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COVID-19 and Employee Benefits: New Relief Act, Vendor Performance, HIPAA Issues, Paid Leave, 401(k) Considerations

Recent IRS Guidance, Compliance Issues, Legal and Regulatory Obligations,
Responsibility to Employees and Communications

THURSDAY, MAY 21, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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May 21, 2020

COVID-19 and Employee Benefits: Regulatory Update and Best Practices

Rachel Leiser Levy, Principal

Ryan Temme, Principal

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Agenda

- Group Health Plans
 - COVID Testing
- HIPAA and Privacy
- Paid Leave
- 401(k) Considerations

COVID Testing

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COVID-19 Testing Requirements

- Group health plans and health insurance issuers must cover:
 - FDA-approved COVID-19 diagnostic testing products
 - Emergency Use or seeking Emergency Use
 - State approved
 - HHS approved
 - Serology tests
 - Included related items and services furnished during a provider visit (office, telehealth, urgent care, and emergency room)
 - Must be provided without cost sharing, prior authorization, or other medical management requirements

COVID-19 Testing Requirements

- What plans are affected?
 - Self insured and insured plans
 - Grandfathered plans
 - Government programs
 - Not excepted benefits, STLDI, or (likely) retiree-only plans
- Effective on March 18
- Minimum payment requirements for non-contracted providers

Tri-Agency FAQs Part 42

- Tri-agency guidance on FFCRA (“Families First”) and CARES Act
- Fourteen questions addressing
 - Applicability of Families First to group health plans and health insurance issuers
 - What must be covered by group health plans and issuers
 - Whether plan amendments are required
 - State requirements
 - Excepted benefits
 - Telehealth

Tri-Agency FAQs Part 42

- Q&A 1-4
 - Group health plans (insured and self-funded) must cover COVID-19 tests and certain other items and services from March 18, 2020 until the end of the public health emergency
 - Must cover:
 - in vitro diagnostic tests and serological tests for the detection of SARS-CoV-2 or the diagnosis of COVID-19
 - the administration of the test
 - items and services furnished during provider office visits (in-person and telehealth), urgent care visits, and ED visits that result in an order for, or administration of, an in vitro diagnostic test for COVID-19

Tri-Agency FAQs Part 42

- Q&A 5. What “relates to the furnishing or administration” of a COVID-19 test?
 - Example: if the individual’s attending provider determines that other tests (e.g., influenza tests, blood tests, etc.) should be performed during a visit (which term here includes in-person visits and telehealth visits) to determine the need of such individual for COVID-19 diagnostic testing, and the visit results in an order for, or administration of, COVID-19 diagnostic testing, the plan or issuer must provide coverage for the related tests

Tri-Agency FAQs Part 42

- Q&A 7. Does the plan have to cover out-of-network tests?
 - Yes. If the plan does not have a negotiated rate, the plan must pay the cash price listed by the provider on its website
- Q&A 8. What is a “visit?”
 - “traditional and non-traditional care settings” including drive-through screening
- Q&A 9. Are plan amendments necessary?
 - No enforcement action against plans that provide greater coverage related to COVID-19 without providing the SBC’s 60-day advance notice
 - If changes are maintained beyond the emergency period, all the usual plan document and disclosure requirements apply (except advance notice)

Tri-Agency FAQs Part 42

- Q&A 11-12. Excepted benefits
 - An EAP will not be considered to provide benefits that are significant in the nature of medical care solely because it offers benefits for diagnosis and testing for COVID-19 during the emergency period
 - What about diagnosis and testing for COVID-19 at an on-site medical clinic? Yes – still excepted
- Q&A 14. Telehealth
 - The Departments will apply the same non-enforcement policies described in Q8 to situations where a plan or issuer adds benefits, or reduces or eliminates cost sharing, for telehealth and other remote care services during the emergency period

CMS guidance on provider relief funds

- \$30 Billion in direct payments to providers
- Eligible if billed Medicare in 2019 and treating confirmed or suspected cases of COVID-19
- Attestations include representation that the provider will not balance bill for COVID-19 related testing or treatment
 - Limited guidance and no complementary requirement for payers

HIPAA and Privacy

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HIPAA Privacy Update

General Rules

- HIPAA applies to a covered entity – health plan, health care provider, health care clearinghouse
- If add new service provider (e.g., telehealth, COVID app), likely need BAA
- A covered entity or business associate must have a HIPAA authorization to use or disclose PHI, except for purposes of treatment, payment, or health care operations (TPO) or unless a specific exception applies
- Examples of TPO: paying claims, care coordination within health plan or with providers, sending information to enrollees about available benefits

HIPAA Privacy Update

General Rules

- HIPAA authorization must be in writing, signed by enrollee, and contain specific content required by HIPAA
- Some exceptions include:
 - Reporting to public health authority
 - Disclosures for government oversight
 - To avert imminent threat (but very fact-specific)
- But see specific requirements for each of these exceptions

HIPAA Privacy Update

COVID Guidance

- www.hhs.gov/hipaa
 - Includes COVID-specific page
- Bulletins outline existing regulations and exceptions that could apply in COVID context
- Nonenforcement guidance applies to providers (not health plans)

HIPAA Privacy Update

Nonenforcement Guidance

- Telehealth
 - No enforcement under HIPAA security rules related to good faith provision of telehealth services as long as use non-public facing remote communication product
- Business Associates
 - No enforcement if BA discloses for public health purposes even if not expressly permitted in BAA; must notify covered entity within 10 days
- Hospitals with Disaster Protocol
 - No enforcement related to privacy notice, right to confidential communications, right to restrict, and disclosures to family members

HIPAA Privacy Update

CARES Act – Part 2 Information

- CARES Act conforms Part 2 privacy rules to HIPAA
- Rules under 42 CFR Part 2 apply to substance use disorder (SUD) information
- Generally, SUD provider must obtain individual's consent to further disclose information, even to other provider or health plan (for every disclosure)
- In turn, provider or health plan also likely needs consent to further disclose
- Difficult for providers/health plans because two sets of rules: Part 2 and HIPAA

HIPAA Privacy Update

CARES Act – Part 2 Information

- Part 2 provider may obtain single consent for future disclosures for TPO until revoked by the patient
- HIPAA covered entity may further disclose Part 2 information as otherwise permitted by HIPAA
- Adopts HIPAA's definitions for TPO
- Adds HIPAA breach rules, privacy notice, and civil and criminal penalties to Part 2
- Changes take effect 12 months after date of enactment; directs HHS to issue regulations implementing changes

EEOC Privacy Update

- **Is COVID-19 a disability under the ADA?**
 - The EEOC has indicated that there is still much that is unknown about the virus and it is unclear if COVID-19 is a disability under the ADA. Regardless, an employer may bar an employee from entering the workplace because he may pose a direct threat to other employees.

EEOC Privacy Update

- **Can an employer ask an employee whether he has COVID-19 or symptoms of COVID-19? What if the employee refuses to answer?**
 - Yes. The ADA allows an employer to ask an employee if they have COVID-19 or symptoms associated with it (cough, sore throat, fever, chills, shortness of breath).
 - If the employee refuses to answer the question, the employer can bar the employee from the workplace. But the employer may want to inquire why the employee is reluctant to share in case it is due to privacy concerns.

EEOC Privacy Update

- **Can an employer ask an employee if they have family members with COVID-19?**
 - No. Asking if a family member has COVID-19 may be a violation of the Genetic Information Nondiscrimination Act, or GINA, which prohibits an employer from asking its employees for their family medical history.
 - An employer can ask if the employee has come into contact with anyone that has COVID-19 or symptoms of COVID-19.

EEOC Privacy Update

- **What if a manager knows an employee has COVID-19 or its symptoms. Can the manager disclose the COVID-19 status to other employees or senior management?**
 - The ADA requires employers to keep all medical information confidential, even if the information is not related to a disability.
 - The information that an employee has symptoms of COVID-19 or has COVID-19 is medical information that must be kept confidential.
 - The employee's identity may be disclosed to senior management responsible for reporting or safety in the organization.
 - The employee's identity may NOT be disclosed to the employee's co-workers.

EEOC Privacy Update

- **Can an employer exclude an employee over age 65 from reporting to work because the CDC identified this group as a high risk group?**
 - No. The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination of employees age 40 or older.
 - An employer cannot bar them or require them to telecommute.
 - An employer must treat this group of individuals the same way it treats other employees.

Paid Leave

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Expanded FMLA Leave and Sick Leave

- Two sets of provisions:
 - Expanded FMLA leave
 - Emergency paid sick leave
 - Both effective no later than April 2, 2020 and through December 31, 2020

Expanded FMLA Leave

- Applies to employers with fewer than 500 employees and government employers
- Applies to employees who have been employed at least 30 days
- Up to 12 weeks of leave related to an emergency related to COVID-19
 - If employee is unable to work (or telework) to care for son/daughter under 18 if no school or child care due to COVID-19

Expanded FMLA Leave

- First 10 days unpaid
- Remainder is paid based on an amount that is not less than 2/3rds of an employee's regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work
 - There is a per-employee cap of \$200 per day or \$10,000 in the aggregate

Emergency Paid Sick Leave

- Applies to employers with fewer than 500 employees
- Applies to all employees, regardless of how long employed
- Paid sick leave if the employee:
 - is him/herself under or is caring for an individual who is under quarantine/isolation (mandated by the government or advised by health care provider) due to COVID-19
 - is experiencing symptoms of COVID-19 and seeking medical diagnosis
 - is caring for a son/daughter where the school/place of care is closed or the child care provider is unavailable due to COVID-19 precautions
 - is experiencing any other substantially similar condition, as specified by HHS (in consultation with DOL and Treasury)

Emergency Paid Sick Leave

- Full-time employees – 80 hours of paid leave
- Part-time employees – the number of hours the employee works on average over a 2-week period
- Generally calculated based on regular rate of pay or minimum wage
 - Per-employee cap of \$511 per day and \$5,110 in the aggregate for leave related to the employee.
 - Per-employee cap of \$200 per day and \$2,000 in the aggregate for leave related to other individuals
- Cannot require employees to use other paid leave first

Refundable Tax Credits

- New refundable tax credits for employers subject to the expanded FMLA and paid sick leave requirements
- Tax credit on expanded FMLA wages
 - Per-employee credit capped at \$200 per day and \$10,000 in the aggregate
- Tax credit on emergency paid sick leave wages
 - Per-employee credit capped at \$511 per day for leave related to the employee and \$200 per day for leave related to other individuals
 - The maximum number of days taken into account per employee is 10 days
- Increase in tax credit based on “qualified health plan expenses” allocable to expanded FMLA and/or paid sick leave wages
 - Based on amounts paid or incurred by the employer to provide and maintain a group health plan, but only to the extent that such amounts are excluded under Code section 106

Refundable Tax Credits

- Tax credits are applied against the employer portion of Social Security taxes
 - Employers can increase the amount of the tax credit by the amount of Medicare taxes paid by the employer on the expanded FMLA and paid sick leave wages

401k Plans

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Providing Participant Liquidity

- Participant Loans
 - Existing Provisions: Up to aggregate \$50,000 (not to exceed 50% of account balance). Code section 72(p)
 - Amend Plan to Add or Expand Loans (increase number of loans, eliminate any restrictions on the types of loans)
 - Consider ways to increase processing time

Participant Loans

- Legislative Relief (CARES Act – optional, need plan amendment by end of 2022)
 - Increase to \$100,000 aggregate (not to exceed 100% of account balance)
 - To impacted participants
 - For loans made within 180 days of enactment
 - Permit one-year suspension of loan repayments due between March 27 through December 31, 2020
 - For impacted participants
 - This suspension period is disregarded for 5 year term period (or home loan period)

Participant Loans

- Impacted participant:
 1. individual diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the CDC,
 2. whose spouse or dependent is so diagnosed, or
 3. individual experiences adverse financial consequences as a result of being quarantined; being furloughed or laid off or having work hours reduced to such virus; being unable to work due to a lack of child care due to the virus; closing or reducing hours of a business owned or operated by the individual due to the virus; or such other factors determined by Treasury.

In-Service Distributions

- **Hardship Distributions**
 - Safe Harbor definition (optional) –
 - Federally declared disaster
 - Employee's principal residence or principal place of employment at the time of the disaster was located in the area designated by FEMA for individual assistance
 - Expenses and losses (including loss of income) on account of the disaster
 - Facts and circumstances test
- **Other in-service events**
 - Age 59-1/2
 - Layoffs, furloughs
 - Fixed number of year (2 year/5 year rules)

Legislative Relief – CARES Act

- 2020 distributions – like other qualified disaster distributions
- Optional special in-service distribution right
- Up to \$100,000 for an impacted participant (see above, with employee certification)
- Special taxation (at option of participant) – taxed over 3 years
- Repayment right within three years to plan/IRA
- No 10% early withdrawal tax (Code 1 or 2 in box 7, Form 1099-R)
- Not eligible for rollover treatment (10% voluntary withholding, no 402(f) notice)
- Requires plan amendment by end of 2022

Participant Disclosures and Education

- Consider if a notice would be appropriate
- The notice should steer clear of providing investment advice

Participant Disclosures and Education

- Interpretative Bulletin 96-1
- Plan Information
- General financial and investment information
- Asset allocation information
- Interactive investment materials

Participant Disclosures and Education

- Disclosure Content
- Reminder that the plan offers a diverse array of investment choices
- Reminder that the plan offers resources such as a financial adviser
- Reminder that the plan's record-keeper also has educational resources

Plan Changes

- Any changes that were in the pipeline should be revisited, for example:
 - Investment fund line-ups
 - Service providers

Reviewing and Monitoring Investments

- Designated Investment Options
 - Monitoring investment options and participant trading
 - Reach out to record-keeper for statistics?
 - Is there a need to provide education (see above)?
 - Is there a need to suspend daily trading (or altogether)?
 - Is there a need to replace options?
 - Can/should the employer be ready to provide liquidity?
 - Reach out to managed account providers?
 - Stable value funds and wrappers
 - Dialog with provider?
 - Liquidity issues?

Reviewing and Monitoring Investments

- Designated Investment Options
 - Money market options/STIFs/cash sweeps
 - SEC providing liquidity to some mutual funds
 - OCC still considering same for STIFs
 - FDIC coverage for bank deposits
 - Fixed income funds – mortgage-related exposure
 - Need for due diligence?
 - How are they handling withdrawal requests?
 - Traditional annuity options

Reviewing and Monitoring Investments

- Impact on Brokerage Windows
 - Safety valve or trap for the unwary?
 - Margin accounts – options/short trading/day trading

Q & A

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