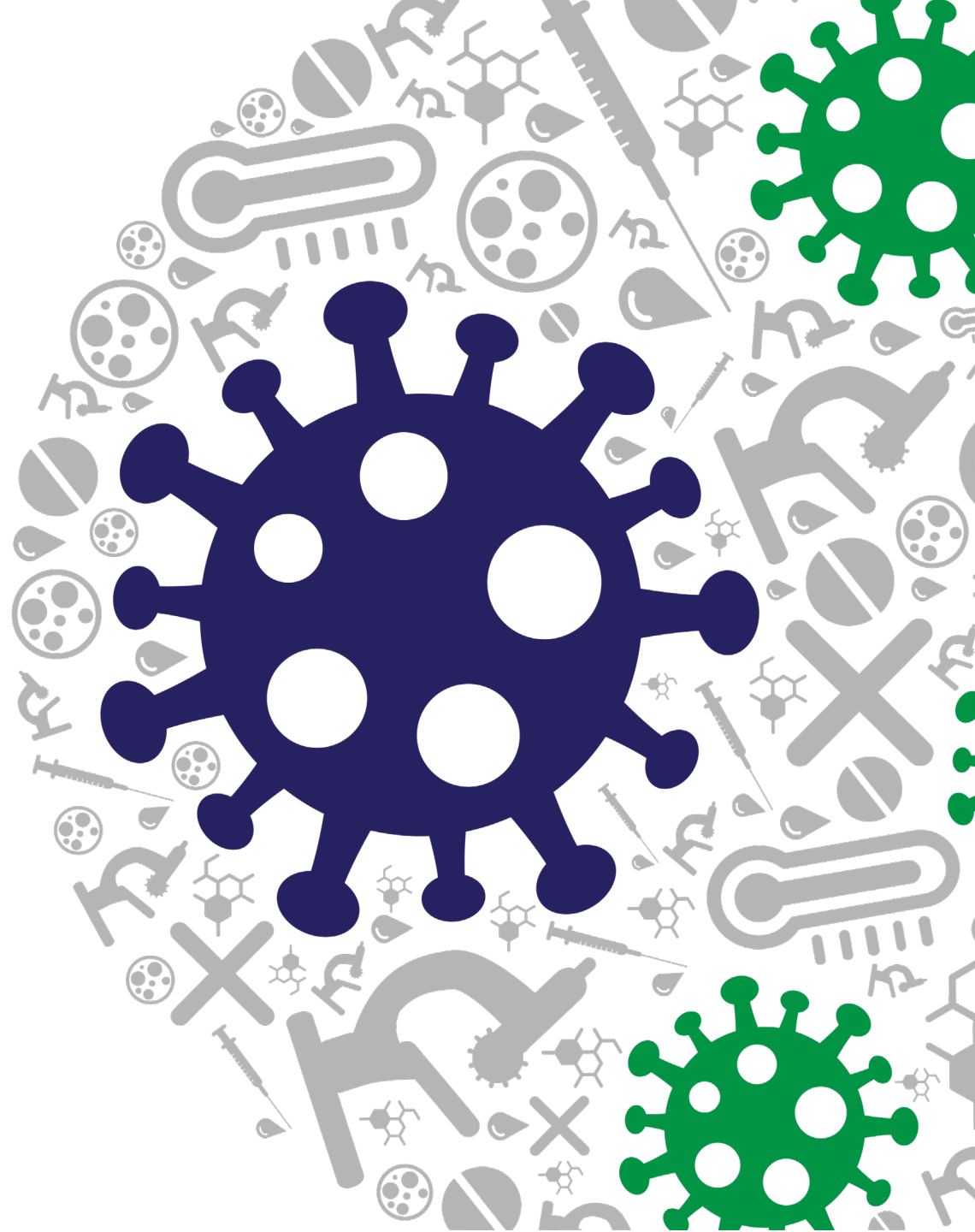


COVID-19

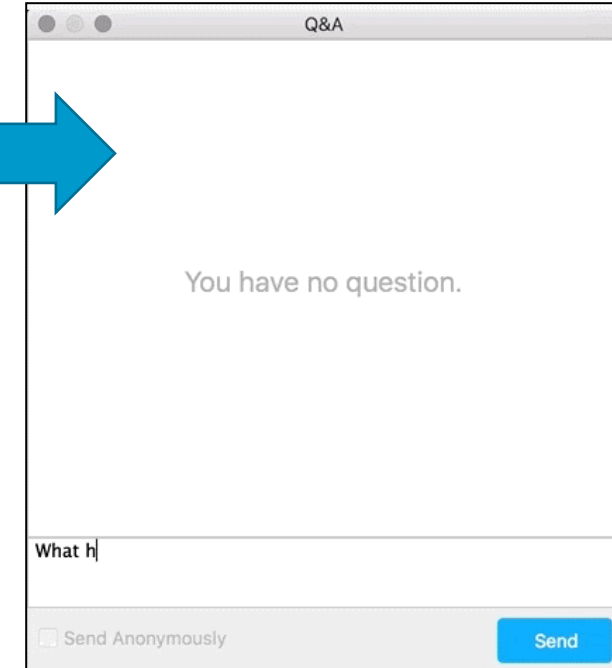
Legal and Regulatory Update

Tuesday, April 14
3:00 – 4:00 PM



Webinar Procedures

- All lines will be muted
- Please submit all questions using the “Q&A” dialog box
- Email Diane Engel at dengel@nebgh.org with any issues during this webinar
- **The recording of this presentation will be shared**



Q&A

You have no question.

What h

☐ Send Anonymously Send

COVID-19 Legal and Regulatory Update

Epstein Becker & Green

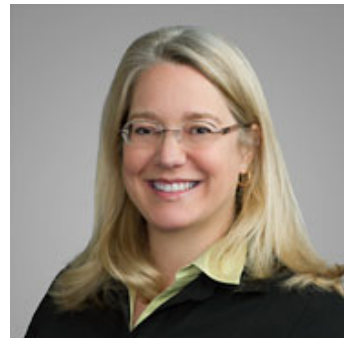
April 14, 2020

Presented by



Susan Gross Sholinsky

Member of the Firm
Sgross@ebglaw.com
(212) 351-4789



Gretchen Harders

Member of the Firm
gharders@ebglaw.com
(212) 351-3784

EPSTEIN
BECKER
GREEN

Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) Public Law No. 116-136

Keeping Employees Employed

Paycheck Protection Program/Employer Loans



Section 1102 of the CARES Act allows certain small business employers (generally 500 or fewer employees) to take out forgivable loans to pay for their employees (the “Paycheck Protection Program” or “PPP”)

Loan amounts will be forgiven as long as the loans are used to cover payroll costs, mortgage interest,

- ✓ rent and utility costs over the 8 week period after the loan is made, and employee and compensation levels are maintained

Payroll costs are capped at \$100,000 annually for

- ✓ each employee and only 25% of the forgiven amount may be for non-payroll costs



Payroll costs are capped at \$100,000 annually for each employee and only 25% of the forgiven amount may be for non-payroll costs



Title IV of the CARES Act provides for mid-size employer loans (employers with between 500-10,000 employees)



Special industries (air carriers, healthcare providers, state and local governments)

Keeping Employees Employed

Employee Leave Benefits/Payroll Tax

Families First Coronavirus Response Act (“FFCRA”)

- Emergency Paid Sick Leave
- Expanded FMLA Leave

CARES Act

- Employee Retention Credit
- Payroll Tax Deferral

Keeping Employees Employed

Employee Retention Credits

1

Section 2301 of the CARES Act allows eligible employers a payroll tax credit equal to 50% of the qualified wages of each employee up to \$10,000 (\$5,000 maximum per employee) paid after March 12, 2020 and before January 1, 2021

2

Eligible employers are all employers (including tax-exempt employers) that:

- Fully or partially suspend operations during any calendar quarter in 2020 due to orders from an appropriate governmental authority limiting commerce, travel or group meetings due to COVID-19, or
- Experience a significant decline in gross receipts during the calendar quarter

Keeping Employees Employed

Employee Retention Credits (Cont.)

3

If an eligible employer has on average 100 or fewer full-time employees in 2019, “qualified wages” are all wages (including an allocation of health care expenses) paid to all employees during the period of hardship described above

4

If an eligible employer has on average more than 100 full-time employees in 2019, “qualified wages” are all wages (including an allocation of health care expenses) paid to employees for the time they were **not performing services** due to the hardship described above

- “The qualified wages may not exceed what the employee was earning 30 days prior to the hardship

Keeping Employees Employed

Payroll Tax Deferral



Section 2302 of the CARES Act permits employers to defer the employer-portion of the payroll taxes (6.2%)

- ✓ For deposits and payments between March 27, 2020 and December 31, 2020
- ✓ Remainder of the deferred amount to be deposited on or before December 31, 2022
- ✓ 50% of the deferred amount to be deposited on or before December 31, 2021



Applies to all employers or all sizes (except that employers receiving a loan under the PPP program will not be permitted to defer on or after the date the loan is forgiven)



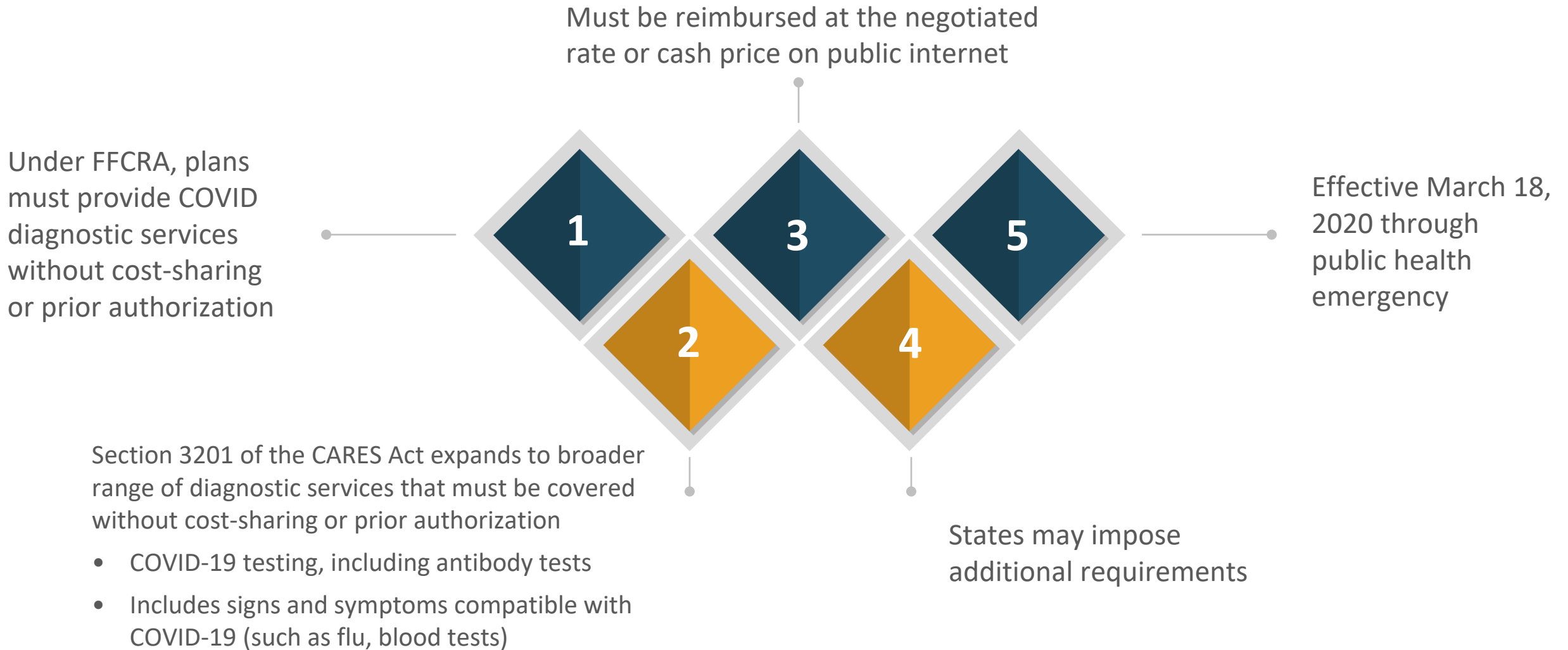
Form 941 for second quarter will be provided (first quarter Form 941 instructions will be provided)

EPSTEIN
BECKER
GREEN

CARES Act, COVID-19 & Group Health Plans

COVID-19 Testing

No Cost-Sharing (FFCRA) and Coverage Mandate



COVID-19 Testing

Mid-Year Changes/Excepted Benefits



Screening and testing may be done through visits to health provider offices, telehealth visits, urgent care centers or emergency rooms



DOL FAQs (April 11, 2020) indicate ***advance notice*** requirements for mid-year changes to implement these provisions will be waived (SBCs, etc.)

- Notice as soon as reasonably practicable still required
- May not shift costs of COVID-19 to other services or benefits



Offering screening and testing under an EAP will not be considered to be benefits that are significant in the nature of medical care solely because it offers COVID-19 testing



Does not appear to require excepted benefits, such as retiree medical plans, to offer COVID-19 testing

COVID-19 Telehealth

Remote Care Services

1

Section 3701 of the CARES Act provides a temporary safe harbor to allow plans to provide telehealth and remote care services without cost sharing under a health savings account (HSA)/high deductible health plan (HDHP) for plan years beginning on or before December 31, 2021

- Not limited to COVID-19

2

DOL FAQs recommend states to review state licensing laws to expand telehealth and remote care services under the public health emergency

3

DOL FAQs indicate that mid-year changes to add benefits, reduce or eliminate cost sharing for telehealth services will not be treated as violating any advance notification requirements

- Notice as soon as reasonably practicable still required
- Cannot shift costs to other benefits or services without advance notice

COVID-19 Expense Reimbursements

FSA/HRAs/HSAs

Section 3702 of the CARES Act allows drugs to be reimbursed over-the-counter without a prescription under an FSA, HRA or HSA

It also allows the reimbursement of menstrual care products under an FSA, HRA or HSA



Applies to all expenses incurred after December 31, 2019

There is no end date

EPSTEIN
BECKER
GREEN

Employee Benefit Plans and Access to Funds

Retirement Plans

COVID Distributions/Hardship Withdrawals



Section 2202(a) of the CARES Act allows for plans to provide for a new type of withdrawal (i.e., a COVID distribution) to “qualified individuals” on and after January 1, 2020 and before December 31, 2020

- Qualified individuals are plan participants who have tested positive for COVID, who have a spouse or dependent who tested positive for COVID, or who have experienced adverse financial consequences due to COVID because the participant is quarantined, furloughed, laid off, working a reduced schedule, or unable to work due to a lack of child care
- A COVID distribution is limited to aggregate amount of \$100,000 and waives the additional 10% tax on early withdrawals
- A COVID distribution generally may be repaid to the plan within three years of the date of withdrawal
- The plan may rely on a participant’s attestation that the participant qualifies for a COVID distribution



Plan participants may be permitted to use a retirement plan’s existing hardship distribution provisions to take a hardship withdrawal

Retirement Plans (Cont.)

Plan Participant Loans

1

Section 2202(b) of the CARES Act allows a plan to increase the maximum plan loan to the lesser of \$100,000 or 100% of the qualified individual's vested account balance

2

Applies to loans made between March 27, 2020 through September 23, 2020

3

Also any plan loan repayment of a qualified individual due on any outstanding loan between March 27, 2020 and December 31, 2020, may be delayed up to one year, with subsequent repayments will be adjusted to reflect the delay and interest accrued during the delay

- The one-year delay is disregarded when determining the five-year maximum period and term of the loan

Retirement Plans (Cont.)

Required Minimum Distributions

1

Section 2203 of the CARES Act temporarily waives the requirements for “required minimum distributions”

2

As of 2020, the age for withdrawing from retirement accounts changed to April 1 following the year the participant reaches age 72 (previously 70 ½) years of age

3

The waiver applies to defined contribution plans (e.g., 401(k) plans) and other types of plans

4

This waiver applies to distributions that must be made in 2020 because the required beginning date occurs in 2020 and the distribution was not made prior to January 1, 2020

Retirement Plans (Cont.)

Funding Relief/Delay of Deadlines

Section 3608 of the CARES Act allows defined benefit plan sponsors to delay their required minimum contributions for 2020 until January 1, 2021

It also allows defined benefit plan sponsors to rely on the 2019 funding percentage in 2020 for purposes of determining certain restrictions on benefits under the plan

Section 3607 of the CARES Act allows the DOL to delay filing and appeal deadlines under ERISA

- Form 5500s due on or after April 1, 2020 have been delayed until July 15, 2020

Student Loan Repayments

Education Assistance Plans

1

Section 2206 of the CARES Act expands the definition of “education assistance” under Section 127 of the Code to allow payment or reimbursement of student loan payments up to \$5,250

2

The payments to the lender or reimbursements to the student must be made by January 1, 2021

3

Employees may not take a deduction for the amounts reimbursed

EPSTEIN
BECKER
GREEN

Other Benefit Strategies for COVID-19

Benefits Strategies for COVID 19

- 1 Continuation of health care coverage during temporary leave of absence or furlough
- 2 “Qualified disaster relief payments”
- 3 Leave donation programs
- 4 Taxable childcare and elder-care stipends
- 5 Pre-tax commuting assistance and other fringe benefits

Benefits Strategies for COVID 19 (Cont.)

6

Reimbursement of home office expenses

7

Death benefits

8

Funding HRAs

9

Tax-free emergency funds through employer affiliates 501(c)(3) charities and private foundations

Guidance Needed for Benefits

1

Allowing additional changes to cafeteria plan elections (DCAPs, FSAs, Special Enrollments)

2

Relief for ACA imposition of penalties for temporary laid-off and furloughed employees if coverage not continued during layoff or furlough

3

Further suspension of employer pension funding requirements

EPSTEIN
BECKER
GREEN

Employment Issues

EPSTEIN
BECKER
GREEN

Families First Coronavirus Response Act and State/Local Sick Time

Sick Time

1 80 Hours of Sick Time

2 Employees may use if they are unable to work or telework because they are:

1. Subject to a government quarantine or isolation order related to COVID-19,
2. Have been advised by health provider to self-quarantine due to COVID-19,
3. Experiencing symptoms of COVID-19 and seeking medical diagnosis,
4. Caring for an individual subject to quarantine order or self-quarantine,
5. Caring for a son or daughter if school or place of care is closed or their child care provider is unavailable because of a public health emergency, or
6. Experiencing substantially similar conditions as specified by the Secretary of Health and Human Services

Sick Time (Cont.)

3 Applies to employers with fewer than 500 employees

4 Paid at full pay (cap of \$511/day) for reasons 1-3; 2/3 of pay (cap of \$200/day) for reasons 4-6

5 Funded through employer tax credit matching value of sick days paid

6 Employers of employees who are healthcare providers or emergency responders may elect to exclude such employees from the paid sick leave


7 Small (<50) employers may be exempted from certain requirements by Secretary of Labor

FMLA Expansion



- 1 Up to 12 weeks of FMLA leave for when employees must care for a son or daughter whose school or day care is closed or whose child care provider is unavailable because of a public health emergency, and the employee cannot work or telework
- 2 Applies to employers with fewer than 500 employees
- 3 Available to employees employed at least 30 days
- 4 First 10 days unpaid
- 5 Rest paid at 2/3 of pay up to cap of \$200/day and \$10,000 in the aggregate

FMLA Expansion (Cont.)

- 
- 6 Funded through employer tax credit matching value of FMLA paid
 - 7 Employers of employees who are healthcare providers or emergency responders may elect to exclude such employees from the paid sick leave
 - 8 Small (<50) employers may be exempted from certain requirements by Secretary of Labor
 - 9 Intermittent Leave permitted, but only where employer agrees

Penalties



Employers who fail to provide mandated leave or unlawfully terminated an employee will be subject to penalties set forth in FLSA



DOL announced it would not enforce non-compliance for first 30 days after effective date, so long as employer acted in “good faith”

- “good faith” exists when violations are remedied promptly, not willful, and employer provides written commitment to comply in the future

What Else?



Unemployment Insurance strengthened

- States have flexibility on work search requirements
- States have flexibility on waiting periods
- Shared Work Programs encouraged

All provisions sunset 12/31/20

Tax Credits available

- During sick time
- During FMLA
- For health coverage during both sick time and FMLA

DOL issued a notice

Concern by Congress that Temporary Rule is too Strict – not employee-friendly enough

State/Local Sick Leave

Enacting New Laws

Colorado (effective 3/11/20)

[Health Emergency Leave with Pay](#) (“HELP”): Covered employers must provide 4 calendar days of paid sick leave for employees in certain industries who have flu-like symptoms to receive COVID-19 testing

New York (effective 3/18/20)

- Guarantees job-protected paid leave to workers who subject to mandatory or precautionary quarantine/isolation for COVID-19, or whose minor dependent child is under such an order
- Requirements vary by size of business:
 - Small (10 or fewer employees and <\$1 million net income): job protection for duration of quarantine/isolation
 - Medium (11-99 employees) and Small Employers with >\$1 million net income: job protection & 5 days of paid sick leave
 - Large (100 or more employees): job protection & 14 days of paid sick leave

State/Local Sick Leave (Cont.)

Enacting New Laws



Los Angeles (effective 4/7/20)

- Requires 80 hours of sick leave for enumerated reasons if employer has (i) 500+ employees in LA or (ii) 2,000 employees nationally
- Several exemptions, including if the employer provides at least 160 hours of paid time off



San Francisco and San Jose

- San Francisco and San Jose also have passed leave laws for large employers exempted from FFCRA

Sick Leave

Clarifying or Expanding Existing Laws

California

[Paid sick leave](#) available for “preventative care,” which may include self-quarantine as a result of potential exposure to COVID-19 if quarantine is recommended by civil authorities, exposure to COVID-19, or return from traveling to a high risk area

New Jersey

[Earned Sick Leave](#) law covers public health emergencies, and Earned Sick Leave can be used for self-care, or for a person to care for a family member

Washington, D.C.

[COVID-19 Response Emergency Amendment Act of 2020](#) expands DCFMLA to provide “declaration-of-emergency” leave (unpaid) to all employees unable to work as a result of the circumstances giving rise to a public health emergency declared by the Mayor

Nevada

Amendment to new paid leave law allows use of paid leave if an employee is unable to report to work as a result of a mandatory government quarantine

Business Continuity/Cost Savings

Reduction in Compensation

01

- Notice (written and timing)
- Limitations (salary basis, minimum wage)

Furloughs

02

- Continue benefits coverage?
- Timing?

Termination of employment

03

- Severance and impact on UI eligibility
- WARN Act implications

Onboarding/Hiring Concerns

I-9 Virtual authentication

- DHS has temporarily allowed remote verification of original documents through an electronic medium, such as video conferencing, fax, or scanned email attachment by the employer's representative.

Background check and other onboarding concerns

- Closed courts leads to slow background check processes
- Options:
 - Delay start date
 - Start without checks
 - alternatives such as criminal background questionnaire
 - Note: still must comply with FCRA and other local laws

Return to Work Considerations

New Guidance issued by CDC

01

When employees can return

02

What to do when employees return to the workplace

1. Pre-screen
2. Monitor
3. Mask
4. Social distancing
5. Disinfection of the workplace

03

Other recommendations

1. Air filtration
2. Barriers between employees and others
3. Scatter shifts/breaks/facilities
4. Cross-train

Epstein Becker Green Coronavirus Resource Center

Epstein Becker Green Coronavirus News and Updates

Employers throughout all industries, and particularly those within health care, are now grappling with how to deal with the various implications of the coronavirus (COVID-19) on their businesses and workforce.

Browse our latest news, [subscribe for email notifications](#), and revisit for updates.

<https://www.ebglaw.com/coronavirus-resource-center/>



OVERVIEW	ALL TOPICS	BENEFITS	CORPORATE/BUSINESS/RETAIL	DATA/PRIVACY/HIPAA
EMPLOYMENT AND LABOR	FDA	FFCRA/CARES ACT	GLOBAL WORKFORCE MANAGEMENT	GOVERNMENT RESOURCES
HEALTH CARE	IMMIGRATION	WAGE AND HOUR	EBG VIDEO NEWS	EBG EVENTS



**Have a question?
Use the Q&A box!**