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Responding to the Covid-19 Pandemic — The Families First Coronavirus Response Act and Other Tools for Employers

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Following natural disasters, such as Hurricane Katrina (HK), the federal government agencies regulating employee benefit plans provided guidance on tools employers can utilize to assist employees impacted by such disasters and with recent declarations of disasters under certain laws, those tools also apply to the Covid-19 pandemic today. In addition Congress passed the Families First Coronavirus Response Act (FFCRA)¹ on March 18, 2020, to provide relief. This article first summarizes the application of the FFCRA to employers and then discusses some of the tools that exist for employers to use to assist employees through the Covid-19 pandemic. In addition, the Covid-19 outbreak has presented a number of legal and practical challenges for employers. This article then discusses employer considerations to those challenges in the areas of workplace safety, work from home programs, leave under the recently enacted FFCRA, and employee benefits.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The FFCRA is a bill that is comprised of a number of separate pieces all of which have names of individual acts. The acts within the FFCRA include the:

- Emergency Family and Medical Leave Expansion Act;
- Emergency Unemployment Insurance Stabilization and Access Act of 2020;

This article was written before the Coronavirus Aid, Relief and Economic Security Act was passed by the U.S. Senate and does not consider the additional retirement plan distribution, required minimum distribution relief, plan loan relief, wage continuation or student loan payment relief contained in that bill. It was limited to the laws and guidance as of March 24, 2020. Review of the laws in effect at the time the question arises is critical in this fast changing area.

¹ Pub. L. No. 116-127.

- Emergency Paid Sick Leave Act; and
- Second Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020.

The FFCRA also provided nutrition assistance and tax law changes. In addition, the FFCRA also amends a number of other federal laws and provides tools for individuals and employers to use to ride out the impact of the Coronavirus or Covid-19 outbreak. We will refer to the viral epidemic as Covid-19 herein.

New Leave Benefits Under the Families First Coronavirus Response Act

On March 18, 2020, President Trump signed into law the FFCRA. Among other employment-related provisions, FFCRA expands leave under the Family and Medical Leave Act (FMLA)² and requires employers to provide paid sick leave in certain circumstances. The FFCRA takes effect on April 1, 2020, and sunsets on December 31, 2020. The new leave provisions apply to employers with fewer than 500 employees and includes the possibility of exceptions for certain health care providers, emergency responders, and employers with fewer than 50 employees when the imposition of the new leave requirements would jeopardize the viability of the business as an ongoing concern. The leave benefits provided under FFCRA are in addition to any leave benefits available to employees under state or local law, or provided to employees by employers.

The expanded FMLA leave benefit provides eligible employees with 12 weeks of leave who are unable to work or telework because of the need to care for a son or daughter under 18 years of age, if the school or place of care has been closed or the child care provider of such son or daughter is unavailable due to Covid-19 related reasons. Employees who have been employed by an employer for at least 30 calendar days are eligible for this leave benefit. The first 10 workdays of the leave may be paid if the employee is eligible for paid sick leave under FFCRA (as discussed below) or if the employee elects to use existing paid leave available to the employee under the employer's policy and/or state or local law. After the first 10 workdays elapse, the employee will receive two-thirds of his or her regular rate of pay for the hours the employee would have been scheduled to work, with a cap of \$200 per day and \$10,000 in the aggregate.

² Pub. L. No. 103-3.

Emergency Paid Sick Leave Act

The FFCRA also includes a paid sick leave provision.³ Employees are eligible for FFCRA's paid sick leave benefit upon hire. Employees who cannot work or telework because of one of the following qualifying events are entitled to up to 80 hours of paid sick leave: (a) the employee is subject to a federal, state, or local quarantine or isolation order related to Covid-19; (b) the employee has been advised by a health care provider to self-quarantine because of Covid-19; (c) the employee is experiencing symptoms of Covid-19 and is seeking a medical diagnosis; (d) the employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to Covid-19 or an individual who has been advised by a health care provider to self-quarantine due to concerns related to Covid-19; (e) the employee is caring for a son or daughter whose school or place of care is closed, or child care provider is unavailable, due to Covid-19 precautions; or (f) the employee is experiencing similar conditions as specified by the Secretary of Health and Human Services. Paid sick leave taken for the reasons identified in (a) – (c) is capped at \$511 per day and \$5,110 in the aggregate. Paid sick leave taken for the reasons identified in (d) – (f) is calculated at two-thirds of the employee's regular compensation and capped at \$200 per day and \$2,000 in the aggregate.⁴

THE EMERGENCY FAMILY AND MEDICAL EXPANSION ACT

The FFCRA creates the Emergency Family and Medical Leave Expansion Act (the EFMLEA). As originally enacted, FMLA provides unpaid leave up to 12 weeks per year to eligible employees because of the birth of a son or daughter of the employee and in order to care for such son or daughter. In addition, the FMLA qualifying events include taking leave for the placement of a son or daughter with the employee for adoption or foster care, to care for the spouse, child, or parent of the employee for a serious health condition, and because of the employee's serious health condition that makes the employee unable to perform the functions of the position of such employee.⁵ In 2008, Congress added a fifth qualifying event relating to family members of service members. This article will refer to these existing types of FMLA leave as "traditional FMLA leave."

Qualifying Need Related to a Public Health Emergency: The EFMLEA adds a sixth category to

³ FFCRA, Division E.

⁴ FFCRA, Division E, §5110.

⁵ FFCRA, Division C.

the list of traditional FMLA leave: “a qualifying need related to a public health emergency.” This sixth category takes effect on April 1, 2020,⁶ and would extend only to December 31, 2020. A “public health emergency” means an emergency with respect to Covid-19 declared by a federal, state, or local authority.

This sixth category of EFMLEA leave – “qualifying need related to a public health emergency” — means that the employee is unable to “work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed or the child care provider of such son or daughter is unavailable, due to a public health emergency.”⁷ Existing FMLA protections, however, may extend to a person diagnosed with Covid-19 or who requires leave to care for an immediate family member with the disease.

Paid Leave Under EFMLEA: A key difference from traditional FMLA leaves is that EFMLEA leave related to a qualifying need for a public health emergency is **paid leave** after the first 10 days for which the employee takes leave. (That 10-day period would be covered by the Emergency Paid Sick Leave Act discussed above). An employee may use pre-existing paid time off during this period for EFMLEA leave. After the first 10 days, the employee receives two-thirds of the employee’s regular pay for the remaining period of EFMLEA leave. The FFCRA provides formulas for employers to determine the amount of paid leave for hourly employees whose schedules vary from week to week. The FFCRA caps the amount of payment to the employee of no more than \$200 per day and \$10,000 in the aggregate.⁸ Other parts of the Act provide for tax credits to the employer’s payroll tax that mitigate part of the cost of providing such leave.⁹

Who Is a Covered Employer for Purposes of EFMLEA: Another key difference is the definition of a covered employer. EFMLEA leave for a qualifying need for a public health emergency applies to employers with **fewer than 500 employees**; traditional FMLA leave applies only to employers with **50 or more employees**. The Secretary of Labor has the authority to issue regulations for good cause to exclude certain health care providers and emergency responders from the definition of eligible employees and to exempt small businesses with less than 50 employees

“when the imposition of such requirements would jeopardize the viability of the business as a going concern.”¹⁰ Under the FFCRA, an employer of an employee who is a healthcare provider or an emergency responder may elect to exclude such employee from EFMLEA leave.¹¹

Eligible Employees: Under existing FMLA law, that remains applicable to traditional FMLA leave, an eligible employee is generally an employee with at least one year of service and 1,250 hours of service.¹² Existing FMLA leave is also restricted to those employees who work at worksites with 50 or more employees within a 75 mile radius. For EFMLEA leave, an eligible employee means an employee who has been employed for at least 30 calendar days by the employer with respect to whom the leave is requested. Under FFCRA, there is no “location” requirement for EFMLEA leave.¹³

Certification and Notification Requirements: While not entirely clear, the healthcare provider certification requirements for a serious health condition under FMLA do not appear to apply to EFMLEA leave, but the FFCRA provides that an “employee shall provide the employer with such notice of leave as is practicable.”¹⁴

Restoration Rights: Restoration rights under existing FMLA provisions¹⁵ apply to EFMLEA leave except that an employer with fewer than 25 employees may be excused when certain conditions as to job unavailability are met, the employer makes reasonable efforts to restore the employee to an equivalent position, and the employer notifies the employee of any equivalent position that become available during a one-year period.

Particular provisions apply to employment under multi-employer bargaining agreements.¹⁶

NEW PAYROLL TAX CREDIT TO HELP DEFRAID THE COST OF THE TEMPORARY EXPANSION OF THE PAID FAMILY AND MEDICAL LEAVE AND THE EMERGENCY PAID SICK LEAVE ACT

While the FFCRA added Paid Family and Medical Leave Act expanded benefits related to Covid-19 and Emergency Paid Sick Leave Act for certain situations

⁶ U.S. Department of Labor, Wage and Hour Division, *Families First Coronavirus Response Act: Questions and Answers*, (the FAQs), Q & A, 1 (Mar. 24, 2020).

⁷ FFCRA, Division C, §3102.

⁸ FFCRA, Division C, §3102 adding FMLA §110 titled Public Health Emergency Leave.

⁹ FFCRA, Division C, §3102.

¹⁰ FFCRA, Division E, §5111.

¹¹ FFCRA, Division C, §3102.

¹² 29 U.S.C. §2611(2).

¹³ FFCRA, Division C, §3102.

¹⁴ FFCRA, Division C, §3102.

¹⁵ 29 U.S.C. §2614.

¹⁶ FFCRA, Division C, §3103.

related to Covid-19, the financial burden of such mandated paid leaves for either the detection of SARS-COV-2 or for the detection of the virus causing Covid-19 is lessened by the payroll tax credit provided by the FFCRA. The tax credit will cover the cost for employees up to \$200 per day for leave covered only by the expansion of the FMLA, and permits a credit of up to either \$200 per day for employees on paid sick leave for the following major reasons: (a) the employee being subject to a federal, state or local quarantine or isolation order related to Covid-19, (b) the employee is caring for an individual who is subject to the order in (1) below or who has been advised as provided in (2) below; (c) the employee is caring for a son or daughter of the employee if such child's school or place of care for the child has been closed or if the child care provider for such child is unavailable due to Covid-19 precautions, or (d) the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the secretaries of Treasury and Labor. The tax credit for the cost of Emergency Paid Sick Leave increases to up to \$511 per day for employees who took paid leave for (1) self isolation due to a diagnosis of Covid-19; (2) the purpose of obtaining a medical diagnosis or care because the employee was experiencing symptoms of Covid-19; or (3) to comply with recommendations or an order by a public official within their jurisdiction or a health care provider¹⁷ because the employee's physical presence on the job would jeopardize the health of others due to the employee's exposure to Covid-19 or symptoms of Covid-19.¹⁸ The Emergency Paid Sick Leave credit is calculated by individual employee who qualifies for up to 10 days in total until December 31, 2020.¹⁹ The credit for the wages paid under the Emergency Paid Family and Medical Leave Act are limited to \$200 per day per person and a maximum credit of \$10,000 per employee for all calendar quarters.²⁰ Both credits can include the cost of providing health insurance to the individual who is on each of the respective types of paid leave.²¹ The cost of providing health insurance during the respective types of leave increases the credits available and is not limited by the dollar caps.²²

An employee on such leave continues in employment and for the Emergency Paid Sick Leave Act²³ would continue to have payroll deductions for the employee's share of the cost of medical plan coverage at the same rate as in effect prior to commencing the leave so that there is no discrimination against the employee for taking the leave.²⁴ The employee would need to be maintained as eligible for coverage to comply with any applicable stability period under §4980H²⁵ for purposes of compliance with the Employer Shared Responsibility tax. An employee on a leave under the EFMLEA²⁶ will be on a leave that has been made part of the FMLA and its protections, such as no discrimination against an individual for taking a leave and the requirements for handling health insurance while on a leave (pre-pay, pay as you go, or pay upon return); however there will be employers who are subject to the Emergency Paid Family and Medical Leave Act who are not subject to the other provisions of the FMLA, and such employers should consult with their own legal counsel regarding how to handle health insurance premium deduction under an Emergency Paid Family Medical Leave Act leave as each situation requires careful analysis of the facts under the various statutes.

The employer reports the credit on its quarterly employment tax return, but it takes the credit by applying the claim for the credit against its payroll deposits.²⁷ The credit is applied against the OASDI portion of the FICA taxes the employer pays. If the credit exceeds the employer's share of the OASDI and Medicare taxes and federal income tax withholding in total for the calendar quarter, the credit in excess of the tax becomes a refund. Employers are permitted to offset their deposits of such payroll tax withholdings and employer's share of the taxes and reconcile on the quarterly return. If an employer does not have sufficient payroll tax payments to absorb the paid sick leave and FMLA expansion paid leave credits, the employer will be able to request an expedited credit refund by filing with the IRS.²⁸ An employer who seeks this tax credit may not also request the credit for Paid Family and Medical Leave under §45S.

Any amount that an employer receives as a credit under this new credit is also treated as income included in the employer's gross income for calculation of income tax on the employer for the taxable quar-

¹⁷ FFCRA, Division G, §7001, §7005.

¹⁸ FFCRA, Division G, §7001, §7003.

¹⁹ FFCRA, Division G, §7001.

²⁰ FFCRA, Division G, §7003(b).

²¹ FFCRA §7003(d) for the Expansion of FMLA and §7001(d) with respect to the Emergency Paid Sick Leave Act.

²² FFCRA §7003(d) for the Expansion of FMLA and §7001(d) with respect to the Emergency Paid Sick Leave Act.

²³ FFCRA, Division E.

²⁴ FFCRA, Division E §5104.

²⁵ All section references herein are to the Internal Revenue Code of 1986, as amended (the "Code"), or the Treasury regulations promulgated thereunder, unless otherwise indicated.

²⁶ FFCRA, Division C.

²⁷ IR-2020-57 (Mar. 20, 2020).

²⁸ IR-2020-57 (Mar. 20, 2020).

ters ending in the tax year of the employer.²⁹ The statute did not address if employers that are pass-through entities such as S corporations and partnerships for federal income tax purposes are also subject to this income inclusion for the credit. Employers have the ability to elect out of requesting this credit.

The employer can apply this credit to the eligible paid sick leave wages beginning on the date the Secretary of Treasury specifies within 15 days of enactment and continuing until December 31, 2020.³⁰

The wages an employer is required to pay under the Emergency Paid Sick Leave Act and under the EFM-LEA are not subject to either the deduction of the employee's share of the OASDI taxes (6.2%) and the employer is not required to pay the employer's share of the same tax also at 6.2%.³¹

COVID-19 TESTING COVERAGE MANDATED IN MOST GROUP HEALTH PLANS

A group health plan and a health insurance company providing group or individual health insurance, including group health plans grandfathered under the Patient Protection and Affordable Care Act (ACA)³² to avoid compliance with some of the ACA's mandates, are all required to begin providing coverage effective as of the date the FFCRA is signed into law.³³ The group health plans and health insurance companies cannot impose any deductible, copayment, coinsurance, cost sharing, or any prior authorization or medical management on the following items and services during the emergency period defined under the Social Security Act for testing using in vitro diagnostic products for the detection of SARS-CoV-2 or the diagnosis of the virus that causes Covid-19 that are approved, cleared, or authorized under the Federal Food, Drug, and Cosmetic Act, and the administration of such in vitro diagnostic products.³⁴

Coverage must also be provided (without any of the above cost sharing or prior approval or medical management) for items and services furnished to an individual during health care provider office visits, urgent care center visits, and emergency room visits that result in an order for or administration of an in vitro diagnostic product described above, but only to the extent such items and services relate to the furnishing or administration of such product or to the evaluation of

such individual for purposes of determining the need of such individual for such product.

While this new mandate did not extend to retiree only medical plans which are exempt from the ACA, the FFCRA did amend Medicare, Medicaid, and Tri-Care to mandate each of those programs also cover such care and treatment for this emergency period.³⁵

While this applies to all group health plans subject to the ACA, employers with collectively bargained group health plans for current employees need to consult with their respective collective bargaining agreements to determine what procedures must be followed to implement the required amendments, if applicable.

Group health plans will need to be amended to provide all of this coverage as of the date the FFCRA is signed into law. Retiree medical plans that cover only retirees and no current employees are not prohibited from providing such coverage, and there is a question of whether they are required to add such coverage due to their exemption from other mandates in the ACA and how that exemption is recognized. Retiree only medical plans that are subject to a collective bargaining agreement need to refer to their respective collective bargaining agreement to determine what options the employer has, if any and what procedures must be followed to implement an amendment.

FFCRA HIGHLIGHTS PROVISION FOR ASSISTANCE TO EMPLOYERS IN EFFORTS TO STABILIZE EMPLOYMENT

The I.R.C. contains several tools that an employer can use in times of natural disasters and for some emergencies. The FFCRA highlights one of those tools that relate to unemployment. The FFCRA requires employers to notify employees of the availability of unemployment compensation to an employee who separates from employment using a model notice that is to be provided by the Secretary of Labor. In addition, the Secretary of Labor is directed to assist in increasing employer awareness of a well-hidden tool related to unemployment compensation, the "short-time compensation program." A discussion of supplemental unemployment benefit plans is beyond the scope of this article.

EMPLOYMENT LAW AND WORKPLACE CONSIDERATIONS RELATED TO COVID-19

Workplace Safety Considerations Related to Covid-19

Though some businesses have shut down in response to the Covid-19 outbreak, or significantly lim-

²⁹ FFCRA, Division G, §7001(e)(1), §7003(d)(1).

³⁰ Notice 2020-21 set the date as April 1, 2020.

³¹ FFCRA, Division G, §7005.

³² Pub. L. No. 111-148.

³³ FFCRA, Division F, §6001.

³⁴ FFCRA, Division F, §6001.

³⁵ FFCRA, Division F, §6001.

ited access to their physical offices, some businesses remain open and continue to require employees to report to their facilities. Employers that continue to require employees to report to their physical offices should take care to ensure compliance with applicable workplace safety laws. The Occupational Safety and Health Act (OSHA) generally protects employees from physical harm in the workplace.³⁶ Specifically, OSHA provides that employers have a general duty to provide their employees with a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”³⁷ In light of OSHA’s general duty requirement, employers should consider implementing certain policies related to Covid-19, such as restricting work travel to areas known to be affected by Covid-19, educating employees on general practices to help prevent exposure to Covid-19, allowing non-essential employees to work remotely and/or permit leaves of absence, and adherence to quarantine guidelines provided by the Centers for Disease Control and Prevention (and other applicable authorities) for employees who have the virus or who have been exposed to someone who has or may have the virus.

OSHA also governs the use of personal protective equipment, such as respirators, gloves, or face protection, that employees may use while working during the Covid-19 outbreak. Specifically, OSHA includes personal protective equipment standards, which employers must adhere to if requiring employees to wear personal protective equipment while working. Recently, President Trump directed the Department of Labor to take all appropriate steps to increase the availability of general use respirators by healthcare professionals in healthcare facilities during the Covid-19 outbreak. In response to President Trump’s directive, the Occupational Health and Safety Administration (the “agency”) modified the standards governing employee use of respiratory protection equipment. Specifically, the agency modified the annual fit-testing requirement for respirator use, as long as employers do the following: (a) make a good faith effort to comply with the OSHA’s respiratory protection standards; (b) only use respirators certified by the National Institute for Occupational Safety and Health; (c) implement strategies promulgated by the Centers for Disease Control and Prevention and the agency for optimizing the supply of N95 filtering face piece respirators and prioritizing their use; (d) perform fit tests for employees who will use respirators; (e) inform employees that the annual fit testing for respirators is temporarily suspended; (f) emphasize the importance of a user seal check each time that an employee uti-

³⁶ 29 U.S.C. §651, *et seq.*

³⁷ 29 U.S.C. §654(a)(1).

lizes a respirator; (g) conduct fit tests if visual changes in an employee’s physical condition is observed that could affect respirator fit; and (h) remind employees that they should inform their supervisor or respirator administrator if the integrity of their respirator is compromised.³⁸ Any employer that requires its employees to use respirators or other personal protective equipment should carefully review all applicable standards.

OSHA standards may also be implicated when implementing cleaning processes to reduce the spread of Covid-19 in the workplace. OSHA requires employers to protect employees from exposure to hazardous chemicals used for cleaning and disinfection, which may include certain sanitizers and sterilizers. In the event that employees are exposed to hazardous chemicals as a result of cleaning processes undertaken in response to Covid-19, employers may be required to comply with OSHA’s hazard communication standard and other applicable OSHA chemical standards.

Employers should also be aware that over 20 states have adopted OSHA state plans that may require more stringent safety standards than those proscribed by the OSHA.

Considerations for Employers That Allow Employees to Work From Home In Response to Covid-19

State and local responses to Covid-19 have forced many employers to allow, or even require, employees to work from home in order to continue business operations. The establishment of clear standards and expectations is important to the success of a work from home program. Accordingly, employers that implement a work from home program should consider developing a written work from home policy that addresses who is allowed to work from home, employee’s expected hours, any logistics issues (such as handling IT issues, conducting conference calls, participating in meetings, etc.), and work productivity standards.

Employers should also be aware of wage and hour issues that may arise when implementing a work from home program. In accordance with the Fair Labor Standards Act (FLSA), exempt employees who are paid on a salary basis must be paid their full salary for each week worked during a work from home period, unless the employee performs no work for the entire

³⁸ DOL Occupational Safety & Health Administration Enforcement Memo., Temporary Enforcement Guidance – Healthcare Respiratory Protection Annual Fit-Testing for N95 Filtering Facepieces During the Covid-19 Outbreak (Mar. 14, 2020), <https://www.osha.gov/memos/2020-03-14/temporary-enforcement-guidance-healthcare-respiratory-protection-annual-fit>.

work week.³⁹ Though the FLSA generally only requires employers to pay non-exempt employees for the hours they actually work, tracking all time worked by non-exempt employees during a work from home period is essential to wage and hour compliance. Employers should consider implementing robust record-keeping and/or productivity tracking systems to ensure compliance.

In the event that an employer does not require an employee to work from home, an employee may make a request to do so due to a health condition that could be adversely affected by Covid-19. In those cases, benefits under the Americans with Disabilities Act (ADA) and FMLA could be triggered. Working from home may be considered a reasonable accommodation under the ADA for certain employees. However, employers should engage in the interactive process to determine whether working from home would in fact be a reasonable accommodation for the requesting employee, without causing an undue hardship to the employer. If working from home is not feasible, an employee may be eligible for FMLA leave or other leave provided by states or municipalities to address certain health conditions.

BENEFIT PLAN CONSIDERATIONS RELATED TO COVID-19

Amendment for High Deductible Health Plan Coverage of Covid-19 Testing

Many employers also offer high-deductible health plans (HDHP) that can only cover the specified preventive care until an individual or family satisfies the high deductible set by the health plan.

The IRS provided relief for employers who want to cover the cost of the Covid-19 diagnostic test and treatment, but who offer health benefits through an HDHP. This relief was provided prior to FFCRA being introduced as a bill. Notice 2020-15 permits an employer to amend its HDHP to cover all medical services received and items purchased associated with testing for and treatment of Covid-19. It can do so without requiring the individual to meet the HDHP's deductible or other cost sharing, and it can implement this process without causing the HDHP to fail to qualify as an HDHP and without denying the employee the ability to contribute to a Health Savings Account. CCFRA requires group health plans and individual insurance policies to cover additional services related to a Covid-19 test beyond just the test,

such as emergency room or urgent care visit related charges. Since CCFRA introduced these as changes to the mandated coverage under the ACA, presumably coverage of the mandated coverage in the ACA added by the CCFRA will also be permitted preventive coverage under the ACA and permissible preventive coverage under the rules applicable to HDHPs.

When the IRS issued this Notice, the change was not required under federal tax law. After the enactment of the CCFRA, the coverage of the diagnostic testing is mandated coverage without cost sharing. Employers with HDHPs still have the option to choose to adopt coverage for treatment of Covid-19 without imposing cost sharing as of the time of this writing. Employers with self-insured plans may consider whether to make an amendment to cover treatment of Covid-19 without cost sharing, but must make an amendment to cover the required testing, and, must comply with all of the normal requirements for a change in the benefit plan coverage, such as amendment, SMM distribution, and working with the third-party administrator and any insurance carrier. Employers with fully insured HDHPs that consider an amendment to cover the treatment of Covid-19 without imposing cost sharing must contact the insurance company for their plan.

Cafeteria Plan Election Changes

To date, no changes have been made to add any additional provision to permit employees to change their benefit plan elections under a cafeteria plan solely as the result of Covid-19. However, the change in status rules under the cafeteria plan regulations provide a number of reasons and a careful review of each employee's circumstances considering the numerous changes already provided in such regulations may reveal circumstances that fit within the existing changes.⁴⁰

Disability Plans

The terms of each short term disability plan need to be analyzed by employers subject to the Emergency Paid Sick Leave Act and the EFMLEA to consider how the short term disability plan's terms and benefit coordination provisions interact and to coordinate with the protections in the new paid leave acts' provisions.

401(k) Plan Changes Employers May Consider

An employer facing financial challenges due to Covid-19 may need to reconsider the level of its con-

³⁹ 29 CFR §541.602.

⁴⁰ Reg. §1.125-4.

tributions to its 401(k) retirement plan. If the employer uses the safe harbor matching contributions or nonelective contribution formula, the change to stop the safe harbor contribution formula can only be made if specific requirements are satisfied, including a 30-day advance notice to the participants. Employers should carefully analyze all of the requirements to qualify to make a change and to implement it so that the change cannot be challenged.⁴¹

For employer plans permitting participants to take loans from their 401(k) plans, the IRS regulations guide how participant loans to participants on furloughs are to be treated and when payments may be missed without triggering inclusion of the outstanding loan amount in the participant's income. Verifying the coding for participants on unpaid leaves with the plan record keeper to ensure participants on unpaid leave are not inadvertently defaulted on their participant loans may help to avoid unpleasant tax consequences to employees on unpaid leaves or furloughs.

OTHER TOOLS FOR PROVIDING ASSISTANCE TO EMPLOYEES IMPACTED BY COVID-19

Employers frequently look for ways to assist employees affected by disasters and we can now benefit from the tax tools that we learned about following HK. Some of the tools for HK were enacted as part of the relief legislation for HK and were of limited duration and those will not be discussed. This will only be a high level discussion of the tools that are still in effect to keep this to a readable length and not too deep in the I.R.C. or in historical provisions. In order to be able to assist employees, employers must have current contact information on all employees (both work and personal phone and e-mail addresses) to be able to reach the employees wherever they may be staying, such as cellphone, personal email, and emergency contact information.

Foundation Resources

Employers who have affiliated tax-exempt foundations should review the foundation's governing documents and tax-exempt status application to determine if providing assistance to individuals who have suffered loss of employment or significant medical expenses related to Covid-19 and still remain in compliance with the organization's statement of its purpose.

⁴¹ Reg. §1.401(k)-3(g) and §401(k)(12), as amended by the SECURE Act, with respect to how the changes in safe harbor plan notice requirements may impact the requirements for contents in the safe harbor notice to be eligible to terminate safe harbor contributions prior to the end of the plan year.

Employer affiliated foundations may need to provide assistance to the general public in the area served by the foundation rather than to just the affiliated employer's employees.

Paid Time Off Donations to Pool for Affected Individuals

Aside from creating an employer affiliated tax-exempt foundation to assist employees, there are other ways an employer can assist its employees or offer its employees as a way to assist the affected individuals, including employees. In the past, some employers have permitted employees to donate their paid time off or leave to a pool that can be used by the affected employees. Donation of leave is possible as long as one carefully structures the leave donation program in compliance with existing guidance so that there is no constructive receipt of the donated leave by the donating employee. The IRS issued sub-regulatory guidance on leave donation programs following HK. The leave donations were to a pool that a committee then determined to which such affected individuals should receive an allocation of the donated paid time off or other personal entitlement to vacation or other time off.⁴²

Disaster Preparation for Employers

Emergency preparedness plans usually initially focus on access to business assets and operations, the integrity of the facilities, business emergency preparedness plans, back up facilities and emergency response teams, and how to locate employees and retirees. Employers, once a natural disaster hits, may shift from business continuity to employee support and assistance in terms of relocating the employees and families, providing temporary housing, home repairs/restoration/sales, and support of daily needs such as food, water, clothing, shelter, medical care, dealing with regular bills, and disaster related financial obligations as well as emotional and trauma support. Covid-19's spread required employers to implement the business continuity plans and know where the employees would be at the same time and requires an employer to have continuous contact with the employees after the business operations move to a remote work situation.

COBRA Reminder

Employers considering reductions in employee hours and furloughs should remember to watch for reductions in hours worked that may trigger a loss of

⁴² See, e.g., Rev. Rul. 90-29.

eligibility for health plan coverage triggering a right to elect COBRA continuation coverage.⁴³ The interaction of whether the reduction in hours triggers a loss of eligibility for coverage for employers subject to the employer shared responsibility tax,⁴⁴ and whether the employee's eligibility is protected by a stability period⁴⁵ should be factored into any analysis on employment decisions, at least until the employee is terminated.

Employee Assistance Plans Can Provide Emotional Support For Living in the Stress of a Pandemic

Employee assistance programs can be established in a tax favored manner in the event of a disaster, but employers are often concerned with whether if they build it, will the employees use it or will it be abused. Employee assistance plans are frequently tied to group medical plans for employees to exclude the cost of the coverage from an employee's income.⁴⁶ The Covid-19 pandemic has focused on medical plan coverage for diagnosis, testing, and treatment of Covid-19 and for using telehealth tools as part of such group health plans. Although, working from home can bring additional stress, such as balancing work and children at the same time, working in a confined setting or in isolation, and the uncertainties from the nature of the pandemic which may indicate that an employee assistance plan's available counselors or referral service may provide important support to employees in stressful situations. Employers may want to remind employees of all of the tools of the employee assistance program which can include referrals to financial counseling as well as emotional and mental health counseling or referrals.

Qualified Disaster Relief Payments From Employer Funds — If Qualified, May Be Tax Free to Recipient

There are provisions under the I.R.C. that permit an employer to exclude from an employee's income an amount paid as a "qualified disaster relief payment." This is a provision that predated HK and continues to exist and can permit payment to an individual to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster and to reimburse or pay reasonable and necessary expenses incurred for the repair or

rehabilitation or replacement of a personal residence or its contents attributable to a qualified disaster, but *only if* such expense is not otherwise compensated for by insurance.⁴⁷ This only applies to presidentially declared disasters if all of the requirements of the section apply. On March 13, 2020, the President of the United States issued an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act in response to the Covid-19 pandemic.⁴⁸ The relief cannot be paid to any individual identified by the Attorney General to have been a participant or conspirator in a terroristic action or a representative of such an individual.⁴⁹ An individual who receives a qualified disaster relief payment under this provision is not permitted a deduction or credit related to the qualified disaster relief payment.

ADDITIONAL TOOLS POTENTIALLY AVAILABLE FOR EMPLOYERS TO ASSIST EMPLOYEES

There are several other tools in the I.R.C. that may be able to assist employees through the disruption of employment and any concurrent economic downturn. For example, 401(k) and 403(b) plans may consider the medical expenses related to treating the employee, spouse, child, or other dependent's Covid-19 diagnosis, to the extent not reimbursed by insurance to constitute the basis for obtaining a hardship distribution to cover the medical expenses, or if it might constitute a hardship for another reason permitting distributions.⁵⁰

EMPLOYEE BENEFIT PLAN COMMUNICATIONS CHALLENGED BY COVID-19

Electronic communications have significantly advanced since the time the regulations facilitating those communications for benefit plans were originally promulgated. However, in the current situation, those are the most efficient way to communicate, but employers need to remember the employees who are not "effectively connected" to ensure that benefit plan communications still reach all of the participants. With the social distancing requirements in place, it would be helpful to have updated electronic communications sanctioned for communicating benefit plan considerations so we can all stay safely separated.

⁴³ §4980B.

⁴⁴ §4980H.

⁴⁵ See Reg. §54.4980H-3.

⁴⁶ §106(a).

⁴⁷ §139.

⁴⁸ Notice 2020-18 references the declaration.

⁴⁹ §139(e).

⁵⁰ Reg. §1.401(k)-1(d)(3)(iii)(B).