What Employers Need to Know About the COVID-19 CARES Act

Author: XpertHR Editorial Team

The Coronavirus Aid, Relief and Economic Security (CARES) Act was signed into law on March 27, 2020. The CARES Act aims to help employers keep workers on their payrolls and provide economic stability while businesses across the nation suffer due to the coronavirus (COVID-19) crisis.

The CARES Act includes several employment related provisions, including:

- Families First Coronavirus Response Act (FFCRA) changes;
- Employee Retention Credit (ERC);
- Deferred payroll tax deposits;
- Paycheck Protection Program (PPP);
- Expanded employer-provided student loan assistance;
- Suspended student loan garnishment collections;
- Expanded unemployment insurance program;
- Health care benefit plan rule changes;
- Retirement plan special rules; and
- Expanded US Department of Labor authority to postpone certain deadlines.

Additional provisions directed at the health care system (e.g., coverage and pricing for diagnostic testing, support for health care providers, nursing workforce development) are mentioned only tangentially in this resource.

Families First Coronavirus Response Act (FFCRA)

The Families First Coronavirus Response Act (FFCRA), was signed into law on March 18, 2020, in response to the growing health and economic crisis due to COVID-19.

The FFCRA includes the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA). Both the EPSLA and EFMLEA took effect April 1, 2020, and apply to leave taken between April 1, 2020, and December 31, 2020. The FFCRA does not apply retroactively.

Further, both the EPSLA and the EFMLEA apply to private employers with fewer than 500 employees. However, the FFCRA includes a potential exemption for businesses with fewer than 50 employees.

Fewer than 10 days after the FFCRA was signed into law, President Trump signed the CARES Act, which amended several provisions of the FFCRA, including technical corrections and clarification of the caps for payment of leave. The US Department of Labor (DOL) also issued regulations implementing the EPSLA and the EFMLEA, as modified by the CARES Act.

Paid Leave Monetary Limits Under FFCRA

Under the FFCRA, the amount of paid leave to which an employee is entitled is subject to monetary limits.

Under the EPSLA, paid sick leave is capped at $511 per day ($5,110 in the aggregate) for each employee for leave taken because the employee:

- Is subject to a quarantine or isolation order;
- Has been advised to self-isolate; or
- Is experiencing COVID-19 symptoms and is seeking medical diagnosis.

Paid sick leave is paid at two-thirds of the required compensation and is capped at $200 per day ($2,000 in the aggregate) for each employee for leave taken because the employee is:

- Caring for an individual who is subject to a quarantine or isolation order or has been advised to self-isolate;
- Caring for their child whose school or place of care is closed or whose care provider is unavailable; or
- Experiencing any other substantially similar condition.

Under the EFMLEA, the first 10 days (or two weeks) an employee takes of expanded family and medical leave to care for their child due to a public health emergency may consist of unpaid leave. However, an employee may elect to substitute unpaid time with any accrued vacation leave, personal leave, or medical or sick leave (including emergency paid sick leave).

After the first 10 days, leave must be paid based on:

- A rate of not less than two-thirds of an employee's regular rate of pay (as defined under the federal Fair Labor Standards Act and the number of hours the employee would have been normally scheduled to work); or
- If the employee works a schedule that varies from week to week, and the employer is unable to determine with certainty the number of hours the employee would have worked if they had not taken leave, then:
    - The average number of hours the employee was scheduled per day over the six-month period ending on the date on which the employee takes EFMLEA leave, including hours for which the employee took any type of leave; or

- If the employee did not work six months, the employee's reasonable expectation at the time of hiring of the average number of hours per day that they would normally be scheduled to work.

Paid leave is capped at $200 per day, up to a total of $10,000, for each employee for the remaining 10 weeks. However, if an employee is eligible for both the EPSLA and the EFMLEA, they may be entitled to receive a total of $12,000.

Employers can choose to pay employees more than the FFCRA requires. However, an employer is not entitled to a tax credit under the FFCRA for any compensation that exceeds the limits set forth under the FFCRA.

Rehired Employees

Under the EFMLEA, an *eligible employee* includes any employee who has been employed by the employer for at least 30 calendar days. The DOL's regulations (29 CFR 826.30) define *employed for at least 30 calendar days* as any employee who is on the employer's payroll for the 30 calendar days immediately before the employee's leave start date.

The CARES Act amended this provision, and the DOL included in its regulations, that an employee who is rehired can qualify for EFMLEA leave if they:

- Are laid off or otherwise terminated on March 1, 2020, or later;
- Are rehired by the same employer on or before December 31, 2020; and
- Had been on the employer's payroll for 30 or more of the 60 calendar days before the date the employee was laid off or otherwise terminated.

Therefore, under the FFCRA as amended by the CARES Act, certain rehired employees are able to use paid leave immediately upon rehire.

Reimbursements for Federal Contractors

The CARES Act provides funds to federal agencies and permits them to reimburse federal contractors through September 30, 2020, for any paid leave provided, including sick leave. The reimbursements are at the minimum applicable contract billing rates, up to an average of 40 hours per week. The reimbursements apply only to a contractor whose employees or subcontractors cannot:

- Perform work on a site due to facility closures or other restrictions; or
- Telework because their job duties cannot be performed remotely during the COVID-19 public health emergency.

DOL Enforcement Authority

The CARES Act provides that the DOL has the authority to investigate and gather data to ensure compliance with the EPSLA. The CARES Act also clarifies that employers cannot discriminate against employees who have taken EPSLA leave *or* (under the

FFCRA this is *and*) filed a complaint under the FFCRA or participated in a proceeding to enforce the FFCRA. After the CARES Act was enacted, the DOL's regulations incorporated these changes to the EPSLA (29 CFR 826.50).

Tax Credit for Leave

Under the FFCRA, employers are required to pay the costs of EFMLEA and EPSLA leave. However, they can offset these costs via the fully refundable Employee Retention Credit (ERC). Specifically, rather than pay up front and seek reimbursement later, employers can retain a portion of their quarterly federal employment taxes they are required to deposit with the IRS and through the ERC obtain a dollar-for-dollar reimbursement equal to 100% of qualified paid leave wages required under the FFCRA.

For wages paid under the EFMLEA, the credit equals $200 for any day an employee is paid qualified family and medical leave wages. The aggregate credit is $10,000 for all calendar quarters. The credit is not allowed if the employer provides unpaid leave.

For wages paid under the EPSLA, the credit equals $511 for any day employees are on paid leave to care for themselves, or $200 for any day employees are caring for others. The total number of days taken into account for a calendar quarter may not exceed the excess of 10 over the total number of days taken into account for all preceding calendar quarters.

An employer may pay employees more than the FFCRA requires. However, the employer cannot claim, and will not receive, tax credits for the excess amounts.

Note that employers may not claim overlapping credits or benefits. While employers may claim a credit for both FFCRA leave and CARES Act wages, they may not claim both credits for the same wages.

Advance Tax Credit

If the cost of FFCRA leave exceeds the employer's federal employment taxes due, the employer may request an advance of the anticipated tax-credit refund. The CARES Act also provides penalty relief for employers that do not deposit the employer's share of Social Security taxes in anticipation of receiving a tax credit for paid sick and paid FMLA leave.

The IRS has posted frequently asked questions regarding the FFCRA refundable credit.

Employee Retention Credit (ERC)

The CARES Act creates the Employee Retention Credit (ERC), which is a fully refundable tax credit for eligible employers. The ERC applies to qualified wages paid during the period from March 13, 2020, through December 31, 2020.

Eligible Employers

The following employers are eligible for the ERC:

- Private employers that experience COVID-19-related partial or total interruptions to business due to orders from an appropriate governmental authority but continue to pay employees during the interruption; and
- Private employers whose gross receipts decline by 50% compared to the same quarter in the previous calendar year.

Key ERC Facts

The ERC is:

- Equal to 50% of the qualified wages (including allocable health plan expenses) an eligible employer pays to its employees.
- Allowed against the employer portion (6.2%) of Social Security taxes.
- Fully refundable, i.e., an eligible employer may receive a refund if the credit amount it is entitled to for any calendar quarter is more than the employer portion of the Social Security tax the employer owes on all wages paid to all employees; and
- Limited in amount:
    - The maximum amount of qualified wages taken into account with respect to each employee for all calendar quarters is $10,000.
    - The maximum credit for an eligible employer for qualified wages paid to any employee is $5,000.

The IRS has posted frequently asked questions, which include examples of how the ERC works.

Qualified ERC Wages

The determination of *qualified wages* (i.e., the wages on which the credit can be claimed) is based on the average number of employees an eligible employer had during 2019.

If in 2019 an employer averaged more than 100 full-time employees (i.e., employees who work 30 hours a week, as defined under the Affordable Care Act), then the credit may be claimed only for wages paid to employees *who did not perform any work* during the calendar quarter due to the suspension of work or a significant decline in gross receipts due to COVID-19. For these employers, qualified wages taken into account for an employee may not exceed what the employee would have been paid for working during the 30 days immediately preceding the period of economic hardship.

If in 2019 an employer averaged 100 or fewer full-time employees, the credit may be claimed on wages paid to *all employees*, regardless of whether they worked or not, during the suspension of work or a significant decline in gross receipts due to COVID-19. If employees did not work full time and were paid for full-time work, the eligible employer would still receive the credit.

Additional ERC Limitations

The following additional limitations apply to the ERC:

- The credit is not available to an employer that obtains a federally guaranteed Paycheck Protection Program loan to meet payroll, rent or other expenses;
- An employer cannot take compensation deductions for the same wages;
- The credit amount is reduced by any paid leave credit received under the Families First Coronavirus Response Act (FFCRA);
- An employer that claims the Work Opportunity Tax Credit cannot take the ERC against the same wages; and
- Under the Family and Medical Leave Act, an employer that takes the 12.5% credit for providing paid family and medical leave to their employees cannot take the credit against the same wages.

Claiming the ERC and the Advance Credit

To claim the ERC, eligible employers must report their total qualified wages and the related health insurance costs for each calendar quarter on Form 941, Employer's Quarterly Federal Tax Return (or Form 943, 944 or CT-1), beginning with the second quarter of 2020. The Form 941 instructions caution employers that paid any qualified wages between March 13, 2020, and March 31, 2020, to include 50% of those wages together with 50% of any qualified wages paid during the second quarter of 2020 on the second quarter Form 941; such employers should not include the credit on the first quarter Form 941.

An eligible employer that pays qualified wages to its employees in a calendar quarter before it is required to deposit federal employment taxes (i.e., federal income tax, Social Security and Medicare taxes) with the IRS for that quarter may reduce the amount of federal employment taxes it deposits for that quarter by half of the amount of the qualified wages paid in that calendar quarter. The employer must account for the reduction in deposits on the Form 941 for the quarter.

Advance Credit Payments

If an employer's employment tax deposits are not sufficient to fund its qualified wages for purposes of paid leave under the FFCRA or the ERC, the employer may (but is not required to) request an advance payment from the IRS by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19. An employer that does not choose to file Form 7200 will instead get a refund when it claims the credits on its employment tax return.

An employer can file Form 7200 for advance credits anticipated for a quarter at any time before the end of the month following the quarter in which it paid the qualified wages. If necessary, an employer can file Form 7200 several times during each quarter. Form

7200 may not be filed after the Form 941 for the fourth quarter of 2020 (or the annual Forms 943, 944, or CT-1) has been filed.

In addition, an employer should not file Form 7200 to request advance credits for any anticipated credit for which the employer already reduced its federal employment tax deposits. Form 7200 may not be corrected; instead, errors may be corrected when filing Forms 941 (or Forms 943, 944, or CT-1) for 2020.

The instructions to Form 7200 include additional information regarding returns filed by third-party payers and certified professional employer organizations, line-by-line instructions and examples of situations where taxes do and do not cover the employer's costs.

Failure-to-Deposit Penalty Relief

Under IRS Notice 2020-22 (released on March 31, 2020), an employer may reduce its federal employment tax deposit by the qualified ERC wages it has paid without incurring the failure-to-deposit penalty imposed by IRC § 6656 for failure to timely deposit employment taxes. The relief applies to the extent that the amounts not deposited are equal to or less than the amount of the refundable tax credits to which an employer is entitled under the FFCRA and the CARES Act.

Tax credit for FFCRA qualified leave wages and health insurance expenses. An employer that fails to deposit employment taxes relating to FFCRA qualified leave wages will not be subject to a failure-to-deposit penalty if the following conditions are met:

- The employer paid qualified leave wages to employees in the calendar quarter prior to the time the deposit is required;
- The amount not deposited is less than or equal to the amount of the employer's anticipated credits under the FFCRA for the calendar quarter; and
- The employer did not seek payment of an advance credit by filing Form 7200 with respect to the anticipated credits the employer relied upon to reduce its deposits.

Reduced deposits cannot exceed the total amount of qualified leave wages, health plan expenses and the employer's share of Social Security and Medicare taxes, less amounts the employer previously used to reduce a prior required deposit in the calendar quarter or to seek payment of an advance credit.

Employee Retention Credit. An employer that fails to deposit the employer's share of Social Security taxes relating to qualified ERC wages will not be subject to a failure-to-deposit penalty in a calendar quarter if the following conditions are met:

- The employer paid qualified ERC wages to employees in the calendar quarter prior to the time a deposit is required;
- The amount not deposited, reduced by the amount of employment taxes not deposited in anticipation of the credit claimed for qualified leave wages and health plan

expenses, is less than or equal to the amount of the employer's anticipated employee retention credits for the calendar quarter as of the time of the required deposit; and

- The employer did not seek payment of an advance credit by filing Form 7200 with respect to the anticipated credits the employer relied upon to reduce its deposits.

Thus, after an employer reduces its payroll deposits by the amount of the credit for providing qualified paid leave, the employer may further reduce its tax deposits by the amount of qualified ERC wages paid in the calendar quarter prior to the required deposit.

ERC Recordkeeping Requirements

An employer must keep all records of employment taxes and employment tax credits for at least four years for IRS review. These records must include documentation of all of the following:

- How the employer calculated the amount of:
  - Qualified sick and family leave wages eligible for the credit;
  - The ERC; and
  - Qualified health plan expenses allocated to wages;
- How the employer determined that employees were qualified to receive sick and family leave wages, including any additional information set out in FAQs or other guidance on IRS.gov;
- The employer's eligibility for the ERC based on suspension of operations or a significant decline in gross receipts; and
- Copies of completed Form(s) 7200 the employer filed with the IRS.

Deferred Payroll Tax Deposits

The CARES Act allows employers (regardless of workforce size) to postpone making all deposits of the employer's share of Social Security taxes (6.2% up to the $137,700 taxable wage base) due between March 27, 2020, and December 31, 2020. This deferral increases an employer's available cash to meet COVID-19 needs.

The deferred taxes must be paid in two installments:

- At least 50% is due by December 31, 2021; and
- The remaining 50% is due by December 31, 2022.

Employers that use a third-party payroll processing agent or a certified professional employer organization must elect to defer the taxes, and they remain liable for the payment of those deferrals. Employers that obtain a federally guaranteed Paycheck Protection Program (PPP) loan under the CARES Act that is eventually forgiven are not eligible to defer tax deposits.

The IRS is expected to issue reporting guidance and revise Form 941 to include new fields needed to report tax deferrals.

Paycheck Protection Program (PPP)

The CARES Act creates the Paycheck Protection Program (PPP), which expands the guaranteed lending program administered by the Small Business Administration (SBA). The PPP is a loan forgiveness program that extends emergency grants and federally guaranteed loans to eligible employers to help them meet their payrolls, cover expenses and keep their workforce afloat during the pandemic. Loans are available under the PPP from April 3, 2020, through June 30, 2020 (i.e., the *covered period*).

Interaction of PPP With Other Benefits

Be aware that an employer that wants to take advantage of the PPP loan program and its loan forgiveness option must consider how that will affect the employer's use of other payroll tax benefits provided under the CARES Act. In particular:

- PPP loans are not available to employers that claim the Employee Retention Credit (ERC); and
- Employers that receive a PPP loan that is eventually forgiven are ineligible to defer payroll tax deposits under the CARES Act.

PPP Eligibility

During the covered period, the following employers, businesses, organizations and individuals may be eligible to receive a covered loan:

- Small employers, i.e., those with no more than 500 employees, whether employed on a full-time, part-time or other basis;
- Nonprofit organizations, veterans' organizations and tribal businesses, if the business or organization employs not more than the greater of:
    - 500 employees (includes individuals employed on a full-time, part-time or other basis); or
    - If applicable, the size standard (in number of employees) established by the Small Business Administration (SBA) for the industry in which the business or organization operates;
- Sole proprietors, independent contractors and eligible self-employed individuals, if they submit required documentation to establish eligibility (e.g., payroll tax filings reported to the IRS, Forms 1099-MISC, and income and expenses from the sole proprietorship);
- Employers with fewer than 500 employees per physical location of the business, if the business is assigned a North American Industry Classification System code beginning with 72 at the time of disbursal (e.g., franchises and food services industry employers can qualify for a loan if they have fewer than 500 workers at *each* physical location); and

- Certain franchise employers.

The SBA makes the loans available through existing lenders. To determine loan eligibility, the lender will look at whether the borrower:

- Was in operation on February 15, 2020; and
- Paid employee salaries and payroll taxes; or
- Paid independent contractors reported on a Form 1099 - MISC.

The SBA requires eligible borrowers to certify in good faith that they:

- Need a loan to support their operations due to the current economic crisis;
- Will use the loan to retain their workers, meet payroll or pay other qualifying expenses;
- Do not have another application pending for the same purpose; and
- Have not already received a loan covering the same period.

Program applications are available online on the [SBA's website.]

PPP Loan Maximums

The maximum PPP loan is 2.5% of the employer's average monthly payroll costs for the one-year period before the date of the loan, with a cap of $10 million (other calculations apply to seasonal employers, and employers in business for less than one year). The maximum interest rate on PPP loans is 4%. No personal guarantee or collateral is required.

Permitted and Prohibited Use of PPP Loans

During the covered period, loans may be used for:

- Payroll costs, including:
  - Salary, wages, commissions or similar compensation;
  - Cash tips or the equivalent;
  - Paid vacation and parental, family, medical or sick leave;
  - Severance, health or retirement benefits;
  - State or local taxes assessed on employee compensation; and
  - The sum of payments to an independent contractor of not more than $100,000 in one year;
- Costs related to group health care benefits during periods of paid sick, medical or family leave and insurance premiums;

- Employee salaries, commission or similar pay;
- Mortgage interest or rent payments;
- Utilities; and
- Interest on other existing debt obligations incurred before February 15, 2020.

Loans may *not* be used to pay for:

- Compensation of highly compensated employees (i.e., those earning more than $100,000 annually, prorated for the covered period);
- Other coronavirus-related benefits, such as paid sick and family leave wages for which a credit is permitted under the Families First Coronavirus Response Act;
- Compensation of an employee whose principal place of residence is outside of the US; or
- Federal income taxes and Social Security and Medicare (FICA) taxes imposed or withheld on employee compensation during the covered period.

Terms of PPP Loan Forgiveness

All covered loans are forgivable in an amount equal to the total amount of costs incurred or payments made during the eight weeks after loan disbursement, *if* the employer maintains its workforce and salary and wage levels for the covered period. Any amounts forgiven under this rule are not taxable.

However, if an employer reduces its workforce (relative to 2019) during the covered period, or reduces the salary or wages paid to an employee by more than 25% (not including salaries of highly compensated employees), the loan forgiveness will drop by the same percentage. To maintain entire loan forgiveness, a reduced-workforce employer can rehire all employees laid off since February 15, 2020, *or* increase their previously reduced salary or wages by no later than June 30, 2020.

An employer must apply for loan forgiveness and the SBA must decide on an application within 60 days. The SBA and the Treasury Department issued interim final regulations on the PPP on April 3, 2020.

Both agencies are expected to issue further guidance on the requirements and administration of these programs for independent contractors by the end of April. In addition, the CARES Act encourages the Treasury Secretary to have the Federal Reserve implement a program to help provide financing to eligible businesses with between 500 and 10,000 employees.

Expanded Employer-Provided Student Loan Assistance

To help employees burdened with student loan debt during the coronavirus emergency, the CARES Act temporarily expands the definition of employer-provided educational assistance (under IRC § 127) to include payments of qualified (i.e., excluded from an employee's gross taxable income) pre-existing student loan debt made by an employer directly to an employee, or to an employee's lender, up to the IRC § 127 overall cap of $5,250 per employee, per year. The payments include both the principal and interest on student loans that are eligible for the student loan interest deduction under IRC § 221(d)(1).

Loan payments are covered if made between March 27, 2020, and December 31, 2020. This relief applies to all employees, even if their ability to make student loan payments has not been affected by COVID-19.

Student loan payments that qualify for this relief are limited to higher education expenses that an employee incurred within a reasonable period of time of taking classes, if the employee carried at least a half-time course load. The repayments do not extend to loans from qualified employer plans (e.g., 401(k) plan loans).

Suspended Student Loan Garnishment Collections

In addition, the CARES Act extends through September 30, 2020, the period of suspension of employer collection of federal student loans (and the accumulation of interest on such loans) under the Higher Education Act (which was announced by the US Department of Education (DOE) on March 25, 2020), as well as all involuntary collections of such debts, including by wage garnishment.

Therefore, employers must stop wage withholding for such garnishments during the suspension period. The DOE is relying on employers to make the change to employee-borrowers' pay and will monitor employer compliance with its directive.

The DOE also directed employees subject to such wage garnishments to contact their employers' HR departments to ensure that their wages would not continue to be garnished for such debt. The DOE may send HR departments a letter in this regard. The DOE will refund any such garnishment payments it receives from employers between March 13, 2020, and September 30, 2020.

Expanded Unemployment Insurance Program

The Unemployment Insurance (UI) program provides partial wage replacement to unemployed workers nationwide while they conduct an active search for new work. UI is a federal-state program, i.e., it is based on federal law but executed through state law.

The CARES Act temporarily enhances and expands the existing, traditional program and makes UI available for individuals who are not usually eligible for it.

Pandemic Unemployment Assistance

More people are now eligible for UI under a temporary Pandemic Unemployment Assistance (PUA) program created by the CARES Act. This includes:

- Independent contractors;
- Self-employed individuals;

- Business owners;
- Gig workers;
- Individuals with a limited work history; and
- Individuals who have exhausted state UI benefits.

Covered individuals include those who self-certify that they are otherwise able to work and available for work (as defined by applicable state law), but are unemployed, partially unemployed or unable or unavailable to work because:

- They have been diagnosed with COVID-19 or are experiencing symptoms of COVID-19 and are seeking a medical diagnosis;
- A member of their household has been diagnosed with COVID-19;
- They are providing care for a family member or a household member who has been diagnosed with COVID-19;
- They are the primary caregiver for a child or other person in the household who is unable to attend school or another facility that is closed as a direct result of COVID-19, and such school attendance or facility care is required for the individual to work;
- They are unable to reach their place of employment because of a quarantine imposed as a direct result of COVID-19;
- They are unable to reach their place of employment because they have been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- They were scheduled to begin employment and do not have a job or are unable to reach the job as a direct result of COVID-19;
- They have become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
- They had to quit their job as a direct result of COVID-19;
- Their place of employment is closed as a direct result of the COVID-19 public health emergency; or
- They meet any additional criteria established by the Secretary of Labor.

Individuals are not eligible for benefits if they have the ability to telework with pay or are receiving paid sick leave or other paid leave benefits.

Benefits under the PUA program are available to covered individuals for weeks of unemployment, partial unemployment or inability to work caused by COVID-19 for the period between January 27, 2020, and December 31, 2020. However, an individual may not receive benefits for more than 39 weeks.

Expanded UI Benefits

The CARES Act also provides an additional 13 weeks of UI to individuals who remain unemployed after state UI is exhausted (through December 31, 2020), up to a maximum of 39 weeks. State benefits must be exhausted first, and then individuals become eligible for the additional benefits for the remaining time period. Although the number of weeks UI benefits normally last depends on the particular state, 26 weeks is common in many states.

All unemployed individuals will be entitled to receive an extra $600 per week in addition to the currently available state unemployment benefits (through July 31, 2020). These payments represent a huge increase in the amount of UI benefits an individual can receive. For example, if an individual would normally receive $400 a week in UI from their state, they would receive a total of $1,000 a week ($400 + $600) during this time period.

The law also provides funding for the first week of UI for states that waive the traditional "waiting week" before UI benefits begin (through December 31, 2020). This provision was designed to help encourage states to waive their waiting-week requirements during the COVID-19 crisis.

Finally, the CARES Act provides:

- States with temporary flexibility to hire temporary staff or rehire former employees to quickly process UI applications and claims;
- Temporary financing of state short-time compensation programs; and
- Unemployment help to nonprofits, government agencies and Indian tribes.

Health Care Benefits Provisions

The CARES Act makes changes to certain rules related to health care benefit plans. For example, it addresses:

- COVID-19 testing and preventive services;
- Telehealth services; and
- Qualified medical expenses.

COVID-19 Testing and Preventive Services

Although the Families First Coronavirus Response Act (FFCRA) already requires group health plans to provide free COVID-19 testing, the CARES Act expands upon the FFCRA's coverage requirements.

The FFCRA mandates that group health plans must provide coverage and may not impose any cost-sharing requirements (e.g., deductibles, copayments and coinsurance), prior authorization or other medical management requirements for:

- Diagnostic products used for the detection or diagnosis of COVID-19 approved by the Food and Drug Administration (FDA); and

- Items and services furnished to an individual during health care provider office visits (including in-person visits and telehealth visits), urgent care center visits and emergency room visits that result in an order for or administration of coronavirus testing.

The CARES Act clarifies that all testing for COVID-19 must be covered by private insurance plans, whether they are fully insured or self-insured, without cost sharing. It also expands the type of testing that must be covered (beyond just FDA-approved testing) to include tests:

- For which a test developer has requested (or intends to request) emergency use authorization; and
- Developed in and authorized by a state to diagnose COVID-19.

The Act also requires providers of diagnostic tests for COVID-19 to publish the prices for such tests on their public websites.

Group health plans and health insurance issuers must reimburse providers of diagnostic COVID-19 testing. If a health plan or issuer already has a negotiated rate with a provider that was in effect before the declared COVID-19 public health emergency, that rate will apply throughout the COVID-19 emergency. However, if the health plan or issuer does not have a prior negotiated rate, it must reimburse the provider for the amount listed on its website, or the plan or issuer may negotiate with the provider to pay at a lower rate.

Additionally, the CARES Act provides for rapid coverage of preventive services and vaccines for the coronavirus once they become available. More specifically, all group health plans must cover any qualifying coronavirus preventive service without cost sharing. A *qualifying coronavirus preventive service* is an item, service or immunization that is intended to prevent or mitigate COVID-19 2019 and is an:

- Evidence-based item or service that has in effect a rating of "A" or "B" in the current recommendations of the US Preventive Services Task Force; or
- Immunization that has in effect a recommendation from the Advisory Committee on Immunization Practices of the Center for Disease Control (CDC) with respect to the individual involved.

Such services must be covered no later than 15 days after the date on which one of the above recommendations is made.

Telehealth Services Exemption

The CARES Act also addresses telehealth as it relates to high-deductible health plans (HDHPs) and health savings accounts (HSAs). Effective for plan years beginning on or before December 31, 2021, HDHPs paired with HSAs can provide telehealth and other remote care services before patients reach their deductibles without jeopardizing their status.

An *HDHP* is a health insurance plan with higher deductibles and lower premiums than the average health plan and is typically linked to an HSA. An *HSA* is a tax-sheltered savings account that individuals can use to pay for qualified medical expenses.

Expanded Qualified Medical Expenses

The Affordable Care Act (ACA) previously mandated that over-the-counter (OTC) medicine purchased without a prescription was not eligible for reimbursement under:

- Flexible spending accounts (FSAs);
- Health reimbursement accounts (HRAs);
- Archer medical savings accounts (MSAs); or
- Health savings accounts (HSAs).

However, the CARES Act effectively repeals this ACA provision, and OTC drugs and medicines are now eligible for reimbursement from HSAs, health FSAs, HRAs and Archer MSAs. The CARES Act also expands the list of qualified medical expenses to include menstrual care products.

These new provisions apply for amounts paid or expenses incurred after December 31, 2019, and are permanent changes.

HIPAA Provisions

The CARES Act contains changes to the Health Insurance Portability and Accountability Act (HIPAA). More specifically, it:

- Adds a provision addressing the confidentiality and disclosure of records relating to substance use disorders; and
- Requires the US Department of Health and Human Services to issue guidance within 180 days regarding the sharing of protected health information during the coronavirus-related public health emergency.

Retirement Plan Provisions

The CARES Act also sets out special rules for retirement plans designed to help individuals affected by the COVID-19 pandemic.

Retirement Plan Withdrawals

Normally, if employees take an early distribution from a qualified retirement plan (e.g., an employer-sponsored IRC § 401(k) plan), they are subject to a 10% additional tax on that early distribution. (This 10% tax is in addition to normal income taxes that must be paid on such early distributions.) However, the CARES Act provides that the 10% tax penalty will not apply to coronavirus-related distributions.

A *coronavirus-related distribution* is any distribution from an eligible retirement plan made on or after January 1, 2020, but before December 31, 2020, to an individual who:

- Is diagnosed with the virus SARS-CoV-2 or with coronavirus disease by a CDC-approved test;
- Has a spouse or covered dependent who is diagnosed with such virus or disease by such a test; or
- Experiences adverse financial consequences because, due to the virus or disease:
    - They are quarantined, furloughed or laid off or had their work hours reduced;
    - They are unable to work because they do not have child care;
    - The business they own or operate closed or reduced its hours; or
    - Other factors as determined by the Secretary of the Treasury (or the Secretary's delegate).

The administrator of an eligible retirement plan may rely on an employee's certification that the employee satisfies the above conditions to determine if a distribution is a coronavirus-related distribution.

The total amount of distributions an individual receives that may be treated as a coronavirus-related distribution may not exceed $100,000 for any taxable year.

Individuals can repay coronavirus-related distributions (or a portion of them) to an eligible retirement plan at any time during the three years after they took them. Such repayments will generally be treated as eligible rollover distributions and will not be counted toward plan contribution limits.

Additionally, an individual who takes a coronavirus-related distribution may choose to have the distribution taxed ratably over three years instead of having it all taxed in the first year.

The CARES Act permits, but does not require, retirement plans to adopt these new provisions related to coronavirus-related distributions. However, if plans do so, they must be adopted on or before the last day of the first plan year beginning on or after January 1, 2022.

Other Retirement Plan Provisions

The CARES Act also:

- Increases the limit on loans from qualified plans not treated as distributions for 180 days;
- Delays the repayment due date on certain outstanding plan loans; and
- Temporarily waives required minimum distribution rules for certain retirement plans and accounts.

Expanded DOL Authority to Postpone Certain Deadlines

Under the Employee Retirement Income Security Act (ERISA), the US Department of Labor may delay compliance deadlines for up to one year in the event of a declared disaster or terroristic or military action. The CARES Act adds public health emergencies declared by the US Department of Health and Human Services to the list. This means employers should be on the lookout for potential future guidance on extensions of any ERISA-mandated deadlines.