

## Services

Employee Benefits &  
Executive  
Compensation

Labor & Employment

## Professionals

MOLLY CALLENDER

HOBBS

DENVER:

303.749.7275

MOLLY.HOBBS@

HUSCHBLACKWELL.COM

ALAN H. KANDEL

ST. LOUIS:

314.345.6463

ALAN.KANDEL@

HUSCHBLACKWELL.COM

CRAIG A. KOVARIK

KANSAS CITY:

816.983.8249

CRAIG.KOVARIK@

HUSCHBLACKWELL.COM

# Key Employee Benefits and Compensation Issues to Consider during the COVID-19 Pandemic

The novel coronavirus (COVID-19) pandemic raises many employee benefit and compensation considerations for employers. In this alert, we examine key issues relating to COVID-19 and provide suggested strategies for employers to prepare for these issues. These are uncertain times, and we anticipate that we may need to revise our thinking or make additions to this list as additional guidance is issued.

**1. Employer Provided Health Coverage.** The Families First Coronavirus Response Act (FFCRA) was signed into law on March 18, 2020. The FFCRA requires group health plans to cover COVID-19 **screening** without cost-sharing. Notably, the FFCRA does **not** require group health plans to cover COVID-19 **treatment** without cost-sharing. As a result, treatment costs relating to a covered individual infected with COVID-19 will be allocated based on the terms of the plan document or insurance contract.

Internal Revenue Service (IRS) Notice 2020-15, issued on March 11, 2020, provides that a high-deductible health plan (HDHP) will not fail to be a HDHP merely because the health plan provides services and items related to COVID-19 prior to the satisfaction of the applicable deductible. As a result, employees covered by HDHPs will remain eligible individuals if they receive health benefits for testing and treatment of COVID-19 without incurring expenses toward their deductible.

*See #6 below concerning telemedicine services and impact on health savings account eligibility.*

**2. Paid Leave and Continuation of Short-Term and Long-Term Disability Coverage.** The FFCRA requires employers with fewer than 500

employees to provide: (1) up to 12 weeks of job-protected leave related to caring for a child via an expansion of the Family and Medical Leave Act (FMLA), and (2) up to 80 hours of emergency paid “sick” leave to full-time employees (with special rules for part-time employees). Our legal alert has more information on the new paid leave requirements. Employers who are not subject to the FFCRA’s paid leave requirements – e.g., employers with 500 or more employees – are potentially subject to myriad different (and often conflicting) state and local laws surrounding paid leave. Guidance is needed to determine whether and to what extent affiliated employers are to be aggregated for purposes of the 500 employee threshold.

Employers should review insured short- and long-term disability programs to determine whether individuals who contract COVID-19 are eligible for paid benefits. Some disability insurance policies include a quarantine benefit rider, which may provide certain benefits in a quarantine situation, although general work disruptions are unlikely to be covered. If an employee went out on short- and long-term disability prior to the recent COVID-19 quarantines, we believe those policies should continue to pay benefits in the ordinary course.

**3. Employer Tax Credits for Paid Leave.** To assist employers in paying for the cost of the new federally mandated paid leave requirements, the FFCRA provides a series of refundable tax credits. The refundable tax credits apply against the employer portion of Social Security taxes and are equal to 100 percent of the “qualifying” paid leave wages paid by the employer, up to a certain amount that varies based on the type of leave. The FFCRA also provides for an increase in the tax credits associated with “qualified health plan expenses” related to paid leave. A Joint Committee summary of the FFCRA states that the employee portion of the 6.2 percent Social Security tax is not collected on qualifying paid leave wages, although this does not appear to be supported by the language of the Act itself. The IRS is expected to issue guidance detailing how these tax credits are to be reported and obtained.

**4. Continuation of Health Coverage during Furloughs and Mandated Leaves of Absence.** Health benefits generally do not continue during an extended unpaid leave of absence (including temporarily layoffs, reduced hours or furloughs). Most group health plans tie eligibility for coverage to the employee’s full-time employment status. Employers should review insurance contracts and stop-loss policies to determine how to treat the employees who lose eligibility under a group health plan due to an extended unpaid leave of absence. If an employer keeps furloughed employees covered as active employees, the employer should amend the plan as necessary after obtaining agreement from the group health plan insurer, or, in the case of a self-funded plan with stop-loss coverage, from the reinsurance carrier.

Employers should also consider implications under the Consolidated Omnibus Budget Reconciliation Act (COBRA), under which furloughed employees may elect to continue group health coverage upon

loss of such coverage as a result of a reduction in work hours. Some employers might want to subsidize COBRA continuation coverage but will need to think through administrative logistics of collecting a furloughed employee's share of the premium. If furloughed employees are receiving payments from their accrued time-off banks, then it may be possible to collect premiums from these payments.

If an employee remains covered despite working no hours – such as a variable hour worker in a stability period – employers should coordinate with reporting vendors to determine how such employees will be treated for measurement reporting.

**5. Employer Inquiries, Screenings and Disclosures Relating to Infected Employees.** The Health Insurance Portability and Accountability Act (HIPAA) privacy rules require health plans and providers to maintain the confidentiality of employees' medical records. An employer asking employees about their health condition should not be a HIPAA violation. However, other laws, such as the Americans with Disabilities Act (ADA), contain prohibitions on disclosing confidential medical information concerning employees. As a result, employers should take appropriate measures to maintain the confidentiality of medical information associated with infected or exposed individuals prior to providing notice to other employees ([click here to learn more](#)). Similarly, if an employer screens employees' temperature on a worksite, the results are unlikely subject to HIPAA, assuming the testing is not associated with the health plan. However, employers should consider implications under the ADA and other laws before implementing worksite health screenings and other infection control practices ([click here to learn more](#)).

**6. Telemedicine Programs.** The use of telemedicine programs during the COVID-19 pandemic allows employees to stay at home while seeking medical care, thus discouraging further spread of COVID-19. However, an employer should confirm with its vendor that all screenings relating to COVID-19 will be provided without cost-sharing. In addition, the employer should confirm that its vendor complies with HIPAA's Security Rule, which requires that only authorized users have access to electronic protected health information (EPHI) and that EPHI be protected by a secure communication system capable of monitoring communications containing EPHI. Employers must remain mindful of the potential impact of offering telemedicine programs on an employee's ability to make contributions to a health savings account (HSA). The IRS issued Notice 2020-15 because it was necessary to make an exception to permit COVID-19 testing without making employees ineligible for an HSA. By the same token, offering telemedicine services at no or reduced cost could make employees ineligible for an HSA unless similar IRS relief is provided.

*See #1 above concerning employer-provided health coverage.*

**7. Retirement Plans.** Retirement benefits represent significant assets for most employees and retirees. Given the dramatic economic changes caused by COVID-19 in recent weeks, participants that

remain employed may look to their retirement plan for resources if they experience a loss of income. Employers should review their retirement plans to understand the available in-service withdrawals, including hardship withdrawals. Under current rules, the coronavirus pandemic alone may not justify a hardship withdrawal under IRS safe harbors. With respect to employees placed on leave, employers should review plan documents to determine whether a leave of absence period counts for purposes of crediting service or vesting. Employers should also review plan loan policies with respect to loan payments while an employee is on unpaid leave.

Some employers may also be looking to suspend or reduce their rates of match. This may require a formal plan amendment in addition to participant communication. Because any suspension is likely temporary, it should not give rise to partial plan termination issues and accelerated vesting.

As part of the new stimulus bill, Congress is considering additional retirement plan withdrawal rules that may give affected employees access to their retirement balances.

**8. Nonqualified Deferred Compensation Arrangements.** As with qualified retirement plans, employees participating in a nonqualified deferred compensation arrangement may look to the nonqualified plan for resources if they experience a loss of income. Internal Revenue Code Section 409A imposes stringent rules regarding the time and form of payment, although an “unforeseeable emergency” is a permissible payment event. Similarly, Section 409A generally precludes changes to deferral elections for nonqualified deferred compensation plans, although deferral elections can be cancelled by an employer in an unforeseeable emergency. An “unforeseeable emergency” includes a severe financial hardship from an illness, such as could arise in the COVID-19 pandemic. Employers should keep in mind that allowing a payment on account of unforeseen emergency when an unforeseen emergency has not occurred risks exposing the employee to severe tax consequences for noncompliance.

**9. Employer Expenses Associated with a Quarantined Employee.** Depending upon the facts and circumstances, some expenses incurred while an employee is quarantined may be deductible expenses excluded from an employee’s compensation as a working condition fringe benefit. For example, if an employee is quarantined while on an out-of-state business trip for a temporary period, certain employee living expenses paid for by the employer may be deductible to the employee and, thus, excluded from the employee’s compensation.

**10. Force Majeure Clauses.** Force majeure is a legal doctrine that excuses parties from certain contractual obligations resulting from unforeseeable events beyond either party’s control. An insurance provider or plan administrator could invoke the force majeure doctrine to attempt to excuse itself from contract performance due to the COVID-19 pandemic. Employers should review vendor contracts for force majeure provisions. Employers should also consider notifying vendors that the

COVID-19 pandemic is a foreseeable event and vendors are expected to continue complying with contractual obligations. Our March 22, 2020 alert provides insight.

## **Contact us**

If you have employee benefit questions regarding this executive order or COVID-19 more generally, please contact your Husch Blackwell attorney.

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and employment, retailing, and supply chain management, among others.