A Coronavirus Update for Employers

Trying to Remain Calm in Troubled Times

"If you can keep your head when all about you are losing theirs…"

Rudyard Kipling, "If" –

Remaining calm is easier said than done given the relentless stream of news about the spread of novel coronavirus ("COVID-19") across the globe. This article summarizes recent actions taken by both the federal and state governments affecting employer-provided health benefits as well as certain other related issues.

This article covers the following:

Families First Coronavirus Response Act

The President signed the Families First Coronavirus Response Act (FFCRA) into law on March 18, 2020. The FFCRA includes certain provisions related to health and welfare benefits and leave programs described in more detail below. This section also reflects changes made to the FFCRA by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) signed into law on March 27, 2020.

Mandate to Cover COVID-19 Testing

Effective March 18, 2020, all fully insured and self-insured group health plans[1] and individual health insurance policies must provide coverage for COVID-19 diagnosis and testing without cost sharing or prior authorization when performed during a health care provider office visit, telemedicine visit, urgent care center visit, or emergency room visit.[2] Plans are not required to cover other care or services received during a visit that are unrelated to COVID-19 diagnosis or testing without cost sharing. The mandate's effective date may require a plan to reprocess claims for services already performed.

The CARES Act redefined covered testing to include:

1. All testing approved by the Food & Drug Administration (FDA),
2. Non-FDA approved testing under an emergency use authorization request unless denied or the test developer fails to timely file the request with the FDA,
3. State-approved testing when the state has notified the U.S. Department of Health & Human Services (HHS) of its intent to use the test, and
4. Other tests approved by HHS.

Although the FFCRA indicates the mandate includes diagnosis and testing through telemedicine, we do not interpret this to mean that employers must offer telemedicine coverage to employees. This mandate also does not require plans to cover the actual treatment for COVID-19 without cost sharing, but please see *States are Addressing Coverage for COVID-19* later in this article for information about state mandates.

FFCRA Leave

The FFCRA creates two new paid leaves related to COVID-19:

1. Emergency paid sick leave (EPSL); and
2. Public health emergency leave under the Emergency Family and Medical Leave Expansion Act (referred to as the "EFMLEA" or "EFMLEA leave" in this article).

[1] This includes grandfathered plans under the Affordable Care Act (ACA).
[2] Other FFCRA provisions extend this requirement to Medicare, Medicaid, and other government programs.

EPSL AND EFMLEA	
Item	**Guidance**
Effective Date	Both are effective **April 1, 2020 through December 31, 2020**, unless extended If a leave that began before April 1st otherwise qualifies, only the period of the leave occurring on or after April 1st is covered
Covered Employers	Private employers with fewer than 500 employees and state and local governmental employers[3] of any size Federal employers of any size are subject to EPSL, but most are not subject to EFMLEA EFMLEA applies to employers who are not traditionally subject to the FMLA due to their small size Please see *Determining Employer Size* for more information **Small Employer Exemption:** Employers with fewer than 50 employees may claim an exemption from EPSL and/or EFMLEA for Qualifying Purpose (5) if an authorized officer of the employer has determined that providing the paid leave would place the business in jeopardy due to any of the following: (1) Providing the leave will result in expenses exceeding revenues and cause the employer to cease effective operation; (2) The absence of certain key employees requesting leave places the employer in significant financial or operational jeopardy; or (3) There are not sufficient available workers to replace employees requesting the leave for the employer to continue effective operation.[4] Employers should document its justification for claiming the exemption but are not required to apply for approval with the DOL.[5] This hardship exemption is not available for any other EPSL/EFMLEA Qualifying Purpose.

[3] We interpret an Indian Tribal Government to qualify as a covered governmental employer for EPSL purposes. The DOL interprets an Indian Tribal Government to qualify as a covered governmental employer under the FMLA.
[4] DOL FAQs on FFCRA, Q/A #58.
[5] Temporary Department of Labor Regulation 29 CFR Section 826.40(b)(2).

EPSL AND EFMLEA

Item	Guidance
Qualifying Purpose	Covered employers are required to provide EPSL and/or EFMLEA if the employee is unable to work for certain Qualifying Purposes The leave must be due to COVID-19 to qualify.

EPSL	EFMLEA
(1) The employee is subject to a federal, state, or local government or agency quarantine or isolation order	
(2) A health care provider has specifically advised the employee to self-quarantine	
(3) The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis	
(4) The employee is caring for an immediate family member, a person who regularly resides in the employee's home, or a roommate who is subject to (1) or (2)[6]	
(5) The employee is caring for a son or daughter[7] under age 18 due to a school or day care provider closure or the unavailability of a child care provider a. Justification is required for children older than 14 during daylight hours b. A school providing online instruction is still "closed" for this purpose c. A child care provider can include an unpaid family member or friend[8]	
(6) The employee is experiencing any other substantially similar condition specified in regulations issued by the U.S. Department of Health & Human Services (HHS)	

Working Remotely: An employee who is actually able to work remotely despite the Qualifying Purpose is not eligible for EPSL or EFMLEA.

Employees unable to work remotely due to a Qualifying Purpose are eligible.

Shelter in Place Orders: The DOL's position on shelter in place orders has changed. If an employer has work for an employee to perform if the employee were able to report to work, a shelter in place order satisfies Qualifying Purpose (1). If there is no work to perform, the shelter in place order does not qualify, because the employee would not be working anyway. A lack of work may be the result of the shelter in place order keeping customers away.[9]

[6] DOL FAQs on FFCRA, Q/A #63 – 65.
[7] "Son or daughter" is defined broadly to include an employee's natural, adopted, step, or foster child, a child who is the legal ward of the employee (including under legal guardianship), or a child for whom the employee acts as the parent (known as in *loco parentis*). The DOL indicates this will also include an adult child age 18 or older if incapable of self-care. Please also see DOL FAQs on FFCRA, Q/A #40.
[8] DOL FAQs on FFCRA, Q/A #68.
[9] DOL FAQs on FFCRA, Q/A #23 – 27 and 60. Unemployment benefits may be available.

<table>
<tr><th colspan="3">EPSL AND EFMLEA</th></tr>
<tr><th>Item</th><th colspan="2">Guidance</th></tr>
<tr><td rowspan="3">Eligibility

Note: If an employee was receiving EPSL or EFMLEA prior to a closure or furlough, the employer must provide covered leave up to the closure or furlough date. If the employee is on furlough they are not eligible.</td><td>EPSL</td><td>EFMLEA</td></tr>
<tr><td>All employees are eligible

Employers cannot require employees to meet any service time or other eligibility requirements prior to taking EPSL</td><td>Employees who have been employed for at least 30 days at the time leave is requested with no minimum number of service hours[10]

Eligibility is determined without regard to whether the Covered Employer has 50 employees within a 75-mile radius</td></tr>
<tr><td colspan="2">Health Care Providers and Emergency Responders: FFCRA guidance gives an employer flexibility to exclude some or all of its health care providers and emergency responders from EPSL and/or EFMLEA, in whole or in part, if needed for the employer to continue to function. The term “health care provider” is not limited to the medical professionals themselves and includes any employee working at the health care provider’s location as well as employees who manufacture medical products for the diagnosis, treatment, or prevention of COVID-19.[11] The exclusion for emergency responders is similarly broad.

The DOL indicates the primary purpose of the FFCRA leaves is to minimize the spread of COVID-19 and encourages employers to exercise restraint when excluding employees

An employee who contracts COVID-19 may qualify for workers’ compensation or disability (please see Certain Labor & Employment Issues)</td></tr>
</table>

[10] This differs from the FMLA’s usual 12 months/1,250 hours of service eligibility requirement.
[11] DOL FAQs on FFCRA, Q/A #56 and Temporary Department of Labor Regulation 29 CFR Section 826.25(c).

EPSL AND EFMLEA		
Item	**Guidance**	
Required Benefits	EPSL	EFMLEA
Payroll Taxes: An employer must pay its share of Medicare tax for Required Benefits but not its share of Social Security taxes.	Covered employers must provide full-time employees with up to 80 hours of paid sick leave and part-time employees with paid sick leave equal to their average number of hours worked in a two-week period[12] EPSL must be paid at a rate at least equal to the greater of: (i) the employee's regular rate of pay; (ii) the applicable minimum wage rate under the Fair Labor Standards Act; or (iii) the applicable state/local minimum wage rate where the employee is employed If EPSL is taken for Qualifying Purposes (4) – (6), the rate described above is reduced to two-thirds The maximum benefit is $511/day (up to a maximum total benefit of $5,110) for the employee's own quarantine, diagnosis, or illness and up to $200/day (up to a maximum total benefit of $2,000) if the paid leave is to care for another[13]	12 weeks of leave – After a 10-day elimination period, the remaining EFMLEA is paid leave (if available, EPSL can fill this elimination period) **Note:** EFMLEA leave does not provide an additional 12 weeks of FMLA leave and is merely another qualifying reason to take FMLA leave. If an employee has already used some or all of their FMLA leave during the current FMLA leave year, it reduces the remaining time available for EFMLEA. Covered employers must pay employees at least two-thirds of their regular rate of pay for the remainder of their EFMLEA leave period based on the employee's regular work schedule[12] For employees with variable work schedules, the average number of hours worked is determined using a 6-month lookback period from the date the leave began or a reasonable expectation of average hours worked for new hires The maximum benefit is $200/day per employee (up to a maximum total benefit of $10,000 per employee)
	Combined, EPSL and EFMLEA can provide up to $12,000 in paid leave for Qualifying Purpose (5) An employer should withhold taxes and may withhold benefit deductions from paid FFCRA leave[14]	

[12] Special rules apply for employees covered under multi-employer collective bargaining agreements. An employer may satisfy its emergency paid sick time requirement by contributing toward a union program that provides the paid sick time.
[13] An employer could provide a larger benefit, but the excess will not be reimbursable to the employer as a credit. Please see Employer Reimbursement later in this table.
[14] IRS FAQs on FFCRA, Q/A #54 – 55.

EPSL AND EFMLEA	
Item	**Guidance**
Intermittent Leave	An employer may permit employees working at a work location to take intermittent leave for Qualifying Purpose (5) Employees working at a work location may not take intermittent leave for any other Qualifying Purpose and must take leave in full day increments An employer may permit employees working remotely to take intermittent leave for any Qualifying Purpose if the employee is unable to work their normal schedule due to the Qualifying Purpose[15] **Remember:** Under the Fair Labor Standards Act and subject to limited exceptions, salaried employees must be paid for an entire week if any work is performed during that week. This effectively limits an employer's ability to provide EPSL or EFMLEA on an intermittent basis to salaried employees. The DOL may address this in later guidance.
Employer Notice	The DOL released a model notice which must be conspicuously displayed at worksite locations similar to the display requirements for other legal notices[16] (there is no requirement to provide the notice in another language) Employers may also satisfy the delivery requirement by mail, email or posting the notice on its website

[15] DOL FAQs on FFCRA, Q/A #20 – 22.
[16] This model notice addresses both FFCRA leaves. A separate notice applies to federal employees.

<table>
<tr><th colspan="3">EPSL AND EFMLEA</th></tr>
<tr><th>Item</th><th colspan="2">Guidance</th></tr>
<tr><td rowspan="3">Employee Notice and Substantiation</td><td>EPSL</td><td>EFMLEA</td></tr>
<tr><td>An employer may require employees to provide reasonable notice of the need for continuing EPSL after the first paid sick day</td><td>Standard FMLA notice rules apply

If EFMLEA is foreseeable, an employee should provide notice of the need for leave as soon as it is practical to do so</td></tr>
<tr><td colspan="2">The DOL indicates that employees are generally required to provide documentation supporting the leave but defers to the IRS for substantiation requirements.[17] The IRS indicates the following information will substantiate leaves for the purposes of qualifying for reimbursement credits:

(1) The employee’s name;

(2) The date or dates for requested leave;

(3) The Qualifying Purpose for the leave and a written statement supporting it (this includes the name of the school or day care closing and the name of any affected child); and

(4) A statement that the employee is unable to work (including remotely) due to the Qualifying Purpose.[18]

The DOL removed its earlier recommendation that employers require a doctor’s note supporting Qualifying Purpose (2), and the IRS does not indicate this is required for substantiation purposes. This may be the DOL and IRS realigning to be consistent with the Centers for Disease Control’s request that employers not require a doctor’s note to validate an absence or for return-to-work purposes due to the demands on health care providers’ time</td></tr>
<tr><td>Employer Reimbursement</td><td colspan="2">Covered Employers are eligible for reimbursement for the following:

(1) 100% of Required Benefits;

(2) The employer’s share of Medicare taxes for the Required Benefits;[19] and

(3) The employer’s Qualifying Health Plan Expenses described later in this article.

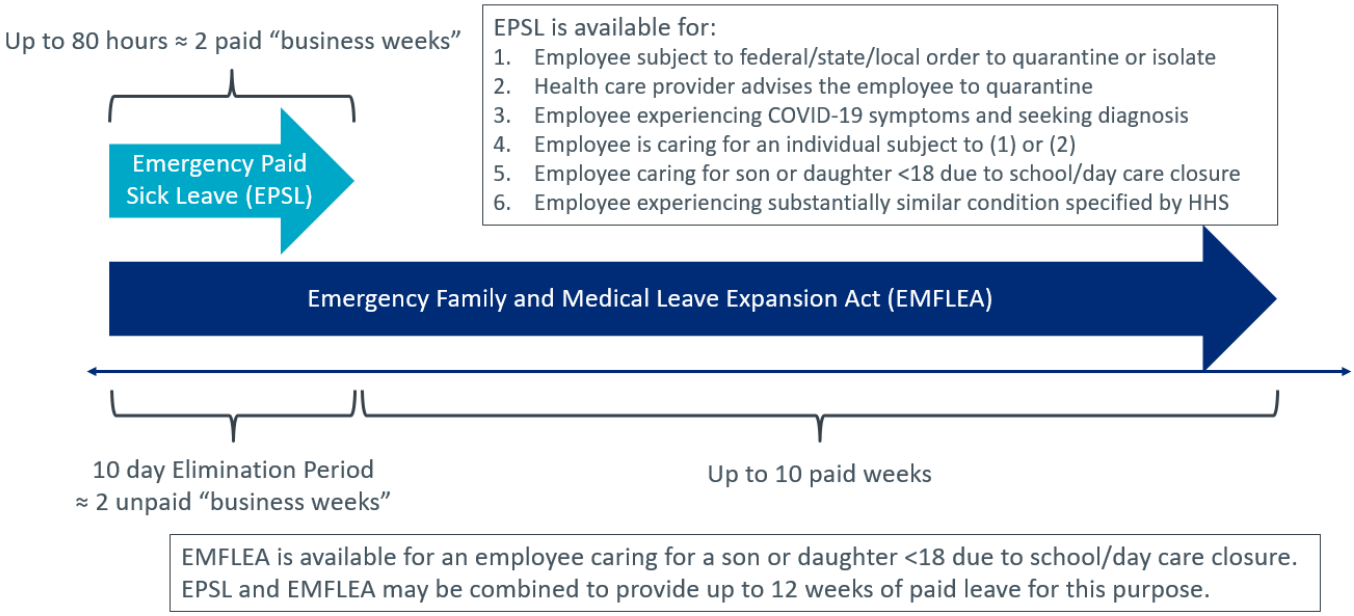
A Covered Employer should retain records substantiating the claimed reimbursements, but it does not file them

Note: Reimbursement is limited to Covered Employers for Required Benefits. Although state and local governmental employers are required to provide FFCRA leave, they are ineligible for reimbursement unless they pay Social Security tax or Railroad Retirement Act tax.[20] This may be an unintended oversight corrected through later legislative action or in guidance.</td></tr>
</table>

<table>
<tr><th colspan="3">EPSL AND EFMLEA</th></tr>
<tr><th>Item</th><th colspan="2">Guidance</th></tr>
<tr><td>Reimbursement Methods</td><td colspan="2">A Covered Employer may use the following reimbursement methods:
(1) Claim an offset by reducing its federal employment tax deposits reported on quarterly IRS Form 941;
(2) Request an advance refund of credits using new IRS Form 7200; and
(3) True up and claim any remaining credits on quarterly IRS Form 941 (or pay any excess credits received).[21]
IRS guidance indicates an employer should use these methods in order, so (1) should be used to the fullest extent possible before (2), etc.</td></tr>
<tr><td rowspan="3">Other Notes</td><td>EPSL</td><td>EFMLEA</td></tr>
<tr><td>Employers cannot require employees to use other paid leave before using EPSL
Employers may permit employees to use other paid leave in addition to EPSL to supplement their leave benefits[22]</td><td>Unpaid EFMLEA – If available, employees may use EPSL during the unpaid leave period; an employer may permit employees to use other accrued paid leave during the unpaid leave period[23]
Paid EFMLEA – Employers can require or may permit employees to use other paid leave to supplement their paid EFMLEA leave benefits[24]</td></tr>
<tr><td colspan="2">The DOL indicates EPSL and EFMLEA are both job-protected leaves
Unused leave does not carry over to the next year (if EPSL or EFMLEA are extended beyond December 31, 2020)</td></tr>
</table>

[17] DOL FAQs on FFCRA, Q/A #15 and 16. Q/A #15 also indicates an employer may provide leave without substantiation.
[18] IRS FAQs on FFCRA, Q/A #44.
[19] IRS FAQs on FFCRA, Q/A #10.
[20] FFCRA Section 7001(a) and preamble to IRS FAQs.
[21] IRS FAQs on FFCRA, Q/A #37 -- 43.
[22] DOL FAQs on FFCRA, Q/A #32.
[23] DOL FAQs on FFCRA, Q/A #31.
[24] DOL FAQs on FFCRA, Q/A #33.

At a Glance



Determining Employer Size

Counting Employees

In general, all full-time and part-time employees,[25] temporary and staffing agency employees[26] (even if paid by the staffing agency), and employees on leaves of absence count for the purposes of determining employer size. This will also generally include employees performing services for a client company through a professional employer organization (PEO). The PEO rules are complex, and employers should review the employment relationship status of PEO employees with their labor & employment counsel. Independent contractors and most unpaid interns/students do not count toward employer size.

Staffing Agencies and PEOs: Staffing agency employees will generally count as employees of both the staffing agency and client employer for the purposes of determining whether an employer has <500 employees. If the staffing agency pays the employees, the staffing agency is required to provide any required FFCRA leave.[27] The same analysis should apply to PEOs.

The <500 employee calculation is performed each day an employee's FFCRA leave is to begin. Employers may find themselves moving in and/or out of being subject to FFCRA leave. This may mean some employees will be covered while others are not. A safe harbor from the DOL would be welcome.

[25] This can include partners, LLC members, and other owners who perform employee functions for the employer.
[26] The staffing agency and client employer may be "joint employers" for these employees.
[27] DOL FAQs on FFCRA, Q/A #74.

Integrated Employers

In general, each business entity is a single employer for the purposes of determining employer size. Separate businesses are combined for determining employer size if they are deemed "integrated employers" using a four-factor test:

1. Common management between the employers – Do the employers share common leadership and/or a significant overlap in human resource functions?
2. Interrelation of the employers' business operations – Do the employers coordinate their business activities? Does one employer provide services to another? Do they share building space, equipment, bank accounts, or other financials?
3. Centralized control of labor relations – Do the employers share employees, transfer employees between them, or exercise any control over hiring, firing, training, or other personnel decisions with respect to each other?
4. Common ownership or financial interests – This is fairly self-explanatory, but it is worth a mention that this does not require the traditional controlled group standard of 80% or more common ownership or financial interest.

More than one factor is usually necessary for the DOL or courts to determine an integrated employer relationship exists, and no single factor controls. Interestingly, the common ownership or financial interests factor is usually considered the *least* important when determining whether an integrated employer relationship exists.

Service Contract Act/Davis Bacon Act Employees

Service Contract Act (SCA) and Davis Bacon Act (DBA) employees count when determining if an employer is a Covered Employer. If an employer is a Covered Employer, SCA and DBA employees can qualify for EPSL and EFMLEA. Since a Covered Employer is required to provide these paid leaves under federal law, they do not count toward satisfying the employer's applicable SCA or DBA wage or fringe benefit rates.

Qualifying Health Plan Expenses

A Covered Employer can claim reimbursement for the cost of maintaining health coverage for employees on FFCRA leave. This is limited to the premium (or premium-equivalent for a self-insured plan) for the health coverage and includes both the employer's contribution plus any portion paid for the employee on a pre-tax basis during the leave. This reimbursement does not include paid claims.

Health coverage includes medical, dental, vision, health care flexible spending account (HCFSA), and health reimbursement arrangement (HRA) coverage, but it does not include health savings accounts.

The applicable cost is equal to the "average daily premium" multiplied by the number of days of paid FFCRA leave. The IRS guidance indicates an employer can use any reasonable method to calculate the average daily premium including:

Using a blended average daily premium rate

Step One: Divide the total premiums paid by the number of covered employees.

Step Two: Divide the result by the expected average number of workdays for covered employees. The IRS indicates an employer may use 260 workdays for full-time employees. An employer may make a reasonable adjustment for part-time employees or use the full-time average daily premium for all employees.

Example 1: ABC Company has 100 covered employees under its medical plan with an expected total annual premium of $1,250,000. Assume only full-time employees are eligible for coverage or ABC Company elects to treat all covered employees as full-time and uses 260 expected workdays when calculating the average daily premium.

(Total Premium ÷ Covered Employees) ÷ 260 = Average Daily Premium

Total Premium	Covered Employees	Average Daily Premium
$1,250,000	100	$48.07

Example 2: The same facts as Example 1 except that certain part-time employees are also eligible to enroll in medical coverage and pay the same premiums as full-time employees. ABC Company adjusts the average daily premium for its part-time employees by using 174 expected workdays.

(Total Premium ÷ Covered Employees) ÷ 260 for FTEs = Average Daily Premium
(Total Premium ÷ Covered Employees) ÷ 174 for PTEs = Average Daily Premium

Total Premium	Covered FTEs	Covered PTEs	Average Daily Premium
$875,000	70		$48.07
$375,000		30	$71.84

Step Three: The result from Step Two is the average daily premium. The employer multiples this by the number of days of paid FFCRA leave for the applicable employees.

Example 3: Using the average daily premium calculated in Example 1, assume ABC Company has 60 days of covered FFCRA leave during the 2nd Quarter of 2020:
60 x $48 = **$2,880** in Qualifying Health Expenses

Determining the average daily premium by tier of coverage

Step One: Divide the total premiums paid by the number of covered employees in each tier of coverage.

Step Two: Divide the results for each tier of coverage by the expected average number of workdays for covered employees. The IRS indicates an employer may use 260 days for full-time employees. An

employer may make a reasonable adjustment for part-time employees or use the full-time average daily premium for all employees.

Example 4: ABC Company has 100 covered employees under its medical plan with an expected total annual premium of $1,250,000. Assume only full-time employees are eligible for coverage or ABC Company elects to treat all covered employees as full-time and uses 260 expected workdays when calculating the average daily premium.

(Total Premium ÷ Covered Employees) ÷ 260 = Average Daily Premium

Tier of Coverage	Total Premium	Covered Employees	Average Daily Premium
Employee-only	$400,000	55	$27.97
Employee + Spouse	$100,000	7	$54.95
Employee + Child(ren)	$300,000	20	$57.69
Family	$450,000	18	$96.15

Step Three: The results from Step Two equals the average daily premium for a covered employee in that tier of coverage. The employer multiples this by the number of days of paid FFCRA leave.

Example 5: Using the average daily premiums calculated in Example 4, assume ABC Company has the following days of covered FFCRA leave for during the 2nd Quarter of 2020:

Employee-Only 10 x $28 = $280
Employee+ Spouse = $0
Employee + Child(ren) 20 x $58 = $1,160
Family 30 x $96 = $2,880
= **$4,320** in total Qualifying Health Expenses

An employer can use either approach for fully insured and/or self-insured coverage. For self-insured coverage, an employer may instead use any reasonable actuarial method to determine the average daily premium. Remember, the employer cannot claim any portion of the premium paid by the employees on an after-tax basis.

HCFSA/HRA

Step One: Determine the expected annual contribution for the HCFSA or HRA. This is an employee-specific amount meaning the average daily premium may vary among the covered employees.

Step Two: Divide this amount by the expected average number of workdays for the covered employee. The IRS indicates an employer may use 260 days for full-time employees. An employer may make a reasonable adjustment for part-time employees or use the full-time average daily premium for all employees.

Example 6: Assume the expected annual contribution for a full-time employee's HCFSA is $2,750. $2,750 ÷ 260 = **$10.58** average daily premium

Other FFCRA Notes

Employers should consider communicating the new leave requirements in conjunction with their existing leave policies. The 500-employee limitation for the paid leaves feels arbitrary. Congress probably believes larger employers are more likely to have paid leave programs in place to assist their workers in situations like this or can afford to implement them.

The FFCRA includes other provisions outside the scope of this article addressing unemployment insurance, food assistance, safety protocols for health care providers and first responders, and other welfare-related matters.

States are Addressing Coverage for COVID-19

Note: The FFCRA supersedes the state mandates for COVID-19 diagnosis and testing without cost sharing. It does not affect state mandates requiring coverage for treatment without cost sharing.

A number of states have enacted mandates requiring insurance coverage for COVID-19 testing without cost sharing for covered participants. Each requires or has requested insurance carriers cover testing at no cost to participants with Massachusetts also requiring coverage for COVID-19 treatment received in medical facilities without cost sharing. These state mandates apply to fully insured coverage and self-insured, non-ERISA coverage[28] issued in the respective states. Situs rules may apply depending upon the state, and employers should check with their insurance carriers to determine if these mandates will apply to a policy sitused in another state. We anticipate one or more states may exercise emergency powers to override any situs rules and apply COVID-19 mandates to policies covering residents that are sitused in other states.

Several major insurance carriers, including Aetna, Anthem, Cigna, United Healthcare, and Humana, have announced that they will include COVID-19 testing as a no-cost preventive service for their fully insured policies, even in states that have not taken regulatory action to require it. A number of insurance carriers are also offering expanded services, such as waiving cost sharing for doctor's office, emergency room and urgent care visits for those diagnosed with the virus. A few carriers are providing no-cost telemedicine visits at this time even if unrelated to COVID-19 diagnosis or treatment as a way of mitigating the number of people in health care providers' offices.

Self-Insured Group Health Plans, ERISA Preemption, and Reality

The FFCRA mandates coverage for COVID-19 diagnosis and testing without cost sharing. Although self-insured group health plans subject to ERISA are not required to follow the state COVID-19 mandates,

[28] This includes state and local governmental plans and church plans.

many employers and other plan sponsors may wish to provide similar and/or additional COVID-19 benefits for obvious reasons.

Employers should pay close attention to communications from their third party administrators (TPAs) to determine whether they are required to opt-out of any proposed plan changes they do not wish to implement or if the employer will need to take affirmative action in order to make any modifications to the plan's normal benefits.

Warning! If you maintain stop-loss coverage, we recommend you confirm any plan design changes with your stop-loss carrier before implementation. This may be a non-issue for COVID-19 testing, but coverage for treatment is another matter.

Plan Design Amendments and Communication

Summary plan descriptions (SPDs) and related plan materials will need updating to reflect any plan design changes including changes to eligibility. Adding or increasing COVID-19 benefits or expanding eligibility are enhancements to the existing plan (please see *Other Coverage Options for Employees* and *Certain Labor & Employment Issues* later in this article for discussion). Fortunately, ERISA provides a very generous amount of time to communicate these summary plan description changes to participants.

Under ERISA, plan administrators have up to 210 days from the end of the plan year in which the change(s) took place to issue a summary of material modification or updated summary plan description.[29] Employers will want to communicate enhanced COVID-19 benefits and/or expanded eligibility much faster than this for practical reasons.

The amendment rules for the Summary of Benefits and Coverage (SBC) operate a little differently. The rules generally indicate that a mid-year plan design change materially affecting an SBC's contents must be communicated at least 60 days *before* the effective date without regard to whether the change is an enhancement. Although this seems problematic, we have two thoughts about this:

1. The additional COVID-19 benefits may not actually affect the corresponding SBC.

Example: The existing SBC may state that preventive services are covered at 100% before the deductible is met. Coverage for COVID-19 testing without cost sharing should already fit within that description.

2. Under the circumstances, the DOL may ignore this issue and/or ultimately provide transition relief.

[29] This is roughly July 31st of the following year for a calendar year plan and often enables plan administrators to simply wait to issue the updated summary plan description for the next plan year rather than issuing a separate summary of material modification. It is also common for employers to use a portion of the open enrollment materials as a summary of material modification to communicate changes for the next plan year.

High Deductible Health Plans

The IRS issued IRS Notice 2020-15, which permits qualified high deductible health plans (HDHPs) to provide coverage for COVID-19 testing and treatment before a participant satisfies the minimum statutory HDHP deductible for the plan year without affecting the participant's ability to make or receive health savings account (HSA) contributions.

This relief includes COVID-19 testing and treatment received through telemedicine, although we understand it may be administratively difficult to identify telemedicine visits for COVID-19 care separately. As written, IRS Notice 2020-15 does not permit an employer to cover all telemedicine visits at no cost or below fair market value cost before a participant has met the applicable minimum statutory HDHP deductible without jeopardizing the participant's ability to make or receive HSA contributions. The CARES Act addresses this potential conflict by exempting all telemedicine or other remote care[30] benefits from conflicting with HSAs for HDHP plan years beginning on or before December 31, 2021.

Example: An employer with a calendar year HDHP can provide telemedicine benefits – whether or not COVID-19 related – at a $0 or below fair market value copayment before a participant has met the applicable minimum statutory deductible for both the 2020 and 2021 HDHP plan years without affecting the participant's ability to make or receive HSA contributions. The exemption would also apply to an HDHP with a plan year beginning on July 1st for the July 1, 2020 – June 30, 2021 and July 1, 2021 – June 30, 2022 plan years.

An employer could choose to assist its employees further by providing additional employer HSA contributions equal to the cost of a limited number of telemedicine visits. These contributions would count against the employee's annual HSA contribution limit, but the employee will still be economically better off. It is possible that some employees have already reached their annual HSA contribution limits.

Spending Account Plans

The CARES Act permits HSAs, health care flexible spending accounts, health reimbursement arrangements, and Archer medical savings accounts to reimburse for the cost of over-the-counter drugs and other medicine purchased after December 31, 2019 without a prescription. This relief is permanent. This is not a qualifying life event permitting a mid-year election changes for a health care flexible spending account.

Other Coverage Options for Employees

This section summarizes other coverage options that may be available for employers to provide COVID-19 coverage for employees, spouses, and dependents who are not enrolled in an employer's medical plan due to previously declining coverage or ineligibility for benefits.

[30] It's not clear what "other remote care" includes yet.

Medicare/Medicaid/CHIP and the Uninsured

Even if they are not eligible under their employer's plan, employees may have other options available to obtain coverage. The FFCRA requires federal programs, such as Medicare, Medicaid, and CHIP, to cover diagnosis and testing at 100% and gives states the option to expand Medicaid eligibility to address this.

The FFCRA also allocates funds to reimburse health care providers for performing diagnosis and testing services for the uninsured. While the law requires emergency rooms to provide diagnosis and testing for those in need, it does not require a hospital to waive its costs for those who are uninsured or cannot pay.

Qualifying Life Events (QLEs)

Note: This section assumes the employer's Internal Revenue Code Section 125 cafeteria plan document permits mid-year, pre-tax election changes for the qualifying life events described below. The underlying benefit coverage issuer also needs to permit the election change.

- **Medical coverage –**
  - Enrollment – Adding coverage for COVID-19 diagnosis and testing at no cost may qualify as a significant improvement of a benefit option permitting a mid-year election change to enroll in the plan by itself, and we are aware that many plans are taking the position that it does.[31] Adding coverage for COVID-19 *treatment* at no cost likely is a QLE. An employer has some discretion to determine what a significant change is, and the rules merely indicate a change is significant if the average participant would consider it significant. The employer should confirm if its insurance carrier or stop-loss carrier will allow these specific mid-year election changes
  - Dropping coverage – The loss of eligibility for medical coverage as a result of a closure or furlough is generally a COBRA qualifying event and may result in a QLE permitting the employee to enroll in coverage through another employer (such as a spouse's employer) or the public health insurance marketplace.[32] This QLE also occurs if the employee remains eligible for coverage but the employer reduces its employer contribution toward coverage to $0.[33]

    If the employer merely reduces – but does not eliminate – its contribution toward coverage, this may result in a QLE permitting the employee to change to a lower cost medical option or enroll in coverage through another employer if the cost of the employer's coverage has significantly[34] increased. This event is a QLE for the public health insurance marketplace if the increased cost for the employer's coverage causes the employee to become newly eligible for premium subsidies.[35]

---

[31] Please see 26 CFR Section 1.125-4(f)(3).
[32] 26 CFR Section 54.9801-6(a)(3)(i).
[33] 26 CFR Section 54.9801-6(a)(3)(ii). This variation would not be a COBRA qualifying event.
[34] Similar to the discussion under enrollment above, "significant" is a subjective standard. Please see 26 CFR Section 1.125-4(f)(2).
[35] 45 CFR Section 155.420(d)(6).

- **Dependent care flexible spending account (DCFSA) coverage –**
  - Decrease election – The closure of a day care provider due to COVID-19 concerns or a reduction in available day care provider hours would likely qualify as a significant reduction of coverage permitting an employee to decrease an existing DCFSA election and/or stop future contributions.[36] This would also apply if a child is required to stay home and is supervised by a parent or relative.
  - Increase election – If day care needs increase (and are available) due to school closure, an employee could start contributing to a DCFSA or increase an existing election.

The maximum annual DCFSA reimbursement is $5,000. It may be premature to be concerned about potential DCFSA forfeitures due to temporary closings of day care providers, schools, and related activities, but we do understand employees feeling comfortable with the additional money in their paychecks right now.[37]

Expanded Eligibility for Medical Coverage

An employer could revise its eligibility rules to cover currently ineligible employees. The communication rules described above in *Plan Design Amendments and Communication* apply. This may include offering telemedicine to employees who are not eligible for or enrolled in medical coverage. There are potential compliance risks to offering telemedicine as a stand-alone benefit, but that is outside the scope of this article.

Individual Coverage HRAs (ICHRAs)

An employer could choose to offer ICHRAs to certain classes of employees who are currently ineligible to elect the employer's medical coverage. The ICHRAs can pay for individual insurance coverage in the public health insurance marketplace as well as pay for COVID-19 related services. This is not an immediate solution, as ICHRAs take time to implement before employees are able to use them to purchase coverage or pay for out-of-pocket expenses.

Onsite/Near-site COVID-19 Testing

An employer should be able to pay for its employees (and any spouses and dependents) to receive COVID-19 testing onsite or at a near-site location on a tax-free basis without creating an ERISA plan or group health plan so long as the testing occurs within a very short timeframe. This is subject to legal interpretation, but the rationale is that the program requires no ongoing administration by the employer. This is the same rationale employers and legal practitioners use to determine that onsite flu shots do not constitute an ERISA group health plan. It may be impractical or undesirable to perform this testing onsite in groups due to the potential for community spread of COVID-19. This option may also be limited by the availability of tests.

---

[36] 26 CFR Section 1.125-4(f)(3).
[37] The situation may different if the employer maintains a non-calendar year DCFSA and it is nearly the end of the plan year, or if an employee only elected DCFSA coverage to cover a specific event (e.g. camp) that is cancelled.

Taxable Cash

Financial resources permitting, an employer can always provide some sort of bonus to help employees pay for the cost of COVID-19 testing and/or services. This should be provided with no strings attached, meaning the employees get the bonus whether they use it for this purpose or not. The bonus is still tax deductible to the employer as paid wages.

Potential Increase in Appeals?

As employers expand coverage under their medical plans to include COVID-19 testing and treatment without cost sharing, it seems reasonable to expect an increase in appeals for denied benefits as a result. A participant might go to a health care provider due to COVID-19 concerns but end up diagnosed and treated for something else the medical plan does not cover at 100%. Participants may claim they would not have gone to the doctor but for COVID-19.

Data Privacy Concerns

The HIPAA privacy rules do not generally apply to most health information collected and disclosed by an employer related to leave administration because the health information is not going to or coming from the employer's health plan(s). By contrast, employers who are health care providers may learn about COVID-19 from treating participants as patients. This really is protected health information (PHI) for HIPAA purposes. Other laws containing data privacy requirements may apply,[38] and this information should be treated like "protected health information" with similar restrictions for those who may access it and how and when it may be disclosed.[39] Lastly, employers can (and should) share COVID-19 health information with the Centers for Disease Control (CDC) and state/local health agencies.

Certain Labor & Employment Issues

We will address certain frequently asked labor & employment questions related to COVID-19 testing and leave administration. Employers should contact their labor & employment counsel for these issues. We will not address circumstances permitting employers to terminate or take disciplinary action against employees in this article.

Mandatory COVID-19 Testing

Many employers probably cannot require all of their employees to submit to COVID-19 testing because one or more employees likely fall into some sort of "protected class" and requiring testing will violate one or more of their legal rights. An employer could give an employee the option of testing or being sent home for a minimum quarantine period, which shifts the conversation to whether the employee can work remotely from home or should be put on paid/unpaid leave.

---

[38] These include the Americans with Disabilities Act and state laws.

[39] Although it may be overkill, treating all health information as if it is protected health information limits the possibility to make mistakes.

Note: The Equal Employment Opportunity Commission (EEOC) granted limited testing relief under the Americans with Disabilities Act permitting employers to measure the temperatures of their employees. The EEOC cautioned employers that an employee may still have COVID-19 even if the employee's temperature is in the normal range. This limited relief applies solely to temperature readings and does not apply to other forms of testing. Employees who display symptoms (such as a high temperature) or who refuse to have their temperature taken can be sent home.

Paid/Unpaid Leave

This section assumes the employee cannot work remotely from home.

- **FFCRA –** Depending upon the timing of the leave and size of the employer, many COVID-19 related leaves should qualify for leave under the FFCRA. Remember that these leaves do not actually require the employee (or immediate family member) to contract COVID-19 to apply.
- **Workers' Compensation –** Workers' compensation covers work-related illnesses and injuries. If an employee contracts COVID-19 during business travel or the employer is a health care provider and the employee contracts COVID-19 in the workplace through patient care or conducting research, the illness is likely a workers' compensation claim. It is less clear if the community spread of COVID-19 in a non-health care workplace will qualify for workers' compensation benefits. In any event, an individual will actually have to contract COVID-19 for workers' compensation to apply.
- **PTO Benefits –** Many employers provide employees with discretionary paid time off, sick, or vacation time. PTO can be used during the elimination period for one of the other forms of paid leave described in this section or to supplement an employee's other paid leave if the employer's leave policy permits it.
- **Employer-Provided Disability Plans –** These disability plans usually require an employee to satisfy a short elimination period before benefits begin and are generally only available for the employee to take leave due to the employee's own health condition. Most disability plans require participants to qualify for disability. This means actually having COVID-19, and a quarantine without a diagnosis does not qualify without amending the definition of disability.
- **State Disability/Paid Leave –** Where applicable, these may permit the employee to take leave due to his or her own health condition or to take care of an immediate family member. These leaves also may not require the employee or family member actually have COVID-19 to apply, and certain states have expanded their definition of qualifying disability to include quarantine.
- **Additional Paid Leave –** An employer will need to decide if it will modify its leave policy to provide paid leave to employees who must take a COVID-19 related leave that does not fit into one of the categories above and will be unpaid leave. This is especially true if the employer is requiring the employee to remain home. This will obviously depend upon each employer's particular circumstances and may be a difficult decision.
- **Unemployment Insurance –** A number of states are modifying their unemployment laws to allow for pay due to lost hours or layoffs due to COVID-19. For companies that do not have or cannot afford

to have their own extended pay benefits, unemployment insurance is available. In general, employees receiving paid leave under the FFCRA are not eligible for unemployment benefits.[40] The FFCRA and the CARES Act include additional federal unemployment assistance for states hit hard by layoffs.

- **Unpaid Leave –** This includes the FMLA, which is both job-protected leave and gives employees the right to continue health benefits while on leave.[41] Other forms of unpaid leave may be available due to the employer's leave policy or under other federal or state law. Please see *Furloughs* below.

Note: An individual cannot use other paid leaves to supplement FFCRA paid leave in excess of 100% of regular earnings while on FFCRA leave. The other forms of paid leave described in this section do typically offset when other paid leave is available, which should include FFCRA leave.

Furloughs

The term "furlough" by itself does not automatically create certain legal rights for furloughed employees or bind an employer to specific legal obligations.[42] A furlough simply implies that an employer believes the layoff is temporary and expects to be able to return the employees to work. In other words, a furlough is really just another name for a type of leave, and an employer has a lot of flexibility to define how it works.

Furlough design considerations include:

- *Will furloughed employees be on full or partial pay during some or all of the furlough period?* This obviously depends upon an employer's financial circumstances. Paid furlough will generally offset unemployment benefits. Remember that furloughed employees are not eligible for FFCRA leave during the furlough period.
- *Will furloughed employees remain eligible for benefits as if they are active employees or lose eligibility (due to a reduction in hours) and be offered COBRA?* If furloughed employees remain eligible as active employees, they will still have their full COBRA continuation coverage period available if terminated. This is a change in eligibility, and an employer should seek the approval of the insurance carrier or stop-loss carrier, if applicable. Remaining eligible for benefits as active employees should not affect eligibility for unemployment benefits. Furloughed employees may lose eligibility for certain ancillary benefits (e.g. life insurance, long-term disability) because they will not meet required actively-at-work requirements during the furlough period.
- *Will the employer subsidize the cost of coverage for all or a portion of the furlough period or require furloughed employees to pay for the full cost?* Again, this depends on the employer's financial circumstances. If the employer intends to subsidize coverage, the employer may want to consider specifying whether the subsidy will last for a limited time or reserve the right to reduce or eliminate the subsidy later in order to avoid disputes that the subsidy is open-ended. If the furloughed employees

[40] Please see the DOL's FAQs on FFCRA, Q/A #29.
[41] Remember, the temporary expansion adding paid leave to the FMLA does not apply to employers with 500 or more employees.
[42] Special "furlough" rules may apply to public sector employees working for federal, state, and local governments. Collectively bargained agreements sometimes also define furloughs and create contractual rights and obligations.

remain eligible as active employees, this should appear in the furlough communication. If the furloughed employees are offered COBRA, this should appear in the COBRA election notice.

Note: Remember that a loss of eligibility for medical coverage or the elimination or reduction of employer contributions toward coverage can trigger a QLE permitting enrollment in other medical coverage.

Paying for Benefits

Employers frequently treat employees as eligible active employees when on certain forms of paid leave. Depending on the source of the paid leave benefits, these employees may also be able to continue their pre-tax payroll deductions for benefits or by paying via check or electronically. The DOL indicates that employees are entitled to continue their coverage while on FFCRA leave on the same terms as active employees.[43]

The FMLA provides for 3 payment options, but payment must be consistent with the employer's approach for other unpaid leave unless impermissible under FMLA:

1. Pay-as-you-go while on leave;
2. Catch-up, recouping contributions upon return from leave; and
3. Pre-payment before the leave begins.[44]

These payment approaches also apply if an individual's FFCRA leave benefits not enough to cover the required contributions. The FMLA's consistency rule means that the payment option(s) used for other forms of unpaid leave – assuming the employee remains benefits eligible while on other unpaid leave – and the FMLA must match. Employers typically use the same approach when employees are required to pay for contributions that are in excess of an employee's paid leave benefits.

If an employee loses eligibility for employer-provided group health coverage during an unpaid leave, the employee experiences a COBRA qualifying event due to a reduction in hours. An employer may choose to subsidize COBRA coverage, although that could adversely affect the individual's ability to purchase coverage in the public health insurance marketplace or enroll in other group health coverage (such as through a spouse's employer). The special enrollment window for a loss of employer-provided group health coverage closes when an individual elects COBRA, and the loss of a COBRA subsidy is not a special enrollment event. Similarly, an employee may lose coverage for non-payment during an unpaid leave, and this is not a special enrollment event either.

Updating Leave Policies and Plan Eligibility Rules

If affected by FFCRA, an employer should communicate the availability of EPSL and EFMLEA to its employees. Employers should also update their leave policies to account for any other changes including

[43] Please see the DOL's FAQs on FFCRA, Q/A #30.
[44] We believe pay-as-you-go and catch-up are the most common approaches.

whether employees will remain eligible to participate in benefits while on leave and how contributions will be paid.

The Affordable Care Act and the Employer Mandate

Placing employees on extended unpaid leaves of absence can have implications for an employer under the ACA's employer mandate and its IRS Form 1094/1095 reporting requirements based on the ACA's rules for determining full-time employee (FTE) status.

Employer Uses Monthly Measurement Method

Under the monthly measurement method, employees on unpaid leaves of absence – including an unpaid furlough – lose their ACA FTE status for any month in which they do not have at least 130 hours of service. This means most furloughed employees will lose their FTE status immediately and pose little risk of triggering employer mandate penalties if the employer does not offer affordable, minimum value coverage or even no coverage at all.

Employer Uses Look-Back Measurement Method

By contrast, employees on unpaid leaves of absence generally do not lose their ACA FTE status immediately when an employer is using the look-back measurement method. Employees who are protected FTEs during a stability period do not lose that FTE status while still employed, even when on an unpaid leave. A lesser-known fact is that other FTEs do not generally lose their ACA FTE status for at least three full calendar months after the month of their status change while still employed.[45]

Note: Depending upon the medical plan's eligibility rules, employees who are ACA FTEs may remain eligible for active coverage if still employed during a leave of absence.

Offers of Coverage

An offer of coverage, even COBRA coverage, to an individual who remains employed while on leave still qualifies as an offer of coverage for the purposes of avoiding the Section 4980H(a) "no offer" penalty. This offer of coverage may not be affordable, particularly if the employee must pay for the full cost, potentially exposing an employer to the Section 4980H(b) "inadequate offer" penalty should one or more ACA FTEs obtain subsidized coverage in the public health insurance marketplace. The risk is low for relatively short leaves of absence of a month or less due to the time it takes to enroll in the marketplace and for coverage to begin. Employers may wish to consider terminating employees furloughed for more than a month to six weeks if the offers of coverage are unaffordable to avoid potential employer mandate penalties.

New Hire Waiting Periods

The ACA limits waiting periods for eligible employees to 90 days. Under HIPAA's nondiscrimination rules, health plans cannot use "actively at work" provisions for coverage to become effective. If an employee is

[45] Treasury Regulation Section 54.4980H-3(f)(2)(i).

hired and furloughed or placed on other unpaid leave while still employed, the rules indicate the employee continues to satisfy the waiting period.

The WARN Act

The WARN Act requires employers to provide written notice at least 60 calendar days in advance of a plant closing (WARN's term for a work location) or mass layoff at a work location. The notice is intended to ensure that assistance can be provided to affected workers and their families through a State Rapid Response Dislocated Worker Unit, and it also allows workers and their families transition time to seek alternative jobs or enter skills training programs.

At a high level, the WARN Act applies to private employers (both for profit and non-profit) with at least 100 employees who will lay off at least 50 employees at a single work location within a 30-day period. For this purpose, a layoff means an actual termination of employment (even if only temporary) or a 50% or greater reduction in hours for 6 months. An employer can exclude employees who have worked for less than 6 months and/or who work less than 20 hours per week for the purposes of determining if the employer has 100 or more employees.

If WARN applies, the employer is generally required to provide written notice of the layoff at least 60 calendar days in advance. The notice has to include certain information such as whether the layoff is expected to be temporary or permanent, the expected date the layoff will begin, and contact information for questions. If an employer gives less than 60-days' advance notice, it must generally continue pay and benefits for the affected employees for the gap period. For example, if WARN applies and an employer only provided 10 days' advance notice, it would generally have to continue pay and benefits for another 50 days.

There are three exceptions to the 60-day advance WARN notice requirement. An employer claiming an exception must still provide the notice as soon as it is reasonably practical to do so and must state the reason for the shortened notice period.

1. **Faltering company –** This can apply when a company is actively seeking financing or business and reasonably believes in good faith that advance notice would harm its ability to get financing or business, and this new financing or business would allow the employer to avoid or postpone a shutdown for a reasonable period.
2. **Unforeseeable business circumstances –** This can apply when the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.
3. **Natural disaster –** This can apply when a closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, drought, storm, tidal wave, or similar effects of nature. In this case, notice may be given after the event.

A mass layoff due to COVID-19 may qualify as an unforeseeable business circumstance. We encourage employers discuss the implications of the WARN Act with their labor & employment counsel.

Additional Resources

For additional information and resources to assist in managing the effects of COVID-19 on your company and employees, please see Addressing the Coronavirus Outbreak.

About the Authors

Christopher Beinecke, J.D., LL.M. *is the Employee Health & Benefits National Compliance Leader for Marsh & McLennan Agency.*

Dawn Kramer, J.D. *is a Compliance Consultant in the Employee Health & Benefits Compliance Center of Excellence for Marsh & McLennan Agency.*

Jennifer Stanley, J.D. *is a Compliance Consultant in the Employee Health & Benefits Compliance Center of Excellence for Marsh & McLennan Agency.*

Andie Schieler, J.D., CEBS *is a Compliance Consultant in the Employee Health & Benefits Compliance Center of Excellence for Marsh & McLennan Agency.*