
MEMORANDUM

To: Board of Trustees
U.A. Union Local No. 290 Plumber, Steamfitter and Shipfitter Industry Health
and Welfare Trust

From: David S. Barlow

Date: April 6, 2020

Re: Obligation to Make Contributions on FFCRA Leaves

I was asked to address whether contributions to the Health Trust are due on the emergency paid sick leave and the expanded FMLA leave created by the Families First Coronavirus Response Act (FFCRA). Absent other action by the bargaining parties contributions are clearly due on expanded FMLA leave. There is no definitive answer in regards to emergency paid sick leave but based on the available guidance, I also conclude contributions are due on it as well.

The FFCRA Leaves

A memo discussing in detail the two leaves established by the FFCRA is attached. The first leave is emergency paid sick leave. This provides up to two weeks of paid leave for employees who are unable to work because of defined circumstances related to COVID-19. Subject employers are to pay the employee's full wage for up to 80 total hours for certain events and two-thirds of the wage for others. The emergency paid sick leave requirements are enforceable under the Fair Labor Standards Act.

Second, the law creates a new event under the Family Medical Leave Act of 1993 (FMLA). The new event is when an employee is unable to work because of a need to care for a child under 18 because school is closed or the childcare provider is unavailable because of COVID-19. This is an amendment to the FMLA and that law's requirements apply unless changed by FFCRA. The principal changes are an "Employee" is anyone who has worked at least 30 days (instead of 1,250 hours in a year) and it is limited to Employers with less than 500 Employees. Employers with less than 25 employees can be exempt. Eligible employees receive two-thirds of normal pay.

Health Coverage and Contributions

The FFCRA statute does not address whether contributions are due on these two leaves. Guidance comes from the FMLA and its interpretative regulations and U.S. Department of Labor (DOL) guidance on FFCRA. The DOL has issued proposed regulations that were published on April 6 (29 CFR 826).

The FMLA requires an employer to maintain group health coverage for an employee on leave under the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period, 29 CFR 825.209(a). The regulations specifically require an employer contributing to a multiemployer plan to continue to make contributions on behalf of an employee using FMLA leave on the same basis as if the employee had been continuously employed. 29 CFR 825.211(a). The FMLA guidance does recognize that the multiemployer plan can contain a provision for maintaining the coverage through a pooled contribution that provides the benefit for all employees participating in the Plan.

In short, FFCRA's emergency family medical leave are part of the FMLA. The FMLA's requirement, including maintaining group health coverage and making required contributions to multiemployer plans are clear. Contributions are due to the Health Trust on expanded FMLA leaves absent other action by the bargaining parties.

The emergency paid sick leave is not part of the FMLA. There is no existing guidance to reference. The DOL's proposed regulations (29 CFR 826) are clear that an employee who takes emergency paid sick leave is entitled to continued health coverage on the same terms as an employee who did not take leave. 29 U.S.C. 2614(c), 29 CFR 826.110. In discussing the obligation to continue group health insurance the DOL regulations treats emergency paid sick leave and FMLA leave the same and cite to FMLA guidance for both. The Preamble to the regulations the DOL states:

Section 826.110(b)-(g) explains what an employer must do to continue group health coverage on the same terms as if the employee did not take paid sick leave or expanded family and medical leave. These requirements are similar to the regulatory requirements for employers when employees take FMLA leave for other reasons.

The regulations also indicate that for emergency paid sick leave the employee is required to pay his or her share of the group health premium as with the FMLA.

In short, with emergency paid sick leave there is no guidance affirmatively stating an employer duty to continue contributions. The guidance, however, treats emergency family medical leave and emergency paid sick leave the same for purposes of the obligation to continue group health coverage and for other purposes, including the employee being required to pay his or her portion of the premium. Given the parallel treatment of the leaves for other purposes, my conclusion is that there is an employer obligation to make contributions on emergency paid sick leave.

Alternatives

The bargaining parties could determine that a portion of the contributions made to the Health Trust could be used to provide the continued health coverage required by the FFCRA leaves. Typically this is done by allocating a small amount, say 1 cent per hour, of the contribution to cover the cost of the leave. The allocation from the negotiated contributions avoids the potential prohibited transaction issues of using plan assets to meet an employer responsibility. The Board of Trustees' decision would be to determine whether to accept the bargaining parties' direction.

Let me know if you wish to discuss further.

Families First Coronavirus Act

The U.S. Senate passed the Families First Coronavirus Act (“Act”) on March 18, 2020. The law is effective April 2, 2020.

The Act provides that coronavirus related exams and testing are to be covered at 100% with no charge to the Participant and also provides for two types of leave related to the coronavirus. These are discussed below. The requirements for COVID-19 testing apply on and after March 18, 2020, until the end of the emergency period as declared by the President. The paid leave provisions of the Act will become effective on April 3, 2020, and will expire automatically on December 31, 2020.

A. COVID-19 Testing

The Act orders group health plans to provide coverage for certain COVID-19 related services without imposing deductibles, copayments, coinsurance, preauthorization requirements, or medical management requirements. The covered services and items include:

1. COVID-19 diagnostic products; and
2. Other items and services furnished in connection with an office visit (including telemedicine, if covered), urgent care visit, or emergency room visit related to seeking or obtaining COVID-19 diagnosis.

The Departments of Labor, Treasury, and Health and Human Services will further implement this provision through sub-regulatory guidance. We expect that no further action will be required by plans that have complied with the emergency guidance issued by the state insurance commissioners.

B. Emergency Paid Sick Leave

The emergency paid sick leave is a new benefit. Failures to provide the benefit are considered a violation of the Fair Labor Standards Act. It provides up to 10 days of paid sick leave for an Employee that is unable to work because an Employee:

1. Is subject to a state, federal, or local quarantine law;
- 2.. A medical provider has told the employee to self-quarantine;
3. The employee is experiencing COVID-19 symptoms and is seeking a diagnosis;

4. The employee is caring for someone subject to items 1-3 above;
5. The employee is caring for a child whose school has closed or the child care provider is unavailable because of COVID-19.

This applies to all private sector employers with less than 500 employees. The 500 employee number is a set number without caveats or exceptions. Employers can recover the cost of this benefit by offsetting payroll taxes. The Act allows the Secretary of Labor to adopt regulations exempting employers with less than 50 employees but as drafted they are not exempt under the Act.

The benefit is the employee's regular wage. If the employee is unable to work because of his own condition (Items 1-3 above) the maximum benefit is \$511 per day and \$5,110 in the aggregate. If the Employee is absent to care for someone else, the maximum benefit is 2/3rds of the employee's wage up to \$200 per day or \$2,000 in total. If the employee works less than 40 hours a week the benefit is pro-rated.

C. Emergency FMLA Expansion

This provision amends the Family and Medical Leave Act of 1993 (FMLA). FMLA definitions and requirements continue unless modified by the Act. This provision makes FMLA benefits available for up to 12 weeks if an employee is required to be off work because of a "Qualifying Need Related to a Public Health Emergency." That is defined as an employee who is unable to work (or telework) because of a need to care for a child under 18 because school is closed or the child care provider is unavailable due to COVID-19. Effectively this creates a new FMLA leave category through the end of 2020.

For purposes of this one event certain FMLA definitions are changed. An "Employee" is anyone who has worked at least 30 days (instead of 1,250 hours in a year). "Employer" is an entity with 500 or fewer employees. (This is a total number. The FMLA provisions about 50 or more employees within a geographical range are in the definition of Eligible Employees and do not apply). Employers with less than 25 employees can be exempt from the FMLA's reinstatement provision if certain conditions are met. Presumably employers will be required to continue benefits on the same terms that apply to other types of FMLA leave.

The benefit available is two-thirds of normal pay not to exceed \$200 per day or \$10,000 in aggregate. It is not available during the first two weeks of leave. The Employer can recover the cost of the benefit through payroll tax credits.