TO: Southwestern Electrical Cooperative
FROM: Andy Martone
SUBJECT: FFCRA multiemployer benefits contributions analysis and Q & A
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The Families First Coronavirus Response Act (“FFCRA”) took effect on April 1, 2020. It was the first major federal legislation designed to address the national emergency resulting from the COVID-19 pandemic. Because it was passed on a “fire drill” basis, the FFCRA contains several ambiguities that remain unresolved. At this point, interpreting FFCRA can be a moving target, and as the law develops, many interpretations will be subject to change.

One of the major ambiguities under the FFCRA is whether an employer that is signatory to a collective bargaining agreement that includes obligations to contribute to a multiemployer health and welfare (“H&W”) funds and/or a pension fund is required to make contributions while its union workers are on either Emergency Sick Leave (“Sick Leave”) or Emergency FMLA leave (“FMLA Leave”).

Today, the roadmap to answering these questions looks like this:

1. **Does the collective bargaining agreement (“cba”) require the contributions?**

   Generally, if a collective bargaining agreement requires contributions for “hours paid” (or similar language), then the employer is obligated to make both H&W and pension contributions for both Sick Leave and FMLA Leave. If the collective bargaining agreement requires contributions based on “actual hours worked” (or similar language), then the collective bargaining agreement does not require contributions for hours of Sick Leave or hours of FMLA Leave.
Question: How can I tell whether I am required to make contributions to a multiemployer H&W or pension fund when an employee takes leave under the FFCRA?

Answer: This is not a simple answer, it is a process. The first place to look to answer this question is the contribution language contained in the collective bargaining agreements (and any Trust Agreements incorporated into the collective bargaining agreements).

There are basically two types of contribution language used in collective bargaining agreements: 1) language requiring contributions for “hours worked” (which means that the employer only contributes to the funds for hours actually worked); and 2) language requiring contributions for “hours paid” (which means that the employer has to contribute to the funds for all hours that are paid to employee, not just hours that are paid for actual work). Hours paid for sick leave or for vacation examples where an employee is paid for hours they did not actually work.

If a collective bargaining agreement specifies a contributions are owed for “hours paid” (or similar language), then the employer is required to make both H&W and pension contributions for every hour for which an employee is paid, including hours they are paid for Emergency Sick Leave and/or Emergency FMLA leave under the FFCRA. For many collective bargaining agreements, the inquiry ends here.

If a collective bargaining agreement (and related agreements) only require contributions for “hours worked” or “actual hours worked,” then the collective bargaining agreement does not require an employer to make contributions behalf of employees who take Emergency Sick Leave or Emergency FMLA leave.

2. If the cba does not require the employer to make pension contributions, then pension contributions are probably not required under the FFCRA.

However, the question of whether an employer is required to make H&W contributions for Sick Leave hours and FMLA Leave hours is more complicated.

Question: If my collective bargaining agreement is an “actual hours worked” collective bargaining agreement, do I have to make pension contributions for employees on FFCRA leave?

Answer: Probably not. Making pension contributions for an employee is not required under the explicit language under the FFCRA. However, you should determine if you are signatory to a Participation Agreement or if the Fund's Trust Agreement require such contributions.

The answer with respect to H&W contributions is much more complicated.
3. If the cba does not require the employer to make H & W contributions, the employer still has to make contributions for employees who take FMLA leave.

There is nothing in the FFCRA that requires an employer to contribute to a multiemployer H&W fund unless that fund provides employees with pay for sick leave and/or FMLA leave – which many/most funds do not. However, the Family Medical Leave Act itself has always required such contributions (unless a fund explicitly states that contributions are not required if an employee is on FMLA leave). 29 C.F.R. Section 825.11.

The Emergency FMLA section of the FFCRA – called the “Emergency Family and Medical Leave Expansion Act”— is not a new, standalone law—it is an amendment to the existing Family Medical Leave Act (FFCRA, Section 3102), which has always required an employer to continue an employee’s health insurance while the employee is on medical leave.

In addition to the normal reasons for leave under the FMLA (which includes situations where the employee is suffering from a serious health conditions or if the employee is needed to care for a family member with a serious health condition – like Covid-19, depending on the circumstances), the FFCRA added a new category of leave: if the “employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”

If an employee qualifies for this new form of Emergency FMLA leave, then the employer would have to make H&W contributions on their behalf.

**Question:** If my collective bargaining agreement does not require me to make contributions for hours when an employee is not actually working, do I have to make H&W contributions for employees who take Emergency FMLA leave?

**Answer:** Yes. For employees on both Emergency FMLA leave and regular FMLA leave, the employer is still required to make contributions.

4. With regard to employees who are qualify for Emergency Sick Leave under the Emergency Paid Sick Leave Act – Section 5102 of the FFCRA – but who do not qualify for Emergency FMLA (Section 3102 of the FFCRA), the question of whether an employer must continue contributions is still open.

The Emergency Paid Sick Leave Act is an entirely new law, not an amendment to an existing law like the Emergency FMLA. There is nothing in the Emergency Paid Sick Leave Act that requires the employer to maintain health coverage, and (unlike the Emergency FMLA), it is not part of a larger statute that requires an employer to maintain health care coverage.
Employees are entitled to paid sick leave under the Emergency Paid Sick Leave Act for 6 reasons, some of which also covered by the FMLA (as amended by the Emergency FMLA):

- 1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19. **Probably not covered by FMLA unless one of the other FMLA qualifying reasons exists.**

- 2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19. **Covered by the FMLA if the employee’s health condition rises to the level of a “serious health condition” as defined by the FMLA and H&W contributions would be required. Otherwise an open issue.**

- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis. **Also covered by FMLA- contributions required.**

- The employee is caring for an individual who is:
  - subject to an order as described in subparagraph (1) or
    **Probably not covered by FMLA unless one of the other FMLA qualifying reasons exists.**
  - has been advised as described in paragraph (2).
    **Covered by the FMLA if the employee’s health condition rises to the level of a “serious health condition” as defined by the FMLA – H&W contributions would be required. Otherwise an open issue.**

- The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID–19 precautions.
  **Also covered by Emergency FMLA- contributions required.**

- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor
  **Open issue – no such conditions have been specified (so far).**

If an employee takes Emergency Sick Leave for a reason that is also covered by the FMLA (including the Emergency FMLA), then the employer would have to make H&W contributions to the fund unless the fund does not require contributions while an employee is on FMLA. If this is not the case, there is nothing in the FFCRA that requires an employer to make contributions under a collective bargaining agreement for employees who do not qualify for emergency or standard FMLA.
a. Covid-19 may not automatically be a “serious health condition” under the FMLA.

The FFCRA did not change the FMLA’s definition of “serious health condition:

§ 825.113 Serious health condition.

(a) For purposes of FMLA, serious health condition entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115.

(b) The term incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

(c) The term treatment includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

Although it is quite possible that Congress will legislate (or an agency will regulate) that Covid-19 is by definition a “serious health condition” – regardless of its effect on the individual – today this point is not clear.
b. With regards to the issue of health care coverage, on April 1, 2020 the Department of Labor issued a “temporary rule” (based on HIPAA and the FMLA) that reads as follows:

Section 826.110(a)

_While an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave, an Employer must maintain the Employee's coverage under any group health plan_ (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) _on the same conditions as coverage would have been provided if the Employee had been continuously employed during the entire leave period. All Employers covered by the EPSLA or the EFMLEA are subject to the requirement to maintain health coverage._ The term “group health plan” has the same meaning as under the FMLA (see § 825.102 of this chapter). Maintenance of individual health insurance policies purchased by an Employee from an insurance provider, as described in § 825.209(a) of this chapter, is the responsibility of the Employee.

This Temporary Rule (based on the FMLA’s requirement that the employer maintain health coverage for employees on FMLA leave – 20 C.F.R. Section 825) grafts the requirement that the employer maintain health coverage from the FMLA – which contains this requirement in the language of the statute – onto the Emergency Paid Sick Leave Act – which contains no such requirement.

HIPAA does not require an employer to contribute to a multiemployer H&W plan beyond the requirements of the employer’s cba. 29 C.F.R. Section 2590.702. This is because a cba that only requires that contributions for “hours actually worked” does not “discriminate” between employees who fail to meet the minimum number of contribution hours due to illness and employees who fail to meet the minimum number of contribution hours for other, non-health related reasons because all employees are subject to the same requirement, whether they are sick or not. This is why an employer does not have to maintain contributions to an “actual hours worked” benefit fund whenever an employee misses a day with the flu.

HIPAA specifically explains that minimum hours requirements contained in cbas do not violate its nondiscrimination provisions if they apply equally to all employees, regardless of whether their failure to meet the minimum number of contributions to qualify for coverage is due to illness, vacation or for other reasons:

_(3) Relationship to plan provisions defining similarly situated individuals—_

_(i) Notwithstanding the rules of paragraphs (e)(1) and (2) of this section, a plan or issuer may establish rules for eligibility or set any individual's premium or contribution rate in accordance with the rules relating to similarly situated individuals in paragraph (d) of this section. Accordingly, a plan or issuer may distinguish in rules for eligibility under the plan between full-time and part-time employees, between permanent and temporary or seasonal employees, between current and former employees, and between employees currently performing services and employees no longer performing services for the employer, subject to paragraph (d) of this section. However, other Federal or State laws (including_
the COBRA continuation provisions and the Family and Medical Leave Act of 1993) may require an employee or the employee's dependents to be offered coverage and set limits on the premium or contribution rate even though the employee is not performing services.

(ii) The rules of this paragraph (e)(3) are illustrated by the following examples:

Example 1. (i) Facts. Under a group health plan, employees are eligible for coverage if they perform services for the employer for 30 or more hours per week or if they are on paid leave (such as vacation, sick, or bereavement leave). Employees on unpaid leave are treated as a separate group of similarly situated individuals in accordance with the rules of paragraph (d) of this section.

(ii) Conclusion. In this Example 1, the plan provisions do not violate this section. However, if the plan treated individuals performing services for the employer for 30 or more hours per week, individuals on vacation leave, and individuals on bereavement leave as a group of similarly situated individuals separate from individuals on sick leave, the plan would violate this paragraph (e) (and thus also would violate paragraph (b) of this section) because groups of similarly situated individuals cannot be established based on a health factor (including the taking of sick leave) under paragraph (d) of this section.

Example 2. (i) Facts. To be eligible for coverage under a bona fide collectively bargained group health plan in the current calendar quarter, the plan requires an individual to have worked 250 hours in covered employment during the three-month period that ends one month before the beginning of the current calendar quarter. The distinction between employees working at least 250 hours and those working less than 250 hours in the earlier three-month period is not directed at individual participants or beneficiaries based on any health factor of the participants or beneficiaries.

(ii) Conclusion. In this Example 2, the plan provision does not violate this section because, under the rules for similarly situated individuals allowing full-time employees to be treated differently than part-time employees, employees who work at least 250 hours in a three-month period can be treated differently than employees who fail to work 250 hours in that period. The result would be the same if the plan permitted individuals to apply excess hours from previous periods to satisfy the requirement for the current quarter.

There is nothing in HIPAA or the FFCRA that requires an employer to contribute to a multiemployer H&W plan.
c. Employees covered by multiemployer H&W plans normally do not automatically lose “coverage” if their employer does not make contributions while they are sick.

Many multiemployer H&W plans base eligibility for coverage on an aggregate total of hours for which contributions were made on the employee’s behalf during a prior period of time, often ranging from 3 months to 6 months. As an example, one major fund provides coverage if an employee had 500 hours of contributions made on their behalf in the prior 6 months, based on a calendar year – in other words, if the employee had 500 hours of contributions made on their behalf from January 1-June 30, they would be covered from July 1- December 31 and if that employee had 500 hours of contributions made on their behalf from July 1 – December 31, they would have coverage from January 1 – June 30 for the next calendar year. Plan documents and requirements vary and should be reviewed.

Multiemployer H&W plans that utilize an eligibility formula based on a prior period’s contributions do not cancel coverage when an employer ceases contributing.

d. The DOL’s April 1 Temporary Rules for Emergency Paid Sick Leave Act explicitly respect cbas.

The DOL’s Temporary Rules relating to multiemployer plans and Emergency Sick leave (Section 826.120 (a) and (D) explain how an employer may satisfy its obligations to provide Paid Sick Leave “in accordance with its existing collective bargaining obligations.”

e. Under the Emergency Paid Sick Leave Act, an employer is required to pay employees their “regular rate of pay” as defined by the Fair Labor Standards Act (“FLSA”), which specifically excludes benefit payments to a multiemployer fund.

The Emergency Paid Sick Leave Act requires employers to pay employees up to 80 hours of sick pay at their “regular rate of pay” as defined by the FLSA. **FFCRA Section 5110.5.B.1.i.** The FLSA specifically excludes employer contributions to multiemployer benefit plans from the definition of “regular rate of pay”. **29 C.F.R Section 778.200 (a)(4).**
Question: If my collective bargaining agreement does not require the contributions, do I have to make H&W contributions for employees who take Emergency Sick Leave that is not also covered by Emergency FMLA leave?

Answer: Arguably not, although there are still ambiguities. However, rather than adopting a blanket rule for these varied situations, employers should review the decision on whether to make such contributions on a situation-by-situation basis.

In addition, employers may decide to make these contributions for ease of administration, to avoid disputes and to take advantage of the tax credits that appear to be available.

5. It looks like employers will be able to receive tax credits for the costs of maintaining health coverage.

Section 7001 (d) of the FFCRA provides for a tax credit for an employer’s costs to maintain a group health plan. The Internal Revenue Service’s current guidance on this subject is fairly explicit:

The Eligible Employer is entitled to a fully refundable tax credit equal to the required paid sick leave. This tax credit also includes the Eligible Employer’s share of Medicare tax imposed on those wages and its allocable cost of maintaining health insurance coverage for the employee during the sick leave period (qualified health plan expenses). The Eligible Employer is not subject to the employer portion of social security tax imposed on those wages. (Eligible Employers subject to the Railroad Retirement Tax Act are not subject to either social security tax or Medicare tax on the qualified sick leave wages; accordingly, they do not get a credit for Medicare tax.)