

COMPLIANCE ALERT

DOL CLARIFIES FFCRA AND CARES ACT COVID-19 TESTING COVERAGE REQUIREMENTS

June 23, 2020

The Families First Coronavirus Response Act (FFCRA), which became law on March 18, 2020, and the Coronavirus Aid, Relief, and Economic Security Act (CARES), enacted on March 27, 2020, both contained provisions addressing COVID-19 testing (and eventual vaccination) costs as well as expanding telehealth service availability.

Since both laws passed, the U.S. Department of Labor (DOL), Health and Human Services (HHS) and the Treasury (collectively, the Departments) have released multiple sets of FAQ and other guidance to explain how they will interpret and enforce the various employer and group health plan sponsor obligations in the two laws. [FAQs](#) released April 11, 2020, specifically addressed several questions plan sponsors had raised regarding covering coronavirus testing costs and increasing telehealth access.

As employers have begun to implement return-to-work policies, many have questioned how FFCRA and CARES apply to testing employees who are planning to return to the workplace. The Departments today issued another set of [FAQ](#) that addresses employers' ongoing obligations to cover certain testing expenses under their group health plans; however, return-to-work COVID-19 testing is not required to be covered by a group health plan.

COVID-19 Testing

FFCRA generally requires group health plans to provide benefits for certain items and services related to diagnostic testing to detect SARS-CoV-2 or diagnose COVID-19. Plans must cover these costs with no cost sharing (including deductibles, copayments and coinsurance), prior authorization or any other medical management requirement, when furnished on or after March 18, 2020 (FFCRA's effective date), and until the current national emergency period ends.

Self-insured plans. The new FAQ reiterates prior guidance that explicitly confirmed that FFCRA's health plan provisions apply to self-insured group health plans which include private employment-based group health plans (plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), non-federal governmental plans (such as plans sponsored by states and local governments), and church plans. Plans that do not cover at least two current employees, such as retiree-only plans, are not required to comply.

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Types of tests required. Some employers have questioned which types of diagnostic tests must be covered. The new FAQs clarify that all in vitro diagnostic tests for COVID-19 that have received an emergency use authorization (EUA) under section 564 of the Federal Food, Drug, and Cosmetic Act must be covered and directs employer plan sponsors to a complete list of such tests on the EUA page of [FDA website](#).

Further, the FDA website provides a [list of clinical laboratories and commercial manufacturers](#) that have notified FDA that they have validated their own COVID-19 test and are offering the test as outlined in FDA guidance. If a clinical laboratory or commercial manufacturer is listed on the FDA's website as having provided notice under the FDA guidance, the Departments state that plans can reasonably assume that the laboratory or manufacturer has requested or intends to request an EUA. Therefore, plans must cover in vitro diagnostic tests for COVID-19 that are included on the list. Plans may request that a laboratory or commercial manufacturer provide documentation, such as a copy of the EUA request or pre-EUA submitted to FDA, to demonstrate that it has requested or intends to request an EUA.

Finally, the new FAQs provide that plans also must cover at-home testing when an attending health care provider has determined that the test is medically appropriate for the individual based on current accepted standards of medical practice.

Return-to-work testing excluded. The Departments state that COVID-19 testing for surveillance or employment purposes is not required to be covered under the FFCRA. Clinical decisions about testing are made by the individual's attending health care provider and may include testing of individuals with signs or symptoms compatible with COVID-19, as well as asymptomatic individuals with known or suspected recent exposure to COVID-19, that is determined to be medically appropriate by the individual's health care provider, consulting CDC guidelines as appropriate. However, testing conducted to screen for general workplace health and safety (such as employee return-to-work programs), for public health surveillance for COVID-19, or for any other purpose not primarily intended for individualized diagnosis or treatment of COVID-19 or another health condition is beyond the scope of the FFCRA.

Multiple individual tests. The new FAQs clarify that there is no numerical limit on the number of tests a plan must cover relating to a specific individual. Any number of tests must be covered as long as the tests are diagnostic and medically appropriate for the individual, as determined by an attending health care provider in accordance with current accepted standards of medical practice.

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Facility fees included. If a facility fee (e.g., a fee for using facilities or equipment an individual's provider does not own or that are owned by a hospital) is charged for a visit that results in an order for or administration of a COVID-19 diagnostic test, a plan must cover any facility fee charged for such a visit to the extent the facility fee relates to furnishing or administering a COVID-19 test, or to evaluating an individual to determine his or her need for testing.

Balance billing issues. The new FAQs provide that the Departments interpret FFCRA and CARES (as well as related guidance) as intended to protect participants, beneficiaries, and enrollees from being balance billed for an applicable COVID-19 test. CARES contemplates that a plan will reimburse a COVID-19 testing provider either a negotiated rate or an amount that equals the cash price for such service that is listed by the provider on a public website. In either case, the amount the plan or issuer reimburses the provider constitutes payment in full for the test, with no cost-sharing to the individual or other balance due. Therefore, the Departments state that they view the law to generally preclude balance billing for COVID-19 testing.

CARES provides that, if a plan does not have a negotiated rate with a COVID-19 diagnostic testing provider, the plan shall reimburse the provider an amount that equals the cash price for such service as listed by the provider on a public website, or the plan may negotiate a rate with the provider that is lower than the cash price. Plans that do not already have a negotiated rate with a provider may seek to negotiate to determine a rate, and state laws governing reimbursements may apply. For example, many states have balance billing laws that establish dispute resolution processes for issuers and providers to determine reimbursement rates for certain items and services. Such dispute resolution processes would continue to apply in these states to the issuers and providers that do not already have a negotiated rate.

Notice requirements. The Departments clarify that an employer plan sponsor may reverse the expanded coverage required under FFCRA and CARES when the declared national emergency relating to COVID-19 ends, a plan sponsor must notify participants, beneficiaries, or enrollees of the general duration of the additional benefits coverage or reduced cost-sharing within a reasonable timeframe in advance of the reversal of the changes. This is in keeping with prior guidance that relaxed the generally required advanced notice provisions relating to summary of benefits and coverage (SBC) disclosures.

Conclusion

These are extraordinary times, and the ramifications of COVID-19 will continue to evolve in the coming weeks and months. We will continue to monitor developments, including further departmental and agency guidance as we receive it and will provide the latest updates as they become available.

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We express to all of our clients and friends our deep appreciation for our ongoing relationships, and we look forward to strengthening those ties as we work through this shared adversity. Stay safe and be well.

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