



# COVID-19 FAQs with the Compliance Corner Committee

**Presented by Compliance Corner Committee Members**

April 30, 2020

# NAHU Legislative Council

NAHU's Legislative Council is responsible for developing and advocating for market-based solutions which provide for continued and improved choice, accessibility and affordability of health, disability, and long-term care insurance, employee benefits, and other products designed to meet the health, financial and retirement security needs of the American people.

Additionally, NAHU has several legislative working groups that report to the Legislative Council, which work on various aspects of healthcare policy that impact agents and brokers: Cost Containment; Employer-based Health Plans; Individual Market; Long-Term Care; Medicare; Prescription Drug Task Force; and the new Mental Health Task Force.

Want to get involved? Contact Dan Parker at [dparker@nahu.org](mailto:dparker@nahu.org). The deadline to apply is May 15!



# QUESTIONS?

You may ask your question in the questions box at any time. Any questions that we do not answer during the webinar will be posted on the compliance corner webpage in the coming weeks.

*The information herein should not be construed as legal or tax advice in any way. Regulations, guidance and legal opinions continue to change. The preparer has gathered public information and has attempted to present it in an easily readable and understandable format. Situations vary, technical corrections and future guidance may vary from what is discussed in the presentation.*

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# TODAY'S PRESENTERS



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# AGENDA

- Top frequently asked questions
- Tax credits
- New reliefs granted by the DOL

# FFCRA – Effective Dates

What is the effective date of the Families First Coronavirus Response Act (FFCRA), which includes the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act?

The FFCRA's paid leave provisions are effective on April 1, 2020, and apply to leave taken between April 1, 2020, and **December 31, 2020**.

# FFCRA – Full Time Employee

## What is a full-time employee under the Emergency Paid Sick Leave Act?

For purposes of the Emergency Paid Sick Leave Act, a full-time employee is an employee who is normally scheduled to work 40 or more hours per week.

In contrast, the Emergency Family and Medical Leave Expansion Act does not distinguish between full- and part-time employees, but the number of hours an employee normally works each week will affect the amount of pay the employee is eligible to receive.



# FFCRA – Stay-at-Home Orders

**Are stay-at-home and shelter-in-place orders the same as quarantine or isolation orders? If so, when can I take leave under the FFCRA for reasons relating to one of those orders?**

Yes, for purposes of the FFCRA, a Federal, State, or local quarantine or isolation order includes shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority. However, in order for such an order to qualify you for leave, being subject to the order must be the reason you are unable to perform work (or telework) that your employer has for you. You may not take paid leave due to such an order if your employer does not have work for you to perform as a result of the order or for other reasons.

# FFCRA – Stay-at-Home Orders

Are stay-at-home and shelter-in-place orders the same as quarantine or isolation orders? If so, when can I take leave under the FFCRA for reasons relating to one of those

**Example:** If you are prohibited from leaving a containment zone and your employer remains open outside the containment zone and has work you cannot perform because you cannot leave the containment zone, you may take paid leave under the FFCRA.

**Example:** Similarly, if you are ordered to stay at home by a government official for fourteen days because you were on a cruise ship where other passengers tested positive for COVID-19, and your employer has work for you to do, you are also entitled to paid sick leave if you cannot work (or telework) because of the order.

# FFCRA – Stay-at-Home Orders

**Are stay-at-home and shelter-in-place orders the same as quarantine or isolation orders? If so, when can I take leave under the FFCRA for reasons relating to one of those**

If, however, your employer closed one or more locations because of a quarantine or isolation order and, as a result of that closure, there was no work for you to perform, you are not entitled to leave under the FFCRA and should seek unemployment compensation through your State Unemployment Insurance Office.

# FFCRA – Stay-at-Home Orders

**If my employer closes my worksite while I am on paid sick leave or expanded family and medical leave, what happens?**

Your employer must pay for any paid sick leave or expanded family and medical leave you used before the employer closed. As of the date your employer closes your worksite, you are no longer entitled to paid sick leave or expanded family and medical leave, but you may be eligible for unemployment insurance benefits. This is true whether your employer closes your worksite for lack of business or because the employer was required to close pursuant to a Federal, State or local directive.

# FFCRA – Health Plan Expenses

**Does the amount of qualified health plan expenses include both the portion of the cost paid by the Eligible Employer and the portion of the cost paid by the employee?**

The amount of qualified health plan expenses taken into account in determining the credits *generally* includes both the portion of the cost paid by the Eligible Employer and the portion of the cost paid by the employee with pre-tax salary reduction contributions. However, **the qualified health plan expenses should not include amounts that the employee paid for with after-tax contributions.**

NOTE: See IRC Sections 5000(b)(1), 3121(a) and 1.106-1(a)

# FFCRA – Health Plan Expenses

**For an Eligible Employer that sponsors more than one plan for its employees (for example, both a group health plan and a health flexible spending arrangement (health FSA)), or more than one plan covering different employees, how are the qualified health plan expenses for each employee determined?**

The qualified health plan expenses are determined separately for each plan. Then, for each plan, those expenses are allocated to the employees who participate in that plan. In the case of an employee who participates in more than one plan, the allocated expenses of each plan in which the employee participates are aggregated for that employee.

# FFCRA – Health Plan Expenses

**For an Eligible Employer who sponsors a fully-insured group health plan, how are the qualified health plan expenses of that plan allocated to the qualified sick or family leave wages on a pro rata basis?**

An Eligible Employer who sponsors a fully-insured group health plan may use any reasonable method to determine and allocate the plan expenses, including (1) the COBRA applicable premium for the employee typically available from the insurer, (2) one average premium rate for all employees, or (3) a substantially similar method that takes into account the average premium rate determined separately for employees with self-only and other than self-only coverage.

If an Eligible Employer chooses to use one average premium rate for all employees, the allocable amount for each day an employee covered by the insured group health plan is entitled to qualified leave wages could be determined using the following steps:

1. The Eligible Employer's overall annual premium for the employees covered by the policy is divided by the number of employees covered by the policy to determine the average annual premium per employee.
2. The average annual premium per employee is divided by the average number of work days during the year by all covered employees (treating days of paid leave as a work day and a work day as including any day on which work is performed) to determine the average daily premium per employee. For example, a full-year employee working five days per week may be treated as working 52 weeks x 5 days or 260 days. Calculations for part-time and seasonal employees who participate in the plan should be adjusted as appropriate.
3. Eligible Employers may use any reasonable method for calculating part-time employee work days.

The resulting amount is the amount allocated to each day of qualified sick or family leave wages.



# FFCRA – Health Plan Expenses

**For an Eligible Employer who sponsors a fully-insured group health plan, how are the qualified health plan expenses of that plan allocated to the qualified sick or family leave wages on a pro rata basis?**

**Example:** An Eligible Employer sponsors an insured group health plan that covers 400 employees, some with self-only coverage and some with family coverage. Each employee is expected to have 260 work days a year. (Five days a week for 52 weeks.) The employees contribute a portion of their premium by pre-tax salary reduction, with different amounts for self-only and family. The total annual premium for the 400 employees is \$5.2 million. (This includes both the amount paid by the Eligible Employer and the amounts paid by employees through salary reduction.)

For an Eligible Employer using one average premium rate for all employees, the average annual premium rate is \$5.2 million divided by 400, or \$13,000. For each employee expected to have 260 work days a year, this results in a daily average premium rate equal to \$13,000 divided by 260, or \$50. That \$50 is the amount of qualified health expenses allocated to each day of paid sick or family leave per employee.



# FFCRA – Health Plan Expenses

**For an Eligible Employer who sponsors a self-insured group health plan, how are the qualified health plan expenses of that plan allocated to the qualified leave wages on a pro rata basis?**

An Eligible Employer who sponsors a self-insured group health plan may use any reasonable method to determine and allocate the plan expenses, including (1) the COBRA applicable premium for the employee typically available from the administrator, or (2) any reasonable actuarial method to determine the estimated annual expenses of the plan.

If the Eligible Employer uses a reasonable actuarial method to determine the estimated annual expenses of the plan, then rules similar to the rules for insured plans are used to determine the amount of expenses allocated to an employee. That is, the estimated annual expense is divided by the number of employees covered by the plan, and that amount is divided by the average number of work days during the year by the employees (treating days of paid leave as work days and any day on which an employee performs any work as work days). The resulting amount is the amount allocated to each day of qualified sick or family leave wages.

# FFCRA – Health Plan Expenses

**For an Eligible Employer who sponsors a health savings account (HSA), or Archer Medical Saving Account (Archer MSA) and a high deductible health plan (HDHP), are contributions to the HSA or Archer MSA included in the qualified health plan expenses?**

The amount of qualified health plan expenses does not include Eligible Employer contributions to HSAs or Archer MSAs. Eligible Employers who sponsor an HDHP should calculate the amount of qualified expenses in the same manner as an insured group health plan, or a self-insured plan, as applicable.

# FFCRA – Health Plan Expenses

**For an Eligible Employer who sponsors a health reimbursement arrangement (HRA), a health flexible spending arrangement (health FSA), or a qualified small employer health reimbursement arrangement (QSEHRA), are contributions to the HRA, health FSA, or QSEHRA included in the qualified health plan expenses?**

The amount of qualified health plan expenses may include contributions to an HRA (including an individual coverage HRA), or a health FSA, but does not include contributions to a QSEHRA. To allocate contributions to an HRA or a health FSA, Eligible Employers should use the amount of contributions made on behalf of the particular employee.

# Calculation Qualified Health Plan Expenses

## QUALIFIED HEALTH PLAN EXPENSES

Amounts paid or incurred by employer to provide and maintain a group health plan

- Prorated over the period of leave
- Includes:
  - Amounts to the extent they are excluded from an employee's gross income
  - Cost paid by employer and employee pre-tax contribution
  - Contributions made on behalf of employees to FSA, HRA or ICHRA
  - Does not include contributions for QSEHRA or to MSA or HSA

❖ *benefits mandatory while out on leave*

## DETERMINATION METHODS

Amounts paid or incurred by employer to provide and maintain a group health plan

- Prorated over the period of leave
- Includes:
  - Amounts to the extent they are excluded from an employee's gross income
  - Cost paid by employer and employee pre-tax contribution
  - Contributions made on behalf of employees to FSA, HRA or ICHRA
  - Does not include contributions for QSEHRA or to MSA or HSA

❖ *benefits mandatory while out on leave*

## SAMPLE CALCULATION

### Example

Qualified leave wages per day

*(applies to items 2 & 3 for fully-insured and item 3 for self-funded plans)*

a) Average annual premium per employee =

*$\frac{\text{Overall annual premium}}{\# \text{ of covered employees}}$*

b) Average daily premium per employee =

*$\frac{\text{Average annual premium per employee}}{\text{Average \# of workdays in the year for all covered employees}}$*

c) Example: Total premium = \$5.2 million, 400 employees, each employee expected to work 260 days in the year

*$\$5.2\text{m} \div 400 \div 260 = \$50 \text{ qualified health expenses per day}$*

# Private Employer Tax Savings and Reimbursements

TAX CREDITS APPLY FOR LEAVE DURING THE PERIOD OF  
APRIL 1, 2020 THROUGH DECEMBER 31, 2020

- Fully refundable credit up to daily or aggregate maximums
- Not subject to employer's portion of Social Security taxes on paid sick time wages
- Credit includes:
  - employer's share of the Medicare tax
  - allocable cost of health insurance coverage while sick

## Amount of Credit



- Eligible employers will claim on Form 941, *Quarterly Federal Return*
- May immediately reduce current federal taxes liability by retaining funds
- If amount due is greater than tax liability, employer may request cash advance by using Form 7200, *Advance Payment of Employer Credits Due to COVID-19*

## Payment of Credit



- Employers should retain the following records for 4 years after the date the tax is due or paid, whichever is later:
  - Copies of employee leave request with required information;
  - Detail of federal employment taxes;
  - Determination of qualified sick wages and health plan expenses; employer's share of Medicare tax imposed; and
  - Forms 941 and 7200

## Document Retention



# Common Questions – Eligibility and Benefits

When are employees entitled to benefits?

Benefits apply to individuals – if employee is unable to work or telework due to COVID-19 reason

If on sick leave for COVID-19 reason prior to 4/1/20, FFCRA benefits begin as of 4/1/20

How does FFCRA work if my business closes?

Benefits do not apply when business closes, even if due to a COVID-19 reason

Benefits do not apply business furloughs – business must have work for employee

Do I always pay 80 hours of sick leave?

Provision is number of hours over a typical two-week period, up to 80 hours

Only applies if the employee normally works a 40 hour work week

Does the EFMLA provide a new 12-week FMLA period?

If employer was subject to FMLA prior to 4/1/20, the number of weeks of EFMLA is contingent on how much FMLA already taken in 12-months

Employees may take a total of 12 workweeks for FMLA or EFMLA during the current 12-month period, as defined by the employer



# Common Questions – Admin and Eligibility

## Intermittent leave

EPSLA must be taken in full-day increments for COVID-19 reason, unless employee is teleworking, paid sick leave for qualifying

EFMLA may be taken intermittently if working at employer's site or teleworking, if employer allows it

## Concurrency with sick leave

May only take concurrent leaves during first two weeks of EPSLA if employer agrees to supplement leave pay up to normal earnings

During 10 weeks for EFMLA, employee may elect, or be required by employer, to take remaining EFMLA and other existing leave

## FFCRA and other taxes

Employers receiving tax credits for qualified leave wages under FFCRA may not use these same wages for any of these credits

→ Employer credit for paid family leave (Code § 45S)  
→ CARES ACT – Employee Retention Credit or Paycheck Protection Program “payroll cost” for purposes of loan forgiveness

## DOL Temporary Non-enforcement

No enforcement against a public or private employer for violations occurring March 18, 2020 through April 17, 2020 if:

Violation is not willful or employer provides a written commitment to comply or provides a remedy to the violation upon notification

# NAHU COVID-19 Relief Requests Granted



Secretary Eugene Scalia  
**Department of Labor**  
200 Constitution Ave NW  
Washington, DC 20210

Secretary Alex Azar  
**Department of Health and Human Service**  
200 Independence Ave SW  
Washington, DC 20201

Secretary Steven Mnuchin  
**Department of Treasury**  
1500 Pennsylvania Ave NW  
Washington, DC 20220

Administrator Seema Verma  
**Centers for Medicare and Medicaid Services**  
200 Independence Ave SW  
Washington, DC 20201

April 7, 2020

Dear Secretaries Scalia, Mnuchin Azar and Administrator Verma,

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants, and employee benefits specialists. The members of NAHU work daily to help millions of individuals and employers purchase, administer and utilize health insurance coverage. During this unprecedented time, our members are working with employers and individuals to provide assistance in maintaining health insurance coverage.

We appreciate the work Congress and the Administration have done to provide relief to the impact of the COVID-19 pandemic. In addition to the legislation, guidance, and emergency regulations that have already been released, we believe the Administration can easily provide additional relief by taking further actions through guidance and regulation.

We are including a list of suggestions for agency action that we believe will allow more Americans to maintain or obtain health insurance coverage both in the group and individual market, as well as allow for employers to continue to stay in business and maintain employment. **In many cases, the issues raised are administrative barriers for employers to continue to provide health insurance coverage while remaining in compliance with current regulations. Employers are concerned that non-compliance could lead to the loss of coverage or government financial penalties at a time in which many of those same employers are applying for Paycheck Protection Program loans to maintain operations.**

Our suggestions are organized by agency. We recognize that in some cases more than one agency will need to take action, or will have to coordinate with state and local policymakers in order to provide relief. NAHU and our members stand at the ready to provide any assistance possible to provide the suggested relief to American healthcare consumers.

**Department of Labor**



# NAHU COVID-19 Relief Requests Granted

On April 29, 2020 the Dept of Labor released guidance that addresses many of the topics included in the letter.

Guidance applies to:

- employee benefit plans
- employers
- labor organizations and other plan sponsors
- plan fiduciaries
- participants and beneficiaries
- service providers

Subject to ERISA from March 1, 2020 until **60 days after the announcement of the end** of the COVID-19 National Emergency or any other date determined by the DOL in a future notice

# NAHU COVID-19 Relief Requests Granted

## Deadline compliance

- A period of up to one year that may be disregarded in determining the date by which any action is required or permitted to be completed
- No plan shall be treated as failing to be operated in accordance with the terms of the plan solely as a result of complying with the postponement of a deadline

# NAHU COVID-19 Relief Requests Granted

## Examples

The following examples illustrate the timeframe for extensions required by this notice. An assumed end date for the National Emergency was needed to make the examples clear and understandable. Accordingly, **the Examples assume that the National Emergency ends on April 30, 2020, with the Outbreak Period ending on June 29, 2020 (the 60th day after the end of the National Emergency).**

To the extent there are different Outbreak Period end dates for different parts of the country, the Agencies will issue additional guidance regarding the application of the relief in this notice.

# NAHU COVID-19 Relief Requests Granted

## Example 1 (Electing COBRA).

(i) Facts. Individual A works for Employer X and participates in X's group health plan. Due to the National Emergency, Individual A experiences a qualifying event for COBRA purposes as a result of a reduction of hours below the hours necessary to meet the group health plan's eligibility requirements and has no other coverage. Individual A is provided a COBRA election notice on April 1, 2020.

(ii) What is the deadline for A to elect COBRA?

Conclusion. In Example 1, Individual A is eligible to elect COBRA coverage under Employer X's plan. The Outbreak Period is disregarded for purposes of determining Individual A's COBRA election period. The last day of Individual A's COBRA election period is 60 days after June 29, 2020, which is August 28, 2020.

# NAHU COVID-19 Relief Requests Granted

Example 2 (Special enrollment period).

- (i) Facts. Individual B is eligible for, but previously declined participation in, her employer-sponsored group health plan. On March 31, 2020, Individual B gave birth and would like to enroll herself and the child into her employer's plan; however, open enrollment does not begin until November 15.
- (ii) When may Individual B exercise her special enrollment rights?

Conclusion. In Example 2, the Outbreak Period is disregarded for purposes of determining Individual B's special enrollment period. Individual B and her child qualify for special enrollment into her employer's plan as early as the date of the child's birth. Individual B may exercise her special enrollment rights for herself and her child into her employer's plan until 30 days after June 29, 2020, which is July 29, 2020, provided that she pays the premiums for any period of coverage

# NAHU COVID-19 Relief Requests Granted

Example 3 (COBRA premium payments).

- (i) Facts. On March 1, 2020, Individual C was receiving COBRA continuation coverage under a group health plan. More than 45 days had passed since Individual C had elected COBRA. Monthly premium payments are due by the first of the month. The plan does not permit qualified beneficiaries longer than the statutory 30-day grace period for making premium payments. Individual C made a timely February payment, but did not make the March payment or any subsequent payments during the Outbreak Period. As of July 1, Individual C has made no premium payments for March, April, May, or June.
- (ii) Does Individual C lose COBRA coverage, and if so for which month(s)?

Conclusion. In this Example 3, the Outbreak Period is disregarded for purposes of determining whether monthly COBRA premium installment payments are timely. Premium payments made by 30 days after June 29, 2020, which is July 29, 2020, for March, April, May, and June 2020, are timely, and Individual C is entitled to COBRA continuation coverage for these months if she timely makes payment. Under the terms of the COBRA statute, premium payments are timely if made within 30 days from the date they are first due. In calculating the 30-day period, however, the Outbreak Period is disregarded, and payments for March, April, May, and June are all deemed to be timely if they are made within 30 days after the end of the Outbreak Period. Accordingly, premium payments for four months (i.e., March, April, May, and June) are all due by July 29, 2020. Individual C is eligible to receive coverage under the terms of the plan during this interim period even though some or all of Individual C's premium payments may not be received until July 29, 2020. Since the due dates for Individual C's premiums would be postponed and Individual C's payment for premiums would be retroactive during the initial COBRA election period, Individual C's insurer or plan may not deny coverage, and may make retroactive payments for benefits and services received by the participant during this time.

# NAHU COVID-19 Relief Requests Granted

Example 4 (COBRA premium payments).

- (i) Facts. Same facts as Example 3. By July 29, 2020, Individual C made a payment equal to two months' premiums.
- (ii) For how long does Individual C have COBRA continuation coverage?

Conclusion. Individual C is entitled to COBRA continuation coverage for March and April of 2020, the two months for which timely premium payments were made, and Individual C is not entitled to COBRA continuation coverage for any month after April 2020. Benefits and services provided by the group health plan (e.g., doctors' visits or filled prescriptions) that occurred on or before April 30, 2020 would be covered under the terms of the plan. The plan would not be obligated to cover benefits or services that occurred after April 2020.



# NAHU COVID-19 Relief Requests Granted

Example 5 (Claims for medical treatment under a group health plan).

- (i) Facts. Individual D is a participant in a group health plan. On March 1, 2020, Individual D received medical treatment for a condition covered under the plan, but a claim relating to the medical treatment was not submitted until April 1, 2021. Under the plan, claims must be submitted within 365 days of the participant's receipt of the medical treatment.
- (ii) Was Individual D's claim timely?

Conclusion. Yes. For purposes of determining the 365-day period applicable to Individual D's claim, the Outbreak Period is disregarded. Therefore, Individual D's last day to submit a claim is 365 days after June 29, 2020, which is June 29, 2021, so Individual D's claim was timely.



# NAHU COVID-19 Relief Requests Granted

Example 6 (Internal appeal-disability plan).

- (i) Facts. Individual E received a notification of an adverse benefit determination from Individual E's disability plan on January 28, 2020. The notification advised Individual E that there are 180 days within which to file an appeal.
- (ii) What is Individual E's appeal deadline?

Conclusion. When determining the 180-day period within which Individual E's appeal must be filed, the Outbreak Period is disregarded. Therefore, Individual E's last day to submit an appeal is 148 days (180 – 32 days following January 28 to March 1) after June 29, 2020, which is November 24, 2020.

# NAHU COVID-19 Relief Requests Granted

Example 7 (Internal appeal – employee pension benefit plan).

- (i) Facts. Individual F received a notice of adverse benefit determination from Individual F's 401(k) plan on April 15, 2020. The notification advised Individual F that there are 60 days within which to file an appeal.
- (ii) What is Individual F's appeal deadline?

Conclusion. When determining the 60-day period within which Individual F's appeal must be filed, the Outbreak Period is disregarded. Therefore, Individual F's last day to submit an appeal is 60 days after June 29, 2020, which is August 28, 2020.



# QUESTIONS?

You may ask your question in the questions box at any time. Any questions that we do not answer during the webinar will be posted on the compliance corner webpage in the coming weeks.