Covid-19 and Your Health and Dependent Care Accounts Webinar Q&A

Thank you for attending our recent webinar. Slide handouts from our recent presentations can be found on our webinar page: http://www.ebcflex.com/Education/Webinars.aspx. At this time, our free webinars are not pre-approved for outside association CE credits. Upon request to compliance@ebcflex.com, we can provide a certificate of attendance in order for you to pursue the CE credit on your own.

Note to Employee Benefits Corporation BESTflex Plan and EBC HRA customers: If you have a standard health FSA or reimburse all medical expenses through your EBC HRA plan, in the coming days you will receive a communication about an amendment to your plan to include menstrual care products in the plan's definition of eligible expenses. This information was misstated on Wednesday's webinar.

The following questions were asked during the two webinar sessions in April 2020:

Contents

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

The material provided in this Q&A is by Employee Benefits Corporation and is for general information purposes only. The information does not constitute legal advice and may not be relied upon by anyone as such.

Employee Benefits Corporation

1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Eligible Expenses

1. **Is there a list of approved expenses on the EBC website?**

A: Yes, please visit https://www.ebcflex.com/EligibleExpenses.aspx.

2. **As of right now, can our employees use their flex card for masks as long as they are being recommended by CDC?**

A: No, because face masks are not on the IIAS list of approved expenses, the Benefits Card will generally not work at a merchant for this expense. Participants would have to submit a claim manually for this to be reimbursed. We recommend manual submissions be done through the mobile app, online, or email due to the current remote workforce.

3. **If masks were made by a friend and I paid them using PayPal, can this get reimbursed?**

A: If you are an Employee Benefits Corporation customer, we have made the decision to reimburse pre-made masks without a letter of medical necessity through a standard health FSA or EBC HRA that reimburses all medical expenses. This is based on the CDC guidance recommending all Americans wear face masks to prevent COVID-19. Other TPAs may or may not provide reimbursement for these items at this time, and HSA accountholders may wish to proceed with caution in using an HSA to reimburse mask purchases. All other requirements regarding providing documentation to support the claim must be met.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

4. Do you think that the over-the-counter drug and menstrual care expansion will continue after the pandemic is over?

A: No end date was included in the legislation, which would lead us to believe that the eligibility for these products will continue indefinitely.

5. Do the Health Care FSA updates in the CARES act for OTC drugs and menstrual care products extend to HSA eligible expenses as well?

A: Yes, these changes apply to Health Care FSAs, Health Savings Accounts and Health Reimbursement Accounts that allow for reimbursement of all medical care expenses.

6. Will Employee Benefits Corporation require amendments for the FSA plan impacted regulatory changes?

A: For a standard health FSA in a BESTflex Plan, and for EBC HRAs that reimburse all out-of-pocket medical care, while our documents sufficiently cover the reimbursement of OTC medications without an amendment, we will be providing an amendment to employers to clarify the treatment of OTC drugs and to extend coverage relating to menstrual care products. That is because the CARES Act amended the portion of the Internal Revenue Code specific to account-based plans, rather than the general § 213(d) tax definition of "medical care." We plan on updating our standard Plan Documents and SPDs to allow reimbursements for those expenses purchased on or after 1/1/2020 (as long as they are within the plan year) and to make clear that OTC drugs are eligible without a prescription. The final language is currently being worked on, and we expect to have a communication out to impacted employers no later than the end of this week. That communication will direct you where to find your amended Plan Document for restatement, as well as an updated SPD and an SMM for distribution.

7. Did I see that a daycare provider does not have to report earnings to IRS in order to use flex spending dependent care dollars? (can flex dollars be used to pay the next door neighbor's high school age daughter to watch someone's kids?)

A: In order to properly exclude Dependent Care FSA money on your taxes, you must give the provider's tax ID (SSN, in the case of an individual). Therefore these types of payments may be given more scrutiny by the IRS, who would expect those funds to be claimed by the provider as income on their tax return (if they are subject to filing). However, whether income is actually claimed is really up to the provider. Some informal babysitters may be reluctant to give you their SSN. The provider also cannot be the participant's tax dependent, so a high-school aged neighbor who babysits may be an eligible provider, but the child's high-school aged sibling would not be.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Permitted Election Changes (Health Care FSA & Insurance Plans)

8. If your employees have the Health Care FSA for doctors' appointments however they have been canceled due to COVID19, can they change their FSA election? If not can the employer amend the plan to have a $500 carry over for the fiscal year 2019-2020?

A: Unfortunately, at this time, the participant would not be able to change their Health Care FSA election due to canceled appointments. If the plan year has not yet ended, the employer would be able to amend their plan to add the $500 rollover feature on their plan.

9. I've heard different information about the EFMLEA back dating start date. In the case of a parent taking care of a student whose school is closed, does it back date to the day schools closed or April 1st?

A: April 1st.

10. If an employee was over 65 but had not elected to take Medicare, can they switch midyear and drop the 125 election at this time and go on to Medicare?

A: Yes, Medicare entitlement (defined as both eligible and enrolled) is a permitted election change event that allows an individual to make a change to their benefits under a § 125 plan. However, if the participant is already enrolled in Part A, enrolling in Part B now would not create a permitted election change.

The participant may or may not be able to enroll in Medicare at this time. There are three times in which an individual can join Medicare. Medicare's initial enrollment period begins three months prior to the month of the individual's 65th birthday and extends through the month in which they turn 65 and the three months following. If they do not enroll during that period of time, individuals can enroll during Medicare's General Enrollment Period (which runs from January – March annually for a coverage start date of July 1) or they must have a special enrollment period. Generally, to be eligible for the special enrollment period, there must be an event causing the change, such as a loss of employer coverage or employer's open enrollment period.

A mid-year change from an employer's group plan generally cannot be based on Medicare entitlement, and dropping the group health plan voluntarily cannot create a Medicare special enrollment period. In other words, the two events cannot be the reason for each other. There must be a separate event to initiate the change.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

11. A competitor of yours sent out a piece that Healthcare FSA can be changed if medical needs change (more or less). True or does EBC differ in that opinion? I was not aware that a change could be made due to medical need changes, but maybe that is different for COVID?

A: We are aware that one of our competitors has been putting out inaccurate statements that Health Care FSA elections can be updated whenever an employee's healthcare costs change. However, at this time the IRS has NOT made any such relief or relaxing of the rules available. It is the backbone of the irrevocable election rule, and although it is possible the IRS will soften their approach for COVID-19 related reasons, there has been no indication from them at this time that it is in the works so we, and many others, think it is a risky stance to take.

We actively continue to monitor all releases from the IRS and DOL as well as legislative activity, to ensure we know right away if there are any changes to these or any other rules. We are also heavily involved in our industry trade group with lobbying and discussions about proposals being floated behind the scenes. We will of course disseminate any relief for permitted election change rules or anything else as soon as we know details on what is passing, so we can continue to provide our partners and clients with confidence that the answers they receive from us are accurate and up-to-date.

12. What if you have an employee that doesn't feel comfortable coming to work and they have chosen to stay on unemployment. Can you still keep them on your health insurance knowing they will come back after the Safer at Home Act is lifted?

A: This will depend on how you write your leave of absence policy. As the employer, you can determine what reasons someone on a leave of absence remains benefits eligible and for how long. Once you establish a policy, it is good practice to review with any insurance carriers to be sure they will agree to the eligibility you have defined.

13. Our healthcare provider is allowing us to continue to cover employees on the plan through May if they are not currently at work. Once June 1st comes around, if the employee has not returned to work, we'll need to put them on COBRA. I thought I heard that, at that point, employees will not be able to use their FSA account until they return to work. Am I correct? If so, will employees be permitted to submit claims for the time they're on COBRA once they return to work? When they return, how can we recoup their contribution that was missed? Is it up to the employee to choose whether they want to reinstate their prior election or make a new one if it's after the 30 day window?

A: If employees are not at work but on a layoff, and they lose eligibility for their Health FSA (even if their insurance is maintained), then they should be offered COBRA if their Health Care FSA is not

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

overspent. But your policy could allow the Health Care FSA to stay active temporarily if you have a policy that maintains eligibility for a period of time during a layoff.

If they are offered but don't elect COBRA, their Health FSA will terminate and they can only get their election reinstated if they are rehired within 30 days. If on COBRA, or if your policy allows them to maintain their Health FSA and they make their payments (either pre-payment, pay-as-you-go, or catch-up) their expenses remain eligible. If they lose their account because they are terminated and then are rehired after 30 days, we don't allow them to enter the Health FSA until the next plan year to protect the employer from overspent accounts.

Permitted Election Changes (Dependent Care FSA)

14. When making a change on the Dependent Care election, what is considered the event date, which would start the 30-day period of time in which a participant can make a change?

A: If a participant is looking to make a permitted election change to their election, it generally must be within 30 days of the event (unless the plan document specifies another time period). The "date of the event" is the date in which a participant experiences a change, such as a daycare center closes, a nanny is hired, a parent begins a leave of absence, parents pull their child out of daycare, etc.

The change will be effective the LATER of the date of the event or the date that the change is requested.

15. If employee and spouse are working from home due to COVID-19 and their daycare facility remains open, but they decide to keep their dependent at home to avoid contracting the virus, can they stop Dep. Care FSA?

A: Yes. In this case, the parents are making a voluntary choice to change their daycare provider by removing them from the facility. This would allow them to revoke/reduce their Dependent Care FSA election if they are keeping their child home and not paying for care. Likewise, if they temporarily hire a nanny who charges more than the daycare, they would be able to add/increase their Dependent Care FSA election.

16. If an employee is still working but the daycare is closed, can the employee make changes to their Dependent Care FSA election?

A: Yes – the same principals as above apply, only in this case it is not a voluntary change.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

17. Would someone be able to add a Dependent Care FSA because of an increase in day care charges with schools being closed? Could they start one if they did not have one to begin with?

A: Yes, a participant can add a Dependent Care FSA (or increase their Dependent Care FSA election) based on having to add a dependent care provider or increased costs for a dependent care provider. Examples of this are having to hire a daycare provider due to schools being closed, or having to hire a personal nanny because a daycare center is closed (and the nanny costs more than the daycare center).

18. So someone can ONLY make Dependent Care FSA election changes (keeping the coverage but changing the amount paid in) if they are taking a LOA? What if they're staying on, staying eligible, but daycare is closed?

A: A leave of absence is not the only reason that a participant could use to make an eligible change. If a participant is actively working, they are able to reduce or revoke their Dependent Care FSA election based on a change in cost of care of change of provider. For example, if a participant's child's daycare has closed and the child is now staying at home and older children are caring for the child, this qualifies as a change of provider allowing for a reduction in the Dependent Care election.

19. With the Dependent Care FSA, since the daycares are closed can participants change their elections because there is less time in which they will be paying the cost? The cost didn't change but the number of months needed has changed.

A: In the above scenario, the cost has changed as the participant has had to change providers (due to the closure of the daycare). At this time, the cost of the daycare is $0. This would allow for the participant to revoke or decrease their election. When the daycare reopens and again begins charging for care, this again would be a change in cost event and the participant could choose to again change their election.

20. If you are not currently enrolled in Dependent Care FSA, could you enroll now because your kids are not in school and you now need to pay for child care?

A: Yes! Having to secure eligible new dependent care services would qualify as a permitted election change event, allowing someone to increase or add the dependent care FSA. The change must be requested within 30 days of the change and the election would be made prospectively.

21. Do you think the IRS will update the DCA? People are having money deducted for Dependent Care FSA and dependent care facilities are not open.

A: Because we don't yet know what the IRS will do in terms of relief for flexible spending accounts, we would encourage participants who are concerned about their accounts to consider making a permitted election change if they are not currently paying for dependent care.

The material provided in this Q&A is by Employee Benefits Corporation and is for general information purposes only. The information does not constitute legal advice and may not be relied upon by anyone as such.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

22. My question is about the Dependent Care FSA. It mentioned that if you put money aside for planned summer camp for your child but have not enrolled in it yet and if the program gets cancelled due to Covid-19 issues, that's not reason for the employee to make a change to their DC election. They have to already be enrolled in it first and then it gets cancelled, then they can make a change. Am I understanding that correctly? If they aren't enrolled, is there anything they can do or will they be out that money if camps don't open up for kids this summer.

A: The Dependent Care FSA permitted election change rules are quite flexible, but just as with any permitted election change, the person has to actually experience a change in their provider or cost for the event to allow an updated election. As an example, if I make a $600 Dependent Care FSA election at open enrollment because my child usually attends 3 weeks of summer day camp at $200/week, at the time I made the election I had a child eligible for care, but my child has no dependent care provider. If later in the year I decide not to send my child to that summer day camp, and instead send them to an overnight camp (which is not eligible), I did not experience a change in provider that allows me to change my Dependent Care FSA election because before the change and after the change I had no provider. Similarly, my cost before and after the change was $0.

If instead, I enrolled my child in the summer day camp, I think it's arguable that at this point you have a provider. So if, after enrolling, you change to a different camp or decide not to send them at all, or as is the case with COVID-19, the camp cancels, I think you could argue you had a provider before the cancellation and now you don't, so the election can change.

Now, the IRS is fairly gray on all of the circumstances around Dependent Care FSA changes, so it is hard to predict how they would respond to these arguments. It is really up to the employer to determine if the participant has experienced a change in provider or cost. However, the safest course for a participant is to not elect Dependent Care FSA until they actually enroll their child in care, when the provider and cost is certain.

Because you asked what to do now that this has happened, one option would be to find an alternative summer day camp that is still taking enrollments as of this time. If, after enrolling a child, that camp cancels, or the employee decides not to send them after all, that would be a permitted election change event allowing them to stop their deductions. However, any deposit or registration fees would not be eligible to be reimbursed from the Dependent Care FSA because those can only be reimbursed once care has started. The amount in the account to date could be used on a summer nanny or other custodial care (the hiring of whom would be another permitted election change event!), it just can't be refunded to the participant.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Plan Design Features: Runout, Grace Period, Rollover

23. I thought the grace period for an FSA was to allow the employee additional months to submit claims for expenses incurred in the plan year, not to extend use of the funds into the new year?

A: *Grace period* extends the plan year by up to an additional 2 ½ months if the employer adopts this feature as part of their plan design. Payroll deposits are collected over 12 months and claims are eligible over the 14 ½ month coverage period. The grace period allows FSA participants additional time in which to incur expenses from the prior year's plan balance.

Runout is a period of time directly following the end of the plan year, which is available for administrative functions. During the runout, flexible spending account (FSA) participants can submit claims that were incurred during the prior plan year. Any expenses incurred after the last day of the plan year are not eligible for reimbursement during the runout period for the prior plan year.

Most employer plans have a runout period specified in their plans (most frequently, 90 days). An employer has to specifically design their plan to have a grace period, and the runout period overlaps with the grace period most of the time, so that a 90-day runout period ends only half a month after the grace period.

24. Can you chose to rollover $500 and extend grace period to 2.5 months into 2021? Or do you have to choose one or the other.

A: You cannot have both rollover and grace period on your Health Care FSA. You have to choose one or the other. For Dependent Care FSA, only grace period is permitted.

You CAN have rollover on your Health Care FSA and grace period on your Dependent Care FSA.

25. Can an employer amend their FSA plan now to allow a longer run-out period for the CY 2019?

A: Typically a plan's runout period can only be changed prior to the end of the plan year, but during these extraordinary times many employers have determined such a change is worth any risk to the plan. If an employer is interested in extending their runout, and your runout period has not yet ended, please contact your Client Services Consultant and they can provide you with more information about extending your runout period. If your runout period has already ended, Employee Benefits Corporation has already begun processing your forfeiture report and payment and we are not able to extend the runout at this point.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

Collecting Premiums and Contributions during Unpaid Leave

26. Can employer decide the method for paying for benefits during unpaid LOA? Paid LOA?

A: An employer can choose which option(s) to provide to employees for paying for their benefits during an unpaid leave. If an employer chooses to include prepayment as an option and the leave is FMLA leave, it cannot be the only option. During a paid LOA, an employer continues to withdraw from an employee's paycheck as if they were active.

27. Is it discriminatory to require some employees to pay as you go and allow others to do the catch up?

A: If an employer is looking to require different payment options to different employees or classes of employees, we would recommend you first consult with your legal counsel to determine if this would be permitted with your defined leave policy.

28. If you allow an employee to use the "Catch-up" option for premiums can you make note/policy that they will owe full amount by check if they don't return to work?

A: Yes, this policy should be disclosed to participants. It would be up to the employer and any state law regarding withholdings to determine appropriate actions for collections of the debt.

29. When on leave, an EE pays benefits on pay as you go, can the employer require the EE to pay both the EE and ER portions of their premiums?

A: Any additional cost to continue benefits under a leave should be defined in the leave policy. This would not be an option for participants under an FMLA leave. One caution, charging the full premium to employees could run afoul of ACA affordability rules. It will often be more beneficial to provide that an unpaid leave is a loss of eligibility and to offer COBRA.

Employers also should be aware that any amount employer contributes toward the premium is eligible for tax credit, however amounts paid post-tax by employees is not. Read more here (Determining the Amount of Allocable Qualified Health Plan Expenses).

30. When employees are furloughed on an 'unpaid' leave, with benefits being billed to them, if they do not pay for those billed benefits in the timely manner indicated, can we cancel their benefits for 'non-payment of premium' and NOT offer Cobra continuation? We are an employer of 900 employees.

A: If an employee is on an unpaid, non-FMLA leave and they do not pay their premiums, they can be terminated for non-pay. The employer must determine if this is a COBRA eligible event or not. It can be classified as a "delayed event" based on the reduction in hours. It also could be considered a

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

termination for non-payment. We would recommend that if COBRA is not being offered, that you review with legal counsel to be sure it is not required.

31. We are allowing our furlough employees to pay as go for their cafeteria plans. Is there any specific COVID-19 laws for cafeteria plans that need to be complied with regarding how employee need to pay during furlough?

A: You should follow a documented policy regarding the treatment of benefits during the furlough. This should detail what participants are required to pay, when payment is due, the grace period on payment due dates, and what will occur if payment is not made. Many employers will follow guidance under FMLA on these items (such as a 30-day payment grace period) and treat a furlough as an employer-mandated leave of absence.

32. If we have to offer Cobra on these furloughed employees who did not pay for their billed benefits in the timely fashion; should they return to their position, did I understand that benefits will need to be offered back to them at their status, immediately?

A: If an employee is terminated from active group benefit plans during a leave (regardless of the reason for the coverage termination), you should refer to your plan documents and employer policies regarding what happens when an employee returns to work. Other than for FMLA leaves of absence or termination and rehire within a 30-day period, employers are not required to reinstate an employee's benefits immediately without requiring a new waiting period. However, it is somewhat common for employers to waive a waiting period for an employee returning to work, and simply collect any missed payments upon return to work. For FSAs, policies can mandate that the benefits resume at the prior elections if you considered the individual to have continued employment during the furlough. If however, the employee was considered to have been terminated during the leave, you should refer to the rehire provisions within your plan to determine if an employee is eligible to rejoin the plan, and if so, if a waiting period would apply.

33. If an employer pursues furloughs, and employees maintain benefits using the Pay as you go process to pay the premiums, how would the Employer proceed if the employee does not submit timely payment for their Flex Spending elections for healthcare? Does the employer stop the benefit due to lack of payment? If so, when would the benefit stop? The end of the month in which payment was received?

A: It is best to include what happens in the case of non-payment within your employer policy and/or communications to employees.

Generally on a furlough, if an employee does not timely pay their premium, the employer can terminate coverage for non-payment, back to the date coverage was last paid for in full. For a health FSA, that would usually be based on your payment period. Keep in mind that while nonpayment is

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

not a COBRA qualifying event, if the person never paid the premium then the coverage loss could be viewed as based on their termination/reduction in hours event, in which case it may be safer to offer COBRA if the health FSA is not overspent.

Alternately, you can choose to have the employer cover the missed premiums during the leave and keep coverage active. When the participant returns to work, you can collect missed payments from their pay on a pre-tax basis.

34. §125 plan, amount withheld equally for each pay period. Employee agrees to defer wages so no wages being paid (though still working full time) so the per-pay amount of §125 withholding is not being made. Are those amounts lost or can the unpaid amounts be withheld on a future pay period?

A: Generally cafeteria plan deductions must be taken from pay otherwise due to an employee, on whatever payroll schedule the employer has in place. However, we recommend you consult with an employment attorney as to your wage payment obligations and the timing of cafeteria plan deductions; cafeteria plan regulations prohibit using a cafeteria plan as a way to defer compensation past the plan year.

COBRA

35. For the COBRA date, if the staff member's last day is April 15, but the insurance is paid through the April 30th, is the COBRA Qualifying Event April 15th or 30th?

A: This will depend on the defined eligibility within your Plan(s), and whether eligibility ends on the date of termination/reduction in hours or the end of the month. Employers should follow their Plan(s) eligibility, but it is not uncommon for coverage to continue to the end of the month in which the triggering event occurs. To have a COBRA qualifying event, you need a triggering event that causes a loss of coverage. If the date of the triggering event is not the same as the date of the coverage loss, the date of the coverage loss is the qualifying event date.

Employees Exempt from FFCRA

36. For employers considered "essential", is there an exception for the first 80 hours/FFCRA?

A: There is no exception in to either the Emergency Paid Sick Leave Act or the Emergency Family and Medical Leave Expansion Act for "essential" workers. There is only an exception for "health care providers" and "emergency responders". Details about those two exceptions can be found on the Department of Labor's Q/A for FFCRA, found at: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#56.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

37. For an essential employee who is unable to work due to lack of childcare, I want to confirm, are they to be paid the first 80 hours, then 10 days of unpaid time? Sorry, this is confusing.

A: Please see above regarding no exception for "essential" employees. However, more generally, leaves under Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act are designed to work together for employees who need to have time off to care for a child who is out of school or daycare. Those employees would be able to receive up to a total of 12 weeks of leave paid up to $12,000 when using both leaves together for that specific reason. Employees could choose to take the first 2 weeks unpaid and later if they or their family became sick with COVID-19, use the EPSLA leave for those reasons, but cannot take more than 12 weeks total for child care reasons.

38. We are a private ambulance company, and wondered if you could bring more clarity to the exempt status for first responders, healthcare workers, etc.?

A: The following Q/A from the Department of Labor should provide the guidance you are looking for. It can be found at: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#56

Emergency FML Expansion Act (EFMLEA)

39. Is the leave under the expanded leave in addition to what someone could get under the regular FMLA leave?

A: No. If your employer was covered by the FMLA prior to April 1, 2020, your eligibility for expanded family and medical leave depends on how much leave you have already taken during the 12-month period that your employer uses for FMLA leave. You may take a total of 12 workweeks for FMLA or expanded family and medical leave reasons during a 12-month period. If you have taken some, but not all, 12 workweeks of your leave under FMLA during the current 12-month period determined by your employer, you may take the remaining portion of leave available. If you have already taken 12 workweeks of FMLA leave during this 12-month period, you may not take additional expanded family and medical leave.

For example, assume you are eligible for preexisting FMLA leave and took two weeks of such leave in January 2020 to undergo and recover from a surgical procedure. You therefore have 10 weeks of FMLA leave remaining. Because expanded family and medical leave is a type of FMLA leave, you would be entitled to take up to 10 weeks of expanded family and medical leave, rather than 12 weeks. And any expanded family and medical leave you take would count against your entitlement to preexisting FMLA leave.

If your employer only becomes covered under the FMLA on April 1, 2020, this analysis does not apply.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

40. If an employee is out on FMLA or had used their full FMLA leave before this pandemic, can they receive that 12 weeks and then the EFMLEA? If an employee uses EFMLEA in 2020 can they still be eligible for an additional 12 weeks of FMLA if it is a separate event in 2020?

A: No, the EFMLEA did not expand the maximum amount of FMLA leave available to qualifying employees. Refer to the previous question for more information.

41. My company is not currently required to offer FMLA. Do one or both of these new leave acts apply to me?

A: The Emergency Family and Medical Leave Expansion Act (EFMLEA) modifies the FMLA to include additional employers – any private employer with less than 500 employees. There is no location requirement and only a very narrow exemption for small businesses (less than 50 employees) whose business will go under if they don't allow it. But this leave is only available for one reason: to provide 12 weeks of leave, including 10 weeks of paid leave, for an employee to care for their child under age 18 whose school or daycare has closed for COVID-19-related reasons.

The Emergency Paid Sick Leave Act (EPSLA) that creates emergency paid 2-week (80 hours) leave applies to those same employers. However, that leave could be for much broader reasons – the one above, as well as if the employee is experiencing symptoms and seeking medical diagnosis related to COVID-19, is subject to a quarantine or isolation order or advised to self-quarantine by a health care provider, or is caring for someone who is subject to quarantine or isolation order or has been advised to self-quarantine by a health care provider.

42. What paperwork is required for the employees to take the EPSLA and the new Paid FMLA?

A: Information about paperwork required to take EPSLA or EFMLEA leave can be found in the Department of Labor's Q/A about FFCRA, found here: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#16

43. If both mom and dad are employed at the same company, can mom take 10 weeks off, while dad works... and then dad takes his 10 weeks off while mom works? Or can they tag-team and take alternate weeks off, etc.?

A: The FMLA gives each employees the right to their own leave if they qualify, so it would appear that if both parents are employed by the same employer, each parent would be eligible to take leave, just not at the same time. Refer to the Department of Labor's Q/A about FFCRA, found here: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#69

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com

44. What if a spouse is a farmer, can another family member stay home with the EFMLEA?

A: Any employee who is unable to work (or telework) and has worked for you for at least 30 days can take the EFMLEA leave to care for their child under age 18 whose school or daycare has closed for COVID-19-related reasons. Really, it appears that you have to take the employee's word that there is not an alternative care provider to take care of the child. So if your employee has a farmer spouse and tells you that they cannot work because they have to provide care for their child whose school or daycare has closed, you will have to provide the leave.

Miscellaneous

45. Will you issue a sample letter or poster employers can use to relay this info about the EPSLA and EFMLEA?

A: The Department of Labor has a poster and fact sheet that should help. You can go to https://www.dol.gov/agencies/whd/pandemic and see all of the poster versions and fact sheets that may apply.

46. Can we get the list of States that are not allowing the terming of benefits?

A: We are not aware of a central resource for this, but currently we know that Alaska, Arkansas, California, Connecticut, Delaware, Georgia, Maryland, Massachusetts, and Washington all have laws preventing termination for non-payment under a variety of circumstances. However, it is best to check with the specific insurance department of any state in which you have employees or hold insurance policies.

47. Can you please define "within stability period" for ACA lookback periods. What is that period? If someone reduces hours, can we still continue the benefits if they are in a stability period?

A: Employers who are covered by the shared responsibility rules under the ACA (generally employers with 50+ employees) have to determine employee eligibility for health benefits in accordance with ACA rules. Most employers determine employee eligibility on a monthly basis. However, employers can alternatively use a "lookback" measurement method to determine employee eligibility (usually for employees with variable hour schedules). If an employer uses this method, they are required to define a "stability period" during which employees who have met benefits eligibility during the lookback period must maintain the employee's benefits. Benefits must be maintained during the employee's stability period even if their hours are reduced because they are on leave.

Employee Benefits Corporation
1350 Deming Way, Suite 300
Middleton, WI 53562-4640
P: 800 346 2126 | 608 831 8445
F: 608 831 4790
An employee-owned company
www.ebcflex.com