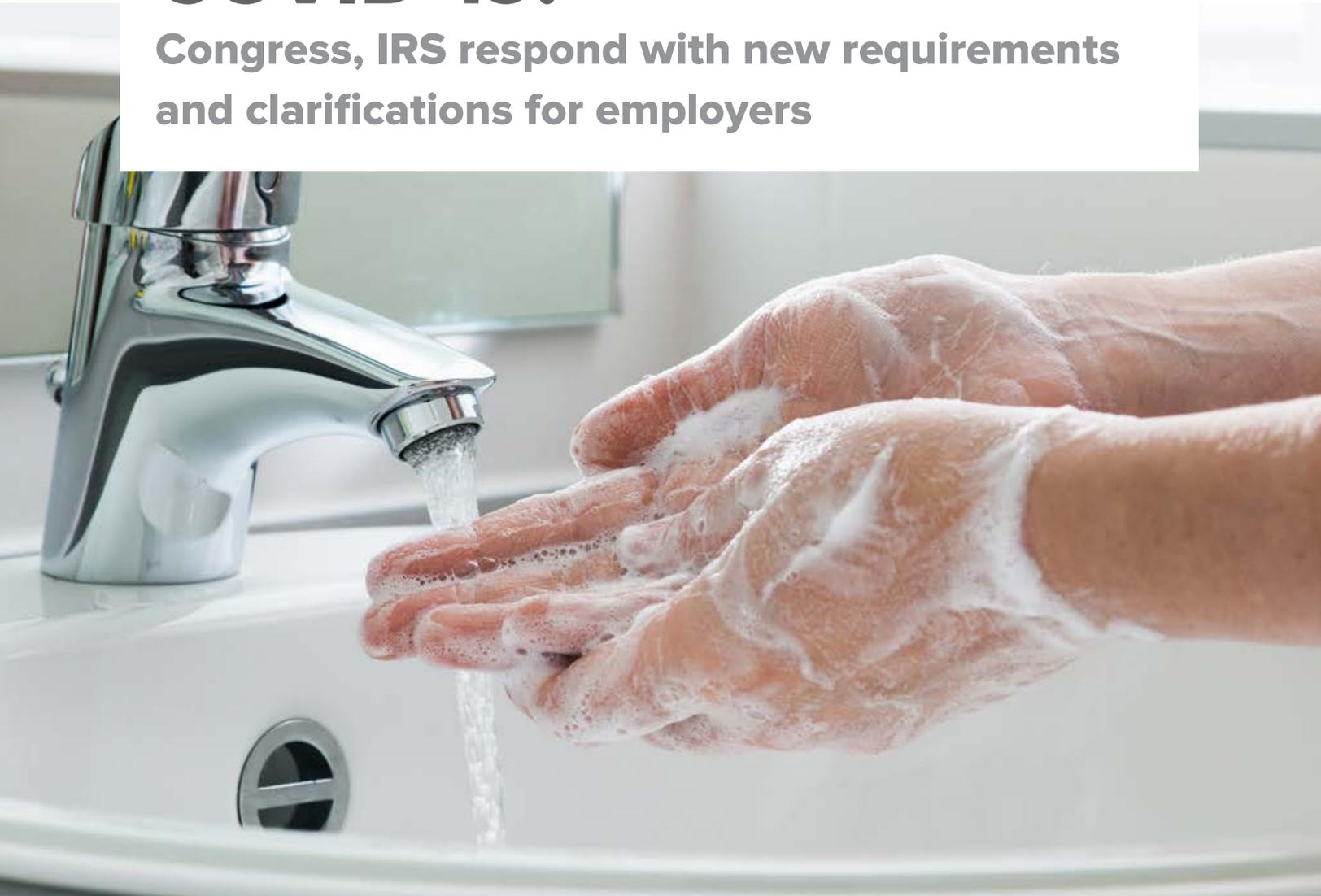


ADVISORY

COVID-19:

**Congress, IRS respond with new requirements
and clarifications for employers**



As our nation combats issues related to the COVID-19 public health emergency, Congress and federal agencies responded with new requirements and clarifications for employers. This advisory provides an overview of three new important developments:

- The Families First Coronavirus Response Act, also known as the Response Act, requires employers to provide paid sick and family leave to employees impacted by COVID-19. For nongovernment employers, these requirements only apply to employers with fewer than 500 employees. Additionally, the act contains new refundable employer tax credits to offset the cost of the paid leave.
- The Response Act requires all employer-provided major medical plans, regardless of employer size, and individual market plans to cover testing for COVID-19 and certain related services without participant cost sharing.
- The IRS clarified that high-deductible health plans may provide testing and treatment for COVID-19 without a deductible so that participants are not disqualified from making health savings account contributions.

Note: The president signed the Response Act into law March 18, 2020. Its provisions are effective no later than 15 days after the law was signed and apply to qualifying leave through Dec. 31, 2020. Federal regulatory agencies will need to clarify the precise effective date.

COVID-19: CONGRESS, IRS RESPOND WITH NEW REQUIREMENTS AND CLARIFICATIONS FOR EMPLOYERS



New paid sick and family leave requirements

The Response Act includes two separately named acts that require covered employers to provide paid leave for health and caregiving issues related to the COVID-19 public health emergency. The act also includes a tax credit to reimburse private employers for the cost of the required leave.

- **The Emergency Paid Sick Leave Act:** Requires covered employers to provide paid sick leave in certain circumstances related to COVID-19.
- **The Emergency Family and Medical Leave Expansion Act:** Amends the Family and Medical Leave Act (FMLA) to require covered employers to provide “public health emergency leave.”

Covered employers and eligible employees

The following chart summarizes and compares “covered employers” and “eligible employees” included in the provisions of the Response Act.

	Emergency paid sick leave	Public health emergency leave
Covered employers	<ul style="list-style-type: none"> • Private employers with fewer than 500 employees. • Public employers with at least one employee. 	Public and private employers with fewer than 500 employees.
Eligible employees	All employees of a covered employer, regardless of the length of employment or number of hours worked.	Employees employed for at least 30 calendar days.

Qualifying leave

An eligible employee qualifies for **emergency paid sick** leave if the employee is unable to work or telework for any one of the following reasons:

- 1** The employee is subject to a federal, state or local isolation order related to COVID-19.
- 2** The employee is advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- 3** The employee has symptoms of COVID-19 and is seeking a medical diagnosis.
- 4** The employee is caring for an individual who is subject to an order under No. 1 above or is advised to self-quarantine as under No. 2 above.
- 5** The employee is caring for their child because the child's school or place of care is closed or the child care provider is unavailable due to COVID-19 precautions.
- 6** The employee is experiencing any other similar condition as specified by the U.S. Department of Health and Human Services.

The circumstances that qualify eligible employees for sick leave are broader than qualifying public health emergency leave. In contrast, the **only** circumstance that qualifies an eligible employee for **public health emergency** leave is the inability to work or telework due to needing to care for their child under age 18 if their school or place of care is closed or the child care provider is unavailable due the public health emergency related to COVID-19.



Leave requirements

The following chart summarizes and compares key portions of the leave requirements under each of the new provisions.

	Emergency paid sick leave	Public health emergency leave
Length of total leave	<p>Total length of required leave for all qualifying leave combined:</p> <ul style="list-style-type: none"> • Full-time employees: 80 hours • Part-time employees: the number of hours the employee works on average over a two-week period 	Same as FMLA leave generally, 12 weeks in a 12-month period for all FMLA leave combined.
Length of required paid leave	All required sick leave must be paid leave.	The paid leave requirements for public health emergency leave coordinate with the sick leave requirements. The first 10 days of public health emergency leave does not have to be paid leave. However, during these 10 days, the employee will be entitled to paid emergency sick leave. Public health emergency leave beyond 10 days must be paid.
Required rate of paid leave	<p>For leave based on the employee's own condition (purposes No. 1, 2 and 3 above), the paid leave is the employee's regular rate of pay, multiplied by the number of hours the employee is normally required to work. This leave is capped at \$511 per day and \$5,100 total per employee.</p> <p>For other leave (purposes No. 4, 5 and 6 above), the leave is based on two-thirds of the employee's regular rate of pay, capped at \$200 per day and \$2,000 total per employee.</p>	Two-thirds of the employee's regular rate of pay multiplied by the number of hours the employee is normally required to work. The paid leave is capped at \$200 per day and \$10,000 total per employee.

Special rules for certain types of employers

There are a couple of special rules for certain types of employers:

- If the imposition of the leave requirements jeopardize the viability of the business as a going concern, the Department of Labor may exempt **small employers** with fewer than 50 employees from sick leave triggered by the employee's need to care for their child due to school closure or the unavailability of a child care provider due to COVID-19. The DOL may provide a similar exemption from the public health emergency leave requirements.
- An employer may elect to exclude employees who are **health care providers or emergency responders** from the sick leave requirements or the public health emergency leave requirements. The DOL has authority to issue rules to implement such exclusions.





Enforcement

The DOL will enforce the new leave requirements. There is also the possibility of litigation by private plaintiffs. Failure to provide required emergency paid sick leave will be treated as a failure to pay minimum wage and can be enforced in accordance with the Fair Labor Standards Act enforcement provisions relating to minimum wage violations. That means that plaintiffs can seek to recover unpaid sick leave wages, an equal amount in liquidated damages and reasonable attorneys' fees and costs. Unlawful retaliation is subject to the anti-retaliation provisions of the FLSA.

Because the public health emergency leave is part of the FMLA, it uses the same enforcement mechanism used under the FMLA generally, which is based on the FLSA enforcement provisions. But under the new law, employers that are subject to the public health emergency leave requirements, but do not otherwise meet the regular requirements to be a covered employer under the FMLA (i.e., employers that do not meet the normal 50-employee FMLA threshold), are not subject to a private right of action by employees for damages for a violation of the public health emergency leave requirements. Still, these employers remain subject to enforcement action by the DOL.

There are many other details. The discussion here is very high-level. There are a variety of other requirements that apply to the new leave provisions, such as notice requirements.

Employer tax credits to offset the cost of paid leave. The Response Act includes two refundable tax credits for private employers to reimburse employers for the cost of required sick and public health emergency leave. Key details include:

- The credits operate on a quarterly basis, so there may often be a lag between when the leave has to be provided and when the employer receives the reimbursement.
- The tax credits do not apply to public employers.
- The amount of the tax credits is the same as the amount of required leave shown in the chart above.
- Both credits first reduce the amount of the employer's share of social security, or Tier 1 railroad retirement taxes, otherwise payable for all of the employer's employees. If the amount of the sick and paid leave credit exceeds the employer's share of these taxes, then the excess amount is refunded to the employer by the federal government. The bill includes provisions to prevent a double tax benefit due to the credits.
- There is some relief from payroll taxes with respect to the paid leave itself. Employers are not subject to the employer's share of social security taxes on the paid leave. Employers are required to pay their portion of Medicare payroll taxes but receive a credit for such taxes. The IRS may provide further clarification regarding the employee's share of these taxes.
- The bill also contains similar tax credits against income taxes for self-employed individuals. These credits are generally determined as if the self-employed individual is an employee eligible for paid leave. There are a variety of requirements and limitations that apply to this credit.



Major medical plans required to cover COVID-19 testing and related services without cost sharing

The Response Act requires self-funded and fully insured group health plans, regardless of employer size, and individual market plans to cover diagnostic testing for COVID-19 and certain related items and services without cost sharing, including deductibles, copayments and coinsurance. In addition to testing, plans must also cover – without cost sharing – items and services provided to a covered individual in an office visit, telehealth setting, urgent care center visit or emergency room visit that results in an order or administration of diagnostic testing. However, plans are only required to cover items or services to the extent that they relate to the furnishing or administering of diagnostic testing or the evaluation of the individual to determine the need for diagnostic testing. **This new requirement doesn't apply to excepted benefits, such as hospital indemnity or other fixed indemnity insurance and specified disease or critical illness policies. Excepted benefits are supplemental coverage and are not intended as primary medical coverage or a substitute for such coverage.**

High-deductible health plans may waive or lower deductibles for COVID-19 testing and treatment

In order to help address COVID-19 issues, many plan sponsors looked for ways to encourage employees and their families to seek necessary testing and treatment for COVID-19. One such approach is to waive otherwise applicable deductibles and copays. For sponsors of HSA-compatible HDHPs, the issue then becomes whether the waiver of the deductible will disqualify employees from HSA eligibility. The IRS provided help on this issue in [Notice 2020-15](#). In light of the public health emergency related to COVID-19, the IRS provided that HDHPs may provide benefits associated with testing for and treatment of COVID-19 without a deductible or below the minimum required deductible for a HDHP. Thus, an individual covered by the HDHP isn't disqualified from making contributions to their HSA merely because of the required COVID-19 benefits.



Conclusion

With Congress and federal agencies acting quickly to try to address issues related to the current public health crisis, employers will need to become aware quickly of what the new laws mean for them. Note that state laws may also apply and in some cases may impose additional requirements. Many of the details are complicated, so employers will need to consult their own advisors as to their particular situations.

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