

# KISTLER TIFFANY

## BENEFITS

NOW A ONEDIGITAL HEALTH AND BENEFITS COMPANY

## Standing COVID-10 Advisory Call for 3/23/20

- Overview of KTB Response
- Expectations for Calls
- Families First Coronavirus Response Act (FFCRA)
  - Overview of Health Insurance Coverage Requirements
    - All private individual and group health insurance providers must cover COVID-19 diagnostic testing, and they cannot apply any restrictions like prior authorization requirements when they do so.
    - The requirement applies to self-funded employer groups and grandfathered health plans, as well as all fully-insured individual and group major medical plans
    - No out-of-pocket costs (deductibles, co-pays, coinsurance) can apply to COVID-19 diagnostic testing
    - People do not have to pay out-of-pocket costs for any office visits, telehealth visits, emergency room visits, or urgent care visits associated with getting COVID-19 testing. They also do not have to meet any cost-sharing requirements for services they might get while determining if they have COVID-19 (e.g. a chest x-ray).
  - Overview of Emergency Family and Medical Leave Act
    - Effective April 2: employers with fewer than 500 employees, and covered public-sector employers, must provide up to 12 weeks of job-protected FMLA to care for a minor child if the child's school or place of child care has been closed is unavailable due to a public health emergency (e.g. the current COVID-19 outbreak).
      - Employees must have been on the payroll for 30 calendar days to qualify, and must not be able to telecommute/telework from home
      - The first 10 days are unpaid, but an employee can use accrued vacation, person, or sick leave, but an employer may not require an employee to do so
        - think of this as an unpaid elimination period
      - The remaining FMLA leave must be paid
        - 2/3 of the employee's regular pay rate for the number of hours the employee would otherwise be scheduled to work
          - Max \$200 per day, and \$10,000 in aggregate
    - Provides job-protection during the 12 weeks
      - exception
        - employers with fewer than 25 employees if:

- the employee's position no longer exists following leave due to operational changes caused by a public health emergency
    - Secretary of Labor may:
      - exclude health care providers and emergency responders from these requirements
      - exempt small businesses with fewer than 50 employees if the required leave would jeopardize the viability of their business
    - Further exclusions:
      - employers with fewer than 50 employees in a 75-mile radius are protected from civil FMLA damages in an employee-initiated lawsuit
    - Tax Credits:
      - Employers are entitled to a credit against the tax imposed by section 3111(a) or 3221(a) of the IRS Code for each calendar quarter, of an amount equal to 100% of qualified sick leave wages paid. Tax credits are available for the self-employed.
- Overview of Emergency Sick Leave
  - Effective April 2: requires employers with fewer than 500 employees to provide paid sick leave to virtually all full and part-time employees who cannot work or telework for reasons related to COVID-19 (including forced government shutdown)
    - Employees receive up to 80 hours of paid leave prorated to reflect their regularly scheduled work week (e.g. employees who regularly work 37.5 hours per week receive 75 hours paid leave), regardless of how many days they worked for the company
    - Employers may exclude workers who are health care providers or emergency responders from the leave benefits
    - The DOL may craft emergency regulations to exempt small companies with 50 or fewer employees if compliance threatens the ongoing viability of the business.
    - Six Qualifying Scenarios
      - to respond to a federal, state, or local quarantine order (most likely applicable in PA, NY, NJ)
      - To quarantine due to a request by a medical provider
      - to get COVID-19 testing or treatment
        - Daily pay rate/cap for 3 reasons above:
          - Regular rate of pay up to a cap of **\$511 per day**, total pay cap of **\$5,110**
      - To take care of family members ordered to quarantine
      - To care for children who cannot go to school or childcare due to COVID-19

- Experiencing other substantially similar condition specified by HHS
    - Daily pay rate/cap for 3 reasons above:
      - Two-thirds of regular rate of pay, up to a cap of **\$200 per day**, total pay cap of **\$2,000**
- **Employers may not force an employee to use other paid leave, but an employee may decide to use vacation/PTO before using the emergency paid leave to save it for later.**
- Tax credit
  - Employers are entitled to a credit against the tax imposed by section 3111(a) or 3221(a) of the IRS Code for each calendar quarter, of an amount equal to 100% of qualified sick leave wages paid. Tax credits are available for the self-employed.
- Notice Requirement
  - The DOL is charged with making a required employer notice available within one week of the law's passage. Employers must post the notice in conspicuous places on their premises, where notices of employees are customarily posted.
- Important notes:
  - employees who are terminated prior to April 2 are likely not protected by this law (may be different for "furloughed" employees who remain on payroll as active)
  - The DOL/Treasury working "feverishly" to issue regulatory guidance addressing the following:
    - The small business exemption process and considerations
      - how to apply for the exemption
    - How are larger businesses with subsidiaries impacted?
    - Whether the new mandated leave benefits are offset against state leave benefits
  - Treasury, IRS and DOL announced a plan to implement FFCRA tax credits ASAP to allow businesses to recover any related outlays to comply with these provisions "swiftly"
    - This may limit the time-period a business would be required to advance the money for the benefits
    - IRS will release guidance this week to permit employers to take immediate advantage of the paid leave credits by retaining and accessing funds that they would otherwise pay the IRS in payroll taxes (which include withheld federal income taxes, the employee share of Social Security and Medicare

taxes, and the employer share of Social Security and Medicare taxes with respect to all employees)

- If those amounts are not sufficient to cover the cost of paid leave, employers can seek an expedited advance from the IRS by submitting a streamlined claim form that will be released this week.
    - The IRS has stated that it expects to process these requests in two weeks or less
  - DOL has stated it will exercise a 30-day non-enforcement policy for compliance failures so long as the employer has acted reasonably and in good faith
    - the DOL will focus of compliance assistance
- FAQs
    - Can furloughed employees remain on insurance plans as active employees?
      - Carriers are beginning to implement exceptions to allow furloughed employees to remain on plans on active employees. Generally, employees who not working the requisite hours for eligibility and are not out on protected leave (e.g. FMLA) are ineligible under most carrier fully-insured plans and stop-loss contracts. Therefore, historically, such furloughs would constitute a COBRA/State Continuation qualifying event.
        - Late last week, it appeared that the primary consideration an employer should have in assessing the viability of maintaining an employee on the plan as an active employee is the likelihood of receiving employee contributions (either while furloughed, or after furlough). It's entirely possible employers could be looking at a months-long furlough where employees could be exposed to significant financial hardship. Planning on wage garnishments at some future date may not be the best idea, from both a practical perspective as well as optics.
        - Over the weekend, it appears that a massive stimulus bill granting long-term full wage replacement is probably going to pass and be signed into law. If employers can be repaid in full for full wage amounts paid out during forced closure, then the consideration for keeping furloughed employees on the plan as active employees might change drastically.
          - This is an example of how best practices are going to change quickly.
          - **If the stimulus is passed, we should do everything we can to help employers stay in the game until that law becomes effective**

- remember, for insured groups, March premiums are paid, so there may not be a need to rush COBRA this month
- What are states considering regarding protecting policy lapse?
  - NJ DOBI
    - Advising carriers to provide flexibility by relaxing due dates for premium payments and insurance policy based loan payments, extending grace periods, waiving late fees and penalties, and allowing forbearance with regard cancellation/non-renewal of policies, etc. in attempt to prevent lapse policies
      - See NJDOBI Bulletin 20-04
  - We may see states implement formalized premium grace periods
    - See OH Bulletin 2020-03
      - OH is allowing a 60-day grace period
      - COBRA/State Continuation available so long as there is one employee actively working
      - Allows furloughed employees to remain on the plan as active employees
        - This may serve as a template for further guidance in NJ, as well as other states
- Does the FFCRA apply to employees terminated/furloughed prior to April 2?
  - Most likely not.
- For essential businesses requiring employees to continue to report for work, where can I find information on best practices?
  - <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
- In a time, where people can ill-afford to be without their health insurance coverage, is there any premium relief or other intervention that will be offered by the insurance carriers, by the State, or by the Federal Government, so that people aren't going without their health insurance coverage?
  - The importance of the answer to this question will depend on whether Congress passes the massive stimulus bill being discussed now that would provide full wage replacement. If the answer is yes, then for all intents and purposes, the employee should be able to continue to afford the contribution to the plan they are presently enrolled-in.
    - If no such relief comes, and employees have their hours reduced, they would qualify for a special enrollment period on healthcare.gov where they can explore subsidy eligibility. Furthermore, some employees may qualify for medicaid under the expansion if they have substantial drop in income.
    - Also, if employers were to contribute to COBRA premiums for a period of time (e.g. 3 months), once an employee loses the contributions, they would qualify for an SEP on healthcare.gov