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Compliance Corner

1Q 2020

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HR Compliance Bulletin

Families First Coronavirus Response Act Notice—Frequently Asked Questions

As part of **sweeping legislation—the Families First Coronavirus Response Act (FFCRA)**—signed into law by President Trump on March 18, 2020, two laws were enacted that provide workers with paid leave for reasons related to the coronavirus (COVID-19) pandemic.

- The “Emergency Family and Medical Leave Expansion Act” allows 12 weeks of partially compensated FMLA leave to care for a child whose school or child care facility has been closed due to COVID-19.

The “Emergency Paid Sick Leave Act” requires employers to provide 80 hours of paid sick time to employees in specified circumstances related to COVID-19 exposure and prevention.

The legislation requires covered employers to post a notice of the FFCRA requirements in a conspicuous place on its premises. The U.S. Department of Labor (DOL) has provided separate versions of this notice for federal and nonfederal employees. The DOL issued the following frequently asked questions (FAQs) regarding this notice requirement.

Action Steps:

- Employers should familiarize themselves with the new leave requirements to ensure compliance.
- Continue to monitor media and news outlets for updates related to the FFCRA and other federal and state guidance in response to the coronavirus outbreak.

- Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

Frequently Asked Questions

- 1. Where do I post this notice? Since most of my workforce is teleworking, where do I electronically “post” this notice?**

Each covered employer must post a notice of the FFCRA requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or by posting this notice on an employee information internal or external website.

- 2. Do I have to post this notice in other languages that my employees speak? Where can I get the notice in other languages?**

You are not required to post this notice in multiple languages, but the DOL is working to translate it into other languages.

- 3. Do I have to share this notice with recently laid-off individuals?**

No, the FFCRA requirements explained on this notice apply only to current employees.

- 4. Do I have to share this notice with new job applicants?**

No, the FFCRA requirements apply only to current employees. Employers are under no obligation to provide the notice of those requirements to prospective employees.

- 5. Do I have to give notice of the FFCRA requirements to new hires?**

Yes. If you hire a job applicant, you must convey this notice to them, either by email, direct mail or by posting this notice on the premises or on an employee information internal or external website.

- 6. If my state provides greater protections than the FFCRA, do I still have to post this notice?**

Yes, all covered employers must post this notice regardless of whether their state requires greater protections. The employer must comply with both federal and state law.

- 7. I am a small business owner. Do I have to post this notice?**

Yes. All employers covered by the FFCRA's paid sick leave and expanded family and medical leave provisions (that is, certain public sector employers and private sector employers with fewer than 500 employees) are required to post this notice.

8. How do I know if I have the most up-to-date notice? Will there be updates to this notice in the future?

The most recent version of this notice was issued on March 25, 2020. Check the Wage and Hour Division's website or sign up for Key News Alerts to ensure that you remain current with all notice requirements.

9. Our employees must report to our main office headquarters each morning and then go off to work at our different worksite locations. Do we have to post this notice at all of our different worksite locations?

The notice must be displayed in a conspicuous place where employees can see it. If they are able to see it at the main office, it is not necessary to display the notice at your different worksite locations

Important Dates

- **March 18, 2020**

President Trump signed coronavirus relief legislation into law.

- **April 1, 2020**

The DOL provided guidance that the new paid leave provisions take effect on April 1, 2020.

- **Dec. 31, 2020**

New leave laws sunset.

Health Care Reform Updates

CMS Issues FAQs on Essential Health Benefits and the Coronavirus

On March 12, 2020, CMS provided a set of FAQs that discusses the designation of COVID-19 treatment as an essential health benefit (EHB). As background, under the ACA, plans may not impose annual or lifetime limits on essential health benefits.

The FAQs address three questions:

- Question and answer 1 confirms that the diagnosis and treatment of COVID-19 would be considered essential health benefits. However, each plan may determine the exact coverage details and any cost-sharing amounts that would apply to those services.
- Question and answer 2 discusses whether COVID-19-related isolation or quarantine would be treated as EHB. On this issue, CMS confirms that hospitalizations for COVID-19 treatment would be considered an EHB. However, self-imposed isolation or quarantine at home is not considered a medical benefit, and therefore would not be covered as an EHB. Keep

in mind, though, that medical benefits provided at home that are required by a medical provider (through home health care or telemedicine) would be covered as EHB.

- Question and answer 3 provides that when a COVID-19 vaccine becomes available, it would be covered without cost sharing, pursuant to the ACA's preventive care mandate. While such a vaccine would generally not be required to be provided without cost sharing until 12 months after the Advisory Committee on Immunization Practices of the CDC recommends them, CMS indicates that plans may voluntarily choose to provide the vaccine with or without cost sharing prior to that date. The answer also indicates that a participant with a plan that does not cover the vaccine may use the plan's drug exceptions process to request that the vaccine be covered under the plan.

Employers should consider this guidance as they provide coverage to participants who may be diagnosed with and treated for COVID-19.

CMS Extends ACA Non-Enforcement Policy for Grandmothered Plans Through 2021

On January 31, 2020, CMS announced an additional one-year extension with respect to specific ACA compliance requirements for certain non-grandfathered individual and small group coverage known as "grandmothered" policies. Under the latest extension, states may permit insurers that have continually renewed eligible grandmothered policies since January 1, 2014, to again renew that coverage for a policy year beginning on or before October 1, 2021, provided that the policies end by January 1, 2022.

As background, on November 14, 2013, CMS issued a letter outlining a transitional policy with respect to the health care reform mandates for coverage in the individual and small group markets. Under the policy, state authorities could allow health insurance issuers to continue certain coverage that would otherwise have been cancelled for failure to comply with the ACA requirements. This initiative allowed individuals and small businesses to elect to re-enroll in such coverage. Specifically, the non-enforcement policy provided relief from the following market reforms:

- Community rating
- Guaranteed issue and renewability of coverage
- Prohibition of coverage exclusions based on pre-existing conditions
- Non-discrimination based on health status
- Non-discrimination regarding health care providers

- Comprehensive coverage (i.e., coverage of essential health benefits and the application of maximum out-of-pocket limits)
- Coverage for participation in clinical trials

The transitional policy has been continually extended since the initial announcement, thus permitting grandfathered policies to maintain an exemption from the above-mentioned requirements. However, although the CMS bulletin allows for the temporary continuation of these non-compliant plans at the federal level, the practice must still be approved by state regulators in order for policies to be available in a particular state. Insurers then also have a choice as to whether to keep offering the policies. The bulletin includes a notice to be used in the event a coverage cancellation notice was already sent and the insurer will now be providing an option to the policyholder to continue the coverage.

Accordingly, small employers who are currently covered by such grandfathered policies should be aware of the most recent non-enforcement extension. These employers should work with their advisors and insurers regarding possible renewal of the coverage.

Agencies Issue FAQs Regarding 2021 Updates to SBC Template, Calculator, and Narratives

On February 3, 2020, the DOL, HHS, and the Department of the Treasury issued two FAQs concerning the application of recent updates to SBC materials.

These agencies are charged with developing standards that group health plans and health insurance issuers can apply when compiling and providing SBCs to plan participants in accordance with the ACA. On November 7, 2019, updates to the SBC template, coverage examples calculator, guide, and narratives for coverage examples were released.

The first FAQ states that group health plans and health insurance issuers must use these updated materials beginning on the first day of the first open enrollment period for plan years beginning on or after January 1, 2021.

The second FAQ clarifies that using the calculator is not mandatory. It is a tool to help group health plans and health insurance issuers to generate the estimated out-of-pocket costs that a consumer can expect to pay under the plan for the coverage examples on the SBC. The calculator makes several assumptions that may not apply to particular plans or policy designs, so the agencies allow the plans and issuers to create their own calculators or to modify the calculator as necessary. However, plans and issuers can use the calculator even when they could develop more accurate methods for generating coverage examples, because it retains its status as a safe harbor.

Employers should be aware of the 2021 updates to SBC materials, their application, and when they must be applied.



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Congress Repeals the ACA's Cadillac, HIT, and Medical Device Taxes; Revives PCOR Fee; and Extends the Paid Family and Medical Leave Tax Credit

On December 20, 2019, President Trump signed the Further Consolidated Appropriations Act of 2020 (HR 1865) into law. The main purpose of this legislation is to continue funding certain government operations. However, the bill also includes a number of employee benefits-related provisions. Specifically, the bill repeals the tax on high cost health coverage (aka the Cadillac tax), the health insurance tax (HIT, aka the Health Insurance Providers Fee), and the medical device tax. The bill also extends the ACA's PCOR fee for 10 years (until 2029) and the paid family and medical leave tax credit for one year, and retroactively eliminates a commuter benefit tax for tax-exempt organizations.

ACA Tax Repeals

- **Cadillac Tax:** The Cadillac tax was introduced by the ACA and would have imposed a 40% excise tax on employer-sponsored coverage that exceeded a certain threshold. The tax was originally set to become effective in 2018, but had been delayed through 2022. HR 1865 completely repeals the tax, meaning it will never be imposed on any employer plan.
- **HIT:** The HIT is a tax imposed on insurers that was meant to help fund the cost of ACA implementation and the exchanges. Although the tax applied to insurers, insurers were allowed to push those costs through to group health plans through increased premium rates. HR 1865 repeals the tax effective January 1, 2021. However, the tax will still be due for the 2020 plan year.
- **Medical Device Tax:** The medical device tax was a 2.3% excise tax on manufacturers and importers of certain medical devices. The tax was originally set to become effective in 2013, but has been delayed multiple times. HR 1865 repeals the tax entirely.

PCOR Fee Extension

HR 1865 extends the PCOR fee for 10 more years. As background, the ACA imposes a fee on issuers of specified health insurance policies and plan sponsors of applicable self-insured health plans to help fund the Patient-Centered Outcomes Research Institute. The fee, required to be reported only once a year on the second quarter Form 720 and paid by its due date, July 31, is based on the average number of lives covered under the policy or plan.

The PCOR fee previously applied to policy or plan years ending on or after October 1, 2012, and before October 1, 2019. However, HR 1865 extends the fee through 2029.



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Employers with self-insured plans (including HRAs) will need to continue their compliance with the PCOR fee requirement by filing Form 720 by July 31 each year. We anticipate the IRS will issue additional guidance on the extension, including applicable fee amounts, prior to the July 31, 2020, deadline.

Federal Update

DOL Announces 2020 Adjustments to ERISA Penalties

On January 15, 2020, the DOL published a final rule adjusting civil monetary penalties under ERISA. As background, the annual adjustments relate to a wide range of compliance issues and are based on the percentage increase in the consumer-price index-urban (CPI-U) from October of the preceding year. The DOL last adjusted certain penalties under ERISA in January of 2019.

Highlights of the penalties that may be levied against sponsors of ERISA-covered plans include:

- Failure to file Form 5500 maximum penalty increases from \$2,194 to \$2,233 per day that the filing is late
- Failure to furnish information requested by the DOL penalty increases from \$156 to \$159 maximum per day
- Penalties for a failure to comply with GINA and a failure to provide CHIP notices increases from \$117 to \$119 maximum per day
- Failure to furnish SBCs penalty increases from \$1,156 to \$1,176 maximum per failure
- Failure to file Form M-1 (for MEWAs) penalty increases from \$1,597 to \$1,625 per day

These adjusted amounts are effective for penalties assessed after January 15, 2020, for violations that occurred after November 2, 2015. The DOL will continue to adjust the penalties no later than January 15 of each year and will post any changes to penalties on their website.

To avoid the imposition of penalties, employers should ensure ERISA compliance for all benefit plans and stay updated on ERISA's requirements.



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Acronyms Glossary

ADA	Americans with Disabilities Act
CMS	Centers for Medicare & Medicaid Services
COBRA	Consolidated Omnibus Budget Reconciliation Act
DOL	U.S. Department of Labor
EBSA	Employee Benefits Security Administration
EEOC	Equal Employment Opportunity Commission
ERISA	Employee Retirement Income Security Act
FLSA	Fair Labor Standards Act
FMLA	Family and Medical Leave Act
FSA	Flexible Spending Arrangement
HHS	U.S. Department of Health and Human Services
HIPAA	Health Insurance Portability and Accountability Act
HITECH	Health Information Technology for Economic and Clinical Health Act
HRA	Health Reimbursement Arrangement
HSA	Health Savings Account
IRC	Internal Revenue Code
IRS	Internal Revenue Service
OTC	Over-the-counter Item or Drug
PPACA	Patient Protection and Affordable Care Act (aka health care reform)

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