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COVID-19 & Benefits: Coverage, Leaves, & Elections, Oh My!

I thought the size of the group that was eligible for an exemption under the FFCRA Paid FMLA Expansion was 25. You indicated it is 50. Has that changed?

No. Employers with fewer than 50 employees may be eligible for an exemption from the Paid FMLA Expansion and category 5 of the Paid Sick Leave provision. The DOL has provided some FAQs to explain this option:

> **4. If providing child care-related paid sick leave and expanded family and medical leave at my business with fewer than 50 employees would jeopardize the viability of my business as a going concern, how do I take advantage of the small business exemption?**
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> To elect this small business exemption, you should document why your business with fewer than 50 employees meets the criteria set forth by the Department, which will be addressed in more detail in forthcoming regulations.
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> ***You should not send any materials to the Department of Labor when seeking a small business exemption for paid sick leave and expanded family and medical leave.***
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> **58. When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?**
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> An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:
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> 1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;

2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or

3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

59. If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?

A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

- employer employs fewer than 50 employees;

- leave is requested because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and

- an authorized officer of the business has determined that at least one of the three conditions described in Question 58 is satisfied.

The Department encourages employers and employees to collaborate to reach the best solution for maintaining the business and ensuring employee safety.

The DOL has also issued regulations explaining the terms of this exemption in more detail (29 C.F.R. § 826.40(b).)

I thought that the maximum the employer has to pay under the Paid Sick Leave provision in FFCRA is $511 per day, even if the regular rate of pay is higher; please clarify.

When an employee is out on Paid Sick Leave or the Paid FMLA Expansion, the employer must pay the employee his or her regular rate of pay (as defined), but only up to the maximum allowed under FFCRA. The employer can be more generous, and pay the employee in excess of the statutory maximums, but the employer does not have to exceed the maximums—and the tax credits are only available up to the maximum rates.

What are the maximum rates? The DOL has summarized them as follows:

For leave reasons (1), (2), or (3): Employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to $511 per day and $5,110 in the aggregate (over a 2-week period).

For leave reasons (4) or (6): Employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate (over a 2-week period).

For leave reason (5): Employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).

Tax Credits: Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage. For more information, please see the Department of the Treasury's website.

Do the timeframe extensions apply to CalCOBRA as well?

No. The timeframe extensions rule—which was issued by the federal Department of Labor (DOL) and the Treasury Department (Treasury)—only apply to COBRA, which is a federal law. The DOL and Treasury do not have jurisdiction over state insurance laws. Therefore, CalCOBRA, and other state mini-COBRA laws, are not impacted by the DOL rule on timeframe extensions.

Your slide says before 12/31/21; please confirm.

The cafeteria plan mid-year election change options can generally be implemented by the employer only during the 2020 calendar year. These changes must be memorialized through an amendment to the cafeteria plan's written plan document. However, the IRS guidance gives the employer until December 31, 2021, to adopt the plan amendment. For administrative ease, it is not recommended that the employer actually wait that long to adopt the amended plan language.

Do new registered domestic partnerships qualify as a special enrollment event or change in status?

Typically not, unless the domestic partner is also a tax code dependent.

Do the timeframe extensions mean that if a former employee does not pay their COBRA premium on time their coverage should be kept active?

Yes. The governing regulations include two examples—quoted below—that state that if a qualified beneficiary does not pay his or her premiums on time during the Outbreak Period, the plan may not deny coverage. The relevant language is highlighted in the following examples taken from the regulations:

> ***Example 3*** **(COBRA premium payments**). (i) *Facts.* On March 1, 2020, Individual C was receiving COBRA continuation coverage under a group health plan. More than 45 days had passed since Individual C had elected COBRA. Monthly premium payments are due by the first of the month. The plan does not permit qualified beneficiaries longer than the statutory 30-day grace period for making premium payments. Individual C made a timely February payment, but did not make the March payment or any subsequent payments during the Outbreak Period. As of July 1, Individual C has made no premium payments for March, April, May, or June. Does Individual C lose COBRA coverage, and if so for which month(s)?
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> **(ii)** ***Conclusion****.* In this Example 3, the Outbreak Period is disregarded for purposes of determining whether monthly COBRA premium installment payments are timely. Premium payments made by 30 days after June 29, 2020, which is July 29, 2020, for March, April, May, and June 2020, are timely, and Individual C is entitled to COBRA continuation coverage for these months if she timely makes payment. Under the terms of the COBRA statute, premium payments are timely if made within 30 days from the date they are first due. In calculating the 30-day period, however, the Outbreak Period is disregarded, and payments for March, April, May, and June are all deemed to be timely if they are made within 30 days after the end of the Outbreak Period. Accordingly, premium payments for four months (*i.e.,* March, April, May, and June) are all due by July 29, 2020. Individual C is eligible to receive coverage under the terms of the plan during this interim period even though some or all of Individual C's premium payments may not be received until July 29, 2020. Since the due dates for Individual C's premiums would be postponed and Individual C's payment for premiums would be retroactive during the initial COBRA election period, Individual C's insurer or plan may not deny coverage, and may make retroactive payments for benefits and services received by the participant during this time.
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> ***Example 4*** **(COBRA premium payments).** (i) *Facts.* Same facts as Example 3. By July 29, 2020, Individual C made a payment equal to two months' premiums. For how long does Individual C have COBRA continuation coverage?
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> **(ii)** ***Conclusion****.* Individual C is entitled to COBRA continuation coverage for March and April of 2020, the two months for which timely premium payments were made, and Individual C is not entitled to COBRA continuation coverage for any month after April 2020. Benefits and services provided by the group health plan (*e.g.,* doctors' visits or filled prescriptions) that occurred on or before April 30, 2020 would be covered under the terms of the plan. The plan would not be obligated to cover benefits or services that occurred after April 2020.

If an annual open enrollment period falls during the Outbreak Period, is there anything in the timeframe extension regulations that negates or overrides an annual open enrollment opportunity?

No. The employer should still have an annual open enrollment period, and all eligible employees (including those on leave and COBRA qualified beneficiaries) should be given the opportunity to enroll or change coverage options at that time.

Employers may be obligated to hold an annual open enrollment opportunity for various reasons: For cafeteria plan compliance purposes, to satisfy the annual offer of coverage mandate in the ACA section 4980H rules, because the group insurance contract or policy requires it, or because the employer has promised or represented to employees that it will do so. None of these circumstances have been negated or overridden by the timeframe extensions established due to COVID-19.

What are the penalties for not providing an ACA exchange notice?

There is no specific penalty that applies to this omission. Nonetheless, it is highly recommended that employers provide the notice to new hires within 14 days of their hire date, as required by statute.

With regard to the ACA's section 4980H affordability calculation, when you use the "rate of pay" safe harbor, I thought the calculation needed to be performed using 30 hours per week. Please clarify.

As defined in the ACA regulations, for the "rate of pay" safe harbor, employers should generally use "an amount equal to 130 hours" per month to calculate the maximum contribution. The regulations provide, in part, as follows (please note that the percentage used in the regulations has been adjusted over time):

> (iii) *Rate of pay safe harbor.* An applicable large employer member satisfies the rate of pay safe harbor with respect to an hourly employee for a calendar month if the employee's required contribution for the calendar month for the applicable large employer member's lowest cost self-only coverage that provides minimum value does not exceed 9.5 percent of an amount equal to 130 hours multiplied by the lower of the employee's hourly rate of pay as of the first day of the coverage period (generally the first day of the plan year) or the employee's lowest hourly rate of pay during the calendar month. . . . .

How are CalSavers contributions made?

CalSavers describes a 4-step process for transmitting payroll contributions, which I summarize as follows:

- First, the employer registers delegates (such as an HR manager) or payroll representatives (such as an outside payroll vendor) to facilitate the payroll contribution process. The employer can assign individuals to various roles that give them different levels of responsibility and authorization within the program.

- Next, within 30 days of registering with CalSavers, the employer must upload a roster of eligible employees. CalSavers will then contact these eligible employees to either customize their account and make saving elections, or notify them of what actions to take if they choose to opt out. The employer can enter the data manually or use an "Employee Information Template" provided by CalSavers. The roster uploaded by the employer will include, for each eligible employee, name, date of birth, Social Security Number or ITIN, and contact information. Once the roster is uploaded, employees have 30 days to opt out before payment contributions start.

- Then, the employer uploads bank information if it plans to fund contributions through ACH debit or have a specific account debited.

- Finally, during the employer's usual payroll process, the employer will deduct a percentage of each participating employee's pay and send it to CalSavers. The percentage will be shown on the employer's account page. Information is entered manually either by using an online form or in bulk using the "Employee Contribution Information Template."

Ongoing employer responsibilities include submitting employees' contributions, adding new employees, and removing terminated employees.

CalSavers also describes on its website what employers do not have to do, including:

> CalSavers does not include any employer fees or employer match contributions. You are also NOT responsible for:
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> - Enrolling employees, disseminating information, or answering questions about the program.
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> - Managing investment options, including choice of investment funds and processing employee investment change requests.
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> - Processing distributions.
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> - Answering questions about investment options. Employers should not give investment or tax advice.
>
> - Managing employee changes or account maintenance, which include but are not limited to Contact information and Beneficiary information.
>
> - Your employees will be responsible for maintaining their account information once it is established.

Will the employer need to communicate employee contributions to CalSavers?

After receiving the employer census, CalSavers will reach out to eligible employees to discuss their options. CalSavers advises employers to refer all inquiries about the program to CalSavers:

> Employers must remain neutral about their employees' participation in CalSavers. You will be provided an email template at the time of your registration that you may share with your employees to inform them that CalSavers will reach out to them. Your employees will be contacted directly by the Program with all necessary information. If they have any questions, or wish to make any changes to their account, they should contact the Program directly (Client Services) at www.calsavers.com, at 855-650-6918 or clientservices@calsavers.com.

Employees can track their contributions and make changes to their contribution rate by signing into their account online or through the mobile app.

Employers should consult with their employment lawyer to ensure they are in full compliance with California Labor Code section 226, which specifies the items that must be included in itemized wage statements, including all deductions from gross wages.

Does CalSavers apply only to employers situsedin California, or do we have to comply based on the number of employees we have working in California?

If you have at least five California-based employees, at least one of whom is age eighteen, and you do not sponsor a qualified retirement plan, your business is required to register for CalSavers. Employers who have any questions about their obligation to participate in the CalSavers program should contact CalSavers.

This is only a brief synopsis of certain provisions of federal and state law applicable to health and welfare plans. Employee benefit laws and regulations are detailed and complex, and this summary does not purport to cover every aspect of applicable law. In addition, laws pertaining to employee benefits and insurance are constantly evolving, so the information provided is subject to change. This summary does not constitute legal advice. Employers should consult their own legal counsel concerning implementation of the provisions discussed in this synopsis, and whether there are other labor and employee benefit legal standards that need to be put into place or updated.