



Coronavirus Update

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Coronavirus and paid leave: Large employer considerations

To date, Congress has not taken legislative action dictating how large employers provide sick pay or protected time off related to the COVID-19 pandemic. However, recently passed legislation does impact both private employers with fewer than 500 employees and all public employers. The Families First Coronavirus Response Act (FFCRA), effective April 1, 2020, dictates a minimum level of sick pay and expands Family Medical Leave Act leave for certain coronavirus-related events.

Congress has considered passing emergency leave laws focusing on requirements for larger employers but has not done so yet. We may see additional legislation focused on larger employers if there becomes a need based on how those employers respond. Although we don't know if mandates will be passed, it is important for larger employers to review the current legislation and consider whether to adopt those or similar requirements when determining appropriate actions in response to the coronavirus. We believe that the FFCRA may be a good minimum threshold for large employers to use.

The coronavirus pandemic presents an opportunity for large and exempted employers to identify potential gaps with existing pay replacement programs and leave policies. Recent events have also confirmed many large employers presently offer generous levels of sick pay and leave benefits. Historically pay and leave practices have been operationally driven and prudent. This pandemic, in conjunction with recent federal, state and local focus on paid sick benefits and leave, has created the need and opportunity for large employers to assess, amend and harmonize pay and leave programs. The greater the regulation, and the more diverse the legislation is at the state and local levels, the more difficult it becomes for larger employers to administer sick pay and leave programs. Failure to provide some base level of reasonable protection may result in further government action mandating minimum levels of sick pay and leave.

Large employers have myriad decisions to make when establishing workforce leave and pay policies, particularly around the current pandemic. Factors to consider include the amount of sick time, the level of pay replacement, determination of eligible employee classes, and the impact to ongoing enterprise business metrics. Lockton recommends employers use this event as a wake-up call to engage in a broad assessment of existing sick pay and leave policies. Reviewing current gaps and points of integration will allow for future informed and targeted choice adoption. Programs should be adopted to address the immediate need, but further consideration should be given to address what sick pay and leave programs will work best beyond 2020.

Brief summary of Families First Coronavirus Response Act (FFCRA)

The coronavirus events affirm the need for all employers, including larger employers, to assess and potentially modify pay and leave options for employees in this unique situation. To begin, employers should review current policies against new requirements under the FFCRA. FFCRA is effective April 1, 2020, but its requirements are in effect only to the end of the calendar year. Affecting only governmental employers and private employers with 500 or fewer employees, the FFCRA mandates the following (a more comprehensive summary may be found [here](#)):

Emergency Paid Sick Leave Act (EPSLA) pay provisions: Employers must provide two weeks (80 hours) of paid leave for quarantine, isolation or medical treatment required because of an employee's own coronavirus-related illness or to care for an individual for those same reasons. In addition, leave under EPSLA may be taken to care for the employee's child whose school or child care provider is closed or unavailable because of the coronavirus. Paid leave for the employee's own condition is based on full wages but is capped at \$511 per day to a maximum of \$5,110 for 80 hours. Paid leave for the employee to care for another individual or because a minor child's school or child care is unavailable is limited to two-thirds of pay and is capped at \$200 per day to a maximum of \$2,000 for 80 hours. Part-time employees are entitled to a prorated period of pay. Employees are entitled to access the paid sick leave provided under the FFCRA first; the ability to "sequence" the order of use is prohibited.

Limited expansion of FMLA (EFMLA) leave and pay impact provisions: EFMLA provides 12 weeks of leave for the purpose of providing care for an employee's minor child whose school or child care provider is closed or unavailable because of the coronavirus. The first two weeks are unpaid (but may be paid under EPSLA if the employee has that time available). After the first two weeks, up to an additional 10 weeks are payable at two-thirds pay, capped at \$200 per day to a maximum of \$10,000. Employees who have worked for the employer for at least 30 days or more are eligible for EFMLA. For employees who are already entitled to FMLA, they may take leave to care for a minor child whose school or child care provider is closed or unavailable, but all leave taken under FMLA is counted toward the maximum 12-week period. Of note, "stacking" of FMLA time is not intended under the Act.

Considerations when modifying sick pay and leave policies

In addition to using the small-employer mandate as threshold guidance, when a large employer establishes its sick pay and leave policy, including any emergency provisions to cover the coronavirus, it may be prudent to consider the following issues and questions:

1. Do I want to mirror the small-employer requirements, provide fewer benefits or provide expanded benefits?
2. When expanding benefits, what benefits am I looking at?
 - a. How many weeks of paid sick leave will I provide unique to this pandemic?
 - b. How will I coordinate mandated federal or state paid sick leave with employee's currently accrued sick leave?
 - c. Have waiting periods for disability pay been fully considered within my paid time off (PTO) design?
 - d. What role do accrued sick days or extended illness bank (EIB) balances play in future design? Simply, do I have existing sources of accrued paid time off that should be modified? Should I liberalize access to such balances?
 - e. For what purposes will I provide or expand current paid sick leave? If not subject to FMLA, will I offer job-protected leave? In relation to the pandemic, will leave apply for:

- The employee's own illness related to the coronavirus?
 - The employee's family member's illness related to the coronavirus?
 - Quarantine or required isolation for the employee (or for a family member), related to (a) actual risk due to exposure or positive testing, (b) possible exposure or (c) attempt to reduce spread of disease?
 - Caring for children due to school closures or lack of child care due to pandemic? How detailed should my definition be to avoid establishment of precedent?
 - Shelter-in-place requirements if my employee is unable to work remotely?
3. Do I want to provide full or partial pay for all or part of FMLA leave? If yes, do I want to limit the event(s) that will trigger payment (e.g., only for care of a child, only for the employee's own serious medical condition, etc.)?
 4. Do I want to establish a period of protected leave for employees not yet entitled to FMLA or who may have exhausted FMLA? Will my pay policy apply for those individuals? Will this dovetail with or replace an existing medical leave of absence (MLOA) or personal leave program?
 5. Are sick pay and leave benefits different based on employee classification or location? Note: Ensure classifications are nondiscriminatory.
 6. Is all or a part of my business considered an essential function that will continue during a state or local shutdown, and how will that affect this policy?
 7. What impact will federal, state or local paid leave requirements have on my leave design? These mandates are quickly being amended by several states in response to the coronavirus.
 8. What can I simplify within my existing design to reduce individual decisions, payroll complications and employee communication?
 9. What impact would a furlough or layoff have to my underlying benefits programs, extensions, and the need to modify or negotiate with my incumbent insurer?
 10. Will I require remote work for employees able to do so, and will that exclude pay under my policies?
 11. Are there limitations I will encounter with "pay administration" variables that would fall outside of current capabilities if I outsource my leave administration? Will my design be administrable?

Large employers have options to modify pay and leave programs to be specific to current situations and can establish long-term policies that will address both current and future concerns. Caution should be taken to assure that an employee's accrued leave is not modified in a way that could be discriminatory or in violation of any mandates.

Administrative considerations when making changes

Of course, as an employer establishes new pay and leave policies, specifically regarding the coronavirus pandemic, many administrative and business issues will arise.

New pay and leave components adopted by a large employer will introduce new variables into the employer's payroll platform, timekeeping systems, budget and leave tracking (internal and external) related to current leave solutions. Employee pay integration rules will require reprogramming of payroll and leave administration systems and will come at a cost. Existing and modified government mandated paid leave programs (where applicable), employer-paid leaves, caregiver leaves, sick leave and extended illness banks must be assessed, and rank ordered for pay integration or coordination. Employers should consider any adjustments related to the coronavirus pandemic. Note, while an employer generally has unfettered choice regarding order of pay, some sick pay laws relating to the coronavirus pandemic prohibit employers from requiring other paid leave be exhausted first. In addition, fully insured programs may include required offsets outside the employer's control. Harmonization will now take on new meaning beyond equality. The external market solutions currently used by

many employers were not constructed for “pay” related nuances that the coronavirus has introduced and will extend complication to large employer designs.

To bring harmonization between the old and the new programs, where possible, employers should review and assess all current paid and unpaid leave programs, identify distinct administrative challenges, and outline goals desired in providing leave benefits. Employers should define “changes” carefully to ensure coronavirus- or pandemic-focused changes are clearly identified and limited. Minimally, large employers should plan on a short-term solution. Better yet, this is the opportunity to consider a broad expansion, modification or clarification of paid leave offered.

Core design challenges of integration and adoption

Several benefits program and policy design variables will pose challenges for larger employers when choosing to adopt the minimum requirements under FFCRA or when adopting a more robust temporary or permanent pay and leave program. It is essential to consider integration required relating to administration and design elements of various paid leave benefits. The following program components and considerations appear prudent and directional in the design of corrective program or policy alignment:

- **Short-term and long-term disability programs:** Making permanent design changes (amending or modifying coverage under these programs) is generally time consuming and counterintuitive to solving a near-term pay problem. However, employers that self-fund short-term disability or pay short-term disability through a payroll practice can easily use this opportunity to introduce a “top-off” to supplement pay otherwise required under a federal, state or local paid leave program. In addition, employers may wish to review eligibility to determine if continuation of pay or eligibility for benefits are desired during furlough relating to any pandemic event, or specific to this pandemic event. Changes can be addressed through amendments and should be specific in plan interpretation.
 - For fully insured benefits, the employer should review with the carrier whether supplemental pay would result in an offset of insured benefits. Application of the policy should be confirmed in relation to coverage options during furlough or after layoff. Currently, many insurers are permitting continuation for furlough, even absent specific coverage under contract provisions, but some have remained silent and need to be consulted. Care should be taken to request extensions for workforces impacted in the near term. Each insurer may interpret coverage and premium continuation differently for furlough and/or layoff. Affirming desired coverage with carriers and reviewing any updated State Department of Insurance declarations specific to COVID-19 are warranted and advised.
- **Temporary expanded sick leave:** This option may offer a near-term solution for pay, but employers should consider issues such as effect on accrued time, whether accrued time is available after the temporary expansion, identifying specific and limited events that trigger access to additional benefits, time limitations, other offsets, percentage versus full pay, and other terms that may differ from standard sick leave programs. Clear terms should be adopted and communicated so there is no potential discrimination in application, rather than offering leave where determinations are based on management discretion. When limiting leave, using clear and specific references to COVID-19 pandemic-related events is recommended. Impact to budgeted overtime payroll variables and mandatory overtime staffing models may be material. Any adjustment to accrual rates and/or access to such should be an embedded assumption.
- **Historical access, usage and administrative rules for sick pay or paid time off (PTO):** We recommend employers conduct a thorough review of administrative rules historically applied to access and use of PTO or sick pay accruals, draw down options and conditions for which time was available. Many employer programs permit access to PTO before fully accrued. Moving forward, whether access to future accruals is advisable should be considered in addition to determining whether such access

should be limited. Some employers may deem it appropriate to offer new access to future accrued benefits. Specific options or differences related to time off for the coronavirus need to be referenced, particularly because enterprise financial exposure may be increased in this situation.

- **Adjustment of current FMLA-like policies:** Although EFMLA does not apply to most larger employers, they may consider adding an option to take leave (paid or unpaid) due to the need to care for a minor child due to a school or child care closure. Be cognizant that this is not an event that will trigger true FMLA for a larger employer and could extend leave time beyond that which is available to an employee under FMLA. To do so may create additional administrative work for the employer to establish eligibility and is likely to increase use of paid time off. Amending existing leave strategies to add time off for this purpose should be specific to the coronavirus pandemic and should be offered for a limited duration (e.g., available through December 2020). Be sure to understand the financial implications of such an expansion and determine whether FMLA-like treatment should be accorded (e.g., job protection).
- **Adjustment of supplemental leave policies:** Consider whether current policies offer the opportunity to supplement pay (received from sources other than the employer), or whether employees are permitted to use accrued time off to supplement other pay. Given the coronavirus pandemic, this may become more of an issue related to state paid leave options, such as Paid Family Leave or Statutory Disability Insurance.

Tax credits for paid leave

Although tax credits are available to employers with fewer than 500 employees for benefits payable under FFCRA, this option is not available to larger employers. However, in some cases larger employers may be entitled to take a tax credit for paid leave for events enumerated under FMLA. The availability of these tax credits is limited and is subject to minimum requirements.

Large employer administrative check list: Insurer, human resource information system and third-party administrator considerations and challenges

The solutions being employed by large employers and that are mandated by law are quickly being addressed by HRIS platform providers, insurers and TPAs. Elements being addressed by external vendors due to FFCRA and other modified paid leave options include, but are not limited to, the following broad elements:

1. Information technology automation of final regulatory rules.
2. Possible changes to administrative contracts for client service delivery.
3. Inbound prospective data changes (eligibility file feeds) that may be required by employers for both leave tracking and pay purposes.
4. Modification of all applicable existing leave letters specific to both FMLA and ADA/ADAAA or state mandated leave.
5. Creation of new leave letters to address unique offers of leave (e.g., specific to the coronavirus).
6. Translation of market sector sizes to ensure as much automation as possible (over and under 500 employer segments).
7. Beta testing the IT implications (this will take time to perfect).
8. A complete review of the supportive internal policy and procedure impacts of the changes, keeping in mind that at this point, changes due to the FFCRA will not be in force after December 2020.
9. Reporting module changes required to serve current employer day-to-day reporting of type of absence, variable cadence, content and relative impact pay file extracts.

10. Impact to prospective influx of new disability and leave incidence rates and each carrier's position on whether to invoke the contractual rights permitting rate adjustment or administrative service fee increases to PEPM-related pricing elements based upon established incidence rate or participation levels.
11. Carrier or TPA staffing model impact to the response time needed to address added leave program complexity (think of this as the additional time in dialogue during inbound and outbound calls, additional key strokes and perhaps manual elements that may not be resolved in the near-term via IT solution or platform) and impact to existing service level agreements (SLA), key performance indicators (KPI) or performance guarantees (PG).
12. Pay system or pay declaration by both insurers and TPAs (this will more clearly segment what is a "pay" function versus a leave-related and tracking function). Pay sequencing is an important consideration in understanding which programs pay and in what order, as well as offset integration requirements introduced.

Large employers should be aware of changes implemented by external vendors, how they impact employer obligations, and whether changes are being made in a timely manner when required.

What's next?

We expect forthcoming guidance under FFCRA may bring light to other issues that should be addressed in any employer leave program. Further, there is a possibility of later legislation being passed in response to large employer actions. We recommend large employers review programs and make modifications in the short-term to address the unique circumstances of this coronavirus pandemic. As part of, or subsequent to this process, employers should review overall leave programs given the rapidly changing and highly focused regulation of leave. Significant changes have been and are likely continuing to be made under state and municipal requirements. Coordinating and understanding required leave in conjunction with employer-provided leave as a benefit will require significant resources both to address the coronavirus pandemic and future employer-leave programs.

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