to pay anything out of pocket for screening and testing](#) of COVID-19. CalPERS has indicated the free testing applies to members in both their health maintenance organization (HMO) and preferred provider organization (PPO) plans.

Question 2: Must employers provide paid leave to employees who are absent from work due to the

COVID-19 emergency?

Answer 2: Yes, in some circumstances. Under the Emergency Family and Medical Leave Expansion Act, enacted as part of the FFCRA on March 18, 2020, private sector employers with fewer than 500 employees and public agencies of any size that are subject to the Family and Medical Leave Act (FMLA) must provide up to 12 weeks of FMLA leave for employees who have been employed for at least 30 days and are unable to work or telework due to a need for leave to care for their minor children as a result of closures of schools or other child care facilities, or because their paid child care provider is unavailable. After the first 10 days of such leave, the leave must be paid. An employee may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave for any part of the ten days of unpaid leave. The law includes provisions for determining the amount of pay that must be provided, which is based on the amount that is equal to at least two-thirds of the employee's regular rate of pay and the number of hours the employee would otherwise be scheduled to work, and which is capped at \$200 per day and \$10,000 in the aggregate. Covered employers may elect to exclude employees who are health care providers and emergency responders from the new leave requirement.

Under the Emergency Paid Sick Leave Act, also enacted as part of the FFCRA on March 18, 2020, private employers with fewer than 500 employees and public agencies with at least one employee must provide employees with up to two weeks (80 hours) of emergency paid sick leave to be used for time off in specific circumstances related to the COVID-19 emergency. As with expanded FMLA leave, employers may elect to exclude employees who are health care providers and emergency responders from the new paid sick leave requirement. [See our Labor and Employment Practice Group Alert for more information on these new paid sick leave requirements.](#)

On March 24, 2020, the U.S. Department of Labor (DOL) issued fact sheets for [employers](#) and [employees](#), and guidance about the paid leave requirements under the FFCRA in the form of a [series of questions and answers](#). According to the guidance, DOL will be issuing regulations to implement the new leave requirements.

Tax credits are available with respect to paid leave provided under these new laws for private sector employers; tax credits are not available for public agencies or other governmental employers. Both new types of paid leave and associated tax credits are scheduled to expire on December 31, 2020. [See our Employee Benefits Practice Group Alert on these issues for additional information.](#)

Question 3: Can an employer amend its **high deductible health plan** ("HDHP") to allow testing for and treatment of COVID-19 without a deductible or with a deductible below the current required minimums?

Answer 3: Yes. On March 11, 2020, the IRS issued Notice 2020-15 making clear that until further notice all medical care services received and items purchased associated with testing for and treatment of COVID-19 that are provided by a health plan without a deductible, or with a deductible below the minimum annual deductible otherwise required for a HDHP will be disregarded for purposes of determining the status of the plan as a HDHP.

Question 4: Can employers allow changes to employee elections under their Internal Revenue Code ("Code") section 125 cafeteria plans to reflect changes in circumstances due to COVID-19?

Answer 4: Treasury Regulations Section 1.125-4 describe the situations under which employees may revoke or change elections made prior to the beginning of the plan year under a Code Section 125 cafeteria plan. If provided for in the cafeteria plan, the types of changes that may create the ability to revoke elections include a change in the employment status of the employee (or the employee's spouse or

dependents) or the offering of a special election period under the plan by the employer.

The change in the election has to be consistent with the change in status, which could include situations where as a consequence of COVID-19 the employee (or his/her spouse or dependents) have a reduction in work hours such that eligibility for or cost of coverage changes.

For employers with dependent care flexible spending account (FSA) plans that provide for mid-year election changes corresponding to a significant cost change, employees may have either an increase or decrease in qualified dependent care costs due to school closures. In that case, the employee could elect to increase or decrease salary reduction contributions (or to start making contributions, for those who did not previously elect to participate for the plan year), if there is a significant cost change with respect to qualified dependent care (except in the case of a cost change imposed by a dependent care provider who is a relative of the employee).

We will also be watching to see if further guidance is issued by the IRS in this area. In addition, we note that legislation introduced on March 11 (S3442) would require private health insurers to provide for special enrollment periods for individuals diagnosed with COVID-19.

Employees who are absent from work due to their own illness or to care for a family member may be eligible for Family and Medical Leave Act (FMLA) leave. During an unpaid FMLA leave, an employee must be permitted to revoke their health coverage, including coverage under a health flexible spending account (health FSA), or to continue coverage but discontinue payment of the employee's share of the premium costs under the health plan, or discontinue FSA contributions during the unpaid FMLA leave. Generally, employees may be permitted to pay their premium share upon returning to work, during the leave using after-tax dollars, or to "pre-pay" before taking leave. Employers should review their plan documents to determine which options are provided, and whether employees who discontinue health FSA coverage during a FMLA leave may resume coverage upon returning to work at the original contribution level, or at a pro-rata level such that the employee's payroll deductions are not increased for the remainder of the year.

Question 5: Can employees receive a loan or hardship distribution from their **401(k) or other defined contribution retirement plans** on account of expenses related to COVID-19?

Answer 5: The IRS has not issued specific guidance about retirement plan loans or hardship distributions related to COVID-19. Hardship distributions from a 401(k) plan, if permitted under the plan, can be made only if necessary to satisfy an immediate and heavy financial need. For plans incorporating the IRS "safe harbor" events that are deemed to be made on account of an immediate and heavy financial need, a hardship distribution is allowed for expenses for (or necessary to obtain) medical care (as defined in Internal Revenue Code section 213(d)), if the recipient of the medical care is the participant, or a spouse, dependent or a named beneficiary under the 401(k) plan.

On March 22, 2020, the COVID-19 emergency was declared a major disaster in California under Section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"), which made federal funding available for crisis counseling for affected individuals in all areas of the state of California. Under new regulations issued by the IRS last year, the "safe harbor" events for a hardship distribution include expenses and losses (including loss of income) incurred by a participant on account of such a disaster, provided that the participant's principal residence or principal place of employment at the time of the disaster was located in an area designated by the Federal Emergency Management Agency (FEMA) for individual assistance with respect to the disaster. Now that the COVID-19 emergency has been declared a major disaster in California under Section 401 of the Stafford Act, for which individual assistance related to

the disaster is available, such hardship distributions can be permitted for participants who live or work in California. If not currently provided for in their plan, employers can amend their plan to provide for such hardship distributions before the end of the plan year.

Employees who participate in a 457(b) plan may qualify for an “unforeseen emergency” distribution, if permitted under the plan, in the case of a severe financial hardship of the participant or beneficiary resulting from an illness, including the need to pay for medical expenses. A distribution for an unforeseen emergency may be made only to the extent the emergency cannot be relieved through reimbursement or compensation from insurance or otherwise, or by liquidation of the participant’s assets, unless the liquidation of assets would itself cause severe financial hardship.

401(k) and other defined contribution retirement plans that permit participant loans generally do not limit the purpose for which a loan can be taken, although there may be restrictions on the number of loans available from the plan at any one time, and the amount of any loan, the repayment period, and other loan terms must comply with IRS rules for participant loans from retirement plans.

Question 6: Can an employer establish **catastrophic leave-sharing or disaster leave-sharing programs** to allow employees to assist one another with COVID-19 situations?

Answer 6: The rules for the two types of leave-sharing programs differ. The IRS has provided guidance under Notice 2006-59 as to the way in which a *disaster leave-sharing program* must be operated. That Notice provides guidance on the federal tax consequences of certain leave-sharing plans that permit employees to deposit leave in an employer-sponsored leave bank for use by other employees who have been adversely affected by a major disaster. A major disaster is defined as (a) a major disaster as declared by the President under § 401 of the Stafford Act, 42 U.S.C. § 5170, that warrants individual assistance or individual and public assistance from the federal government under that Act, or (b) a major disaster or emergency as declared by the President pursuant to 5 U.S.C. § 6391, in the case of employees described in that statute. Because the COVID-19 emergency has been declared a major disaster in California under Section 401 of the Stafford Act that warrants individual assistance (i.e. crisis counseling), employers can establish a disaster leave-sharing program under the rules established under Notice 2006-59 and the leave deposited can only be used for this particular disaster.

With respect to an employer-sponsored *catastrophic leave-sharing program*, the IRS provided guidance under Revenue Ruling 90-29 that would permit the recipient and not the donor to be taxed when a program allows donated leave to be used only for medical emergencies. The catastrophic leave-sharing program must meet three requirements: (1) employees requesting the additional leave are required to submit a written application describing the medical emergency to the employer; (2) after the application is approved and the employee exhausts all of his or her paid leave, the employee is eligible to receive paid leave (at his or her normal rate of compensation) donated by other employees; and (3) the program restricts the amount of leave that can be donated and contains rules regarding how the leave will be granted to leave recipients. The IRS considers a “medical emergency” making the recipient eligible for leave donations to be a medical condition of the employee (or family member of the employee) that would require the prolonged absence of the employee from work and would result in a substantial loss of income to the employee because the employee would have exhausted all paid leave available (not considering leave that might be available under the leave-sharing program). In a 2007 Private Letter Ruling, No. 200720017, the IRS approved of a leave-sharing plan that defined medical emergency as a major illness or other medical condition (e.g., heart attack, cancer, etc.) that requires a prolonged absence from work, including intermittent absences that are related to the same illness or condition. While not all cases of COVID-19 will meet this criteria, it is clear that for significant illness, this type of program could provide an opportunity for co-workers to assist those

who may exhaust their leave balances for their own or a family member's illness from COVID-19. Employees' eligibility for catastrophic leave sharing donations by other employees will be affected by paid sick leave required to be provided under the Emergency Paid Sick Leave Act, enacted on March 18, 2020. [See our Labor and Employment Practice Group Alert for additional information.](#)

Question 7: Are there special privacy issues under the Health Insurance Portability and Accountability Act (HIPAA) that apply to an employer's group health plan with respect to COVID-19?

Answer 7: Yes, the Office for Civil Rights (OCR) of the Department of Health and Human Services (HHS) has issued [guidance about how HIPAA covered entities](#), such as group health plans, can share protected health information related to COVID-19 about participants in the plan. The guidance reminds covered entities that the HIPAA privacy rules are not suspended during an emergency. However, covered entities may need to disclose protected health information to help public health authorities and others responsible for ensuring public health and safety carry out their public health duties. For example, a covered entity may disclose to the Centers for Disease Control and Prevention (CDC) protected health information on an ongoing basis as needed to report all prior and prospective cases of patients exposed to or suspected or confirmed to have COVID-19. Disclosures of protected health information for a public health purpose must be the minimum necessary to accomplish the purpose, and a covered entity can rely on representations by the CDC that the protected health information requested by the CDC about all patients exposed to or suspected or confirmed to have COVID-19 is the minimum necessary for the public health purpose.

OCR also has a [webpage dedicated to planning for and responding to emergency situations](#), that includes a link to a decision tool to help covered entities determine how the HIPAA privacy rules apply to disclosures related to the emergency, including whether the source of the disclosure is in fact a HIPAA covered entity.

Question 8: Has the IRS extended the March 31, 2020 deadline for filing ACA Forms 1094-C and 1095-C regarding coverage provided in 2019?

Answer 8: No, the IRS has not extended the March 31, 2020 deadline for filing Forms 1094-C and 1095-C to report information about offers of health coverage made to full-time employees by applicable large employers in the 2019 calendar year. However, employers may submit [IRS Form 8809](#) on or before the filing deadline to obtain an automatic 30-day extension, and may request an additional 30-day extension using a second Form 8809, if hardship conditions apply.

Questions Applicable Only to Governmental Employers

Question 1: If an employer extends additional benefits to employees or retirees, is there an issue of "gift of public funds"?

Answer 1: Section 6 of article XVI of the California Constitution states in part: "The Legislature shall have no . . . power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever..."

Gifts of public funds are prohibited under this constitutional provision, whether at the state

or local level of government. (See *Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 207; *Paramount Unified School Dist. v. Teachers Assn. of Paramount* (1994) 26 Cal.App.4th 1371, 1388; *Goodall v. Brite* (1936) 11 Cal.App.2d 540, 544-545.) Governmental employers often must analyze this issue when something of value is being provided, particularly to retirees who have

completed providing services to the public agency, without the expectation of further services being provided. In this case, the additional benefits that a public agency might consider providing (such as perhaps lowering co-pays or deductibles) presumably would not be "gifts" but actions taken to protect the health and safety of all the participants in the public agency's programs. Since the particular facts involved will be important in analyzing each situation, please feel free to reach out if you have question in this area.

Question 2: Are special rules in place to help governmental employers in California ensure adequate staffing during the COVID emergency?

Answer 2: Yes, under the Executive Order N-25-20 signed by California Governor Gavin Newsom on March 12, 2020 ("Order"), certain restrictions regarding employment by California state agencies of CalPERS retired annuitants, permanent and intermittent personnel, and state management and senior supervisors have been suspended, to the extent consistent with applicable federal law. Although the language in the Order is ambiguous, we believe it was intended to also extend relief to county and local governments with respect to rehiring annuitants to assist during the COVID-19 emergency.

For state agencies, the Order suspends the application of reinstatement requirements and work hour limitations in Government Code sections 21220, 21224(a), and 7522.56(b),(d),(f), and (g). This means that CalPERS retirees can be rehired by state agencies during the emergency without reinstatement from retirement, even if the employee works more than 960 hours in a fiscal year, or is rehired within 180 days of their retirement date. The Order also suspends the employment time limits that otherwise apply to certain emergency appointments by state agencies without regard to employment lists or existing classes, under Government Code section 19888.1 and California Code of Regulations, title 2, sections 300-303. The Director of the California Department of Human Resources must be notified of any individual employed pursuant to the waivers in the Order.

CalPERS clarified in Circular Letter 200-016-20 that the suspension of work hour limitations also may apply to retired annuitants who were hired before the COVID-19 emergency, if the employee is redirected for the purpose of ensuring adequate staffing during the COVID-19 emergency..

On March 18, 2020, CalPERS issued [Circular Letter 200-015-20](#) to clarify that, under the Order, the suspension of the retired annuitant work hour limitation and wait period rules under Government Code sections 7522.56, 21221(h) and 21224 applies to retired annuitants hired to ensure adequate staffing during the state of emergency by all local government employers that are CalPERS contracting agencies, effective as of March 4, 2020 until the state of emergency is lifted. During the state of emergency, retired annuitants are also exempt from the 60-day separation in service requirement under current CalPERS regulations. CalPERS clarified in Circular Letter 200-016-20 that the suspension of work hour limitations also may apply to retired annuitants who were hired before the COVID-19 emergency, if the employee is redirected for the purpose of ensuring adequate staffing during the COVID-19 emergency. However, the prohibition on any predetermined agreement between an employer and an impending retiree who has not attained normal retirement age continues to remain in effect, consistent with federal law. Other rules related to employment of CalPERS retirees also remain in effect, including that compensation paid to the employee cannot exceed the maximum base salary for the position as listed on a publicly available pay schedule, and the employee cannot receive any benefit, incentive, compensation in lieu of benefits or other form of compensation in addition to the hourly pay rate. In addition, agencies must continue to enroll and report retired annuitants to CalPERS. Further, contracting agencies must report retired annuitants hired pursuant to the Order to the California Department of Human Resources (CalHR) via email at CAStateofEmergency@calhr.ca.gov. CalHR has a notification process in place to share such information with CalPERS.

The provisions of Government Code section 7522.56 also apply to other governmental employers with respect to rehired annuitants. Again, while the language of the Order is not clear, we believe that there is low risk to county and local governments in interpreting the rehired annuitant rules as being suspended in the same manner as CalPERS has done for both State and other participating employers. We believe that county and other local agencies would be able to rehire annuitants needed to respond to the emergency without violating the tax rules using similar rules. We recommend that any questions regarding rehiring retirees be addressed to the particular '37 Act system or other independent retirement system covering employees and retirees affected.

Question 3: Has CalPERS issued any guidance for contracting agencies about reporting employee data and contributions to CalPERS during the COVID-19 emergency, given the impact of COVID-19 closures to schools and public agencies?

Answer 3: Yes ,on March 19, 2020, CalPERS issued [Circular Letter 200-016-20](#) to provide guidance in the form of a series of “Frequently Asked Questions” CalPERS has received about employee data and contributions reporting issues. The guidance explains how employers can request a reporting extension; whether CalPERS will waive penalties, interest or administrative fees associated with late reporting; and how to report compensation paid to employees who are on administrative leave or using accrued vacation during a worksite closure. The Circular Letter also provides additional guidance regarding the suspension of certain restrictions applicable to employment of CalPERS retirees pursuant to Executive Order N-25-20, described in Question/Answer-2, above.

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