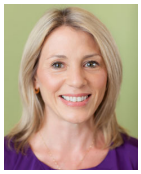
COVID-19 Emergency Paid Leave and Other Leave-Related Benefits



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As a growing number of the workforce is being affected by the COVID-19 pandemic, employers are raising several benefits related questions, particularly with respect to the new paid sick and family and medical leave requirements. 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 answers to some of the most frequent questions received thus far related to leaves of absence and paid leave benefits. 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
IRS FAQs on COVID-19 Related Tax Credits for Required Paid Leave
U.S. Department of Labor Coronavirus Resources
U.S. Department of Labor Questions-and-Answers regarding FFCRA
CalPERS COVID-19 Webpage

For All Employers

Question 1: Must employers provide paid leave to employees who are absent from work due to the COVID-19 emergency?

Answer 1: 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 child care provider is unavailable. After the first two weeks of such leave, the leave must be paid. An employee may elect to use, or an employer may require that an employee substitute any accrued vacation leave, personal leave, or paid time off for any part of the two weeks of unpaid leave. The amount of pay that must be provided is equal to at least two-thirds of the employee's regular rate of pay based on the number of hours the employee would otherwise be scheduled to work, and 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, including information about supplementing FFCRA paid leave with employers' existing paid sick leave policies, when leave can be taken on an intermittent basis, and what it means to be "unable" to work or telework in order to qualify for the leave. On April 1, 2020, the DOL issued rules to implement the FFCRA leave provisions that expand on earlier DOL guidance, including information about documentation employees must provide in support of FFCRA leave. The rules set forth the criteria for the "small employer" exemption, which exempts employers with fewer than 50 employees from having to provide FFCRA leave to an employee to care for a child whose school is closed or child care provider is unavailable, if providing such leave would jeopardize the viability of the business as an ongoing concern. The rules also define "health care providers" and "emergency responders" that may be excluded from the 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. The IRS has issued a series of questions and answers about the tax credits available for FFCRA leave, including information about documentation employers should collect and retain to substantiate eligibility for tax credits with respect to the leave. Both new types of paid leave and associated tax credits are scheduled to expire on December 31, 2020. See our updated Employee Benefits Practice Group Alert on these issues for additional information.

Question 2: Must employers continue to provide **coverage under their group health plans** while employees are on COVID-19 related paid sick leave or paid FMLA leave?

Answer 2: Yes, employers must maintain an employee's coverage under its group health plan during FFCRA leave on the same terms as if the employee did not take leave. These requirements are similar to the regulatory requirements for employers when employees take FMLA leave for other reasons. For information about tax credits available to private sector employers with respect to amounts paid to maintain health insurance coverage for employees while they are on expanded FMLA or paid sick leave under the

FFCRA, see our Tax Credit alert. For information about application of the employer shared responsibility payment rules under the Patient Protection and Affordable Care Act (ACA), see our Group Health Plan alert.

Question 3: 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 3: 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).

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

Answer 4: 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.

For Governmental Employers Only

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.