Information for Employers and Group Health Plan Sponsors on COVID-19

March 17, 2020

States and the federal government have issued (or re-issued) guidance for employers in response to the recent novel coronavirus disease 2019 (COVID-19) pandemic. As of March 14, 2020, the Centers for Disease Control and Prevention (CDC) has reported more than 2,000 cases from 49 states and Washington, DC. Agency guidance includes the following:The Departments have determined that HHS will address the interplay between manufacturers' coupons and out-of-pocket limits in future guidance.

- Internal Revenue Service (IRS): High Deductible Health Plans and Expenses Related to COVID-19
- Centers for Medicare and Medicaid Services (CMS): FAQs on Essential Health Benefit Coverage and the Coronavirus
- Equal Employment Opportunity Commission (EEOC): Pandemic Preparedness in the Workplace and the Americans With Disabilities Act (ADA)
- U.S. Department of Labor (DOL): COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act Questions and Answers

We expect additional guidance in the coming weeks. There will likely be COVID-19 related legislation as well. On March 14, the House of Representatives passed the Families First Coronavirus Response Act (with adjustments on March 16) which includes emergency paid sick leave and job-protected paid family and medical leave. The Act will head to the Senate the week of March 16, where it's expected to pass. The Act applies to employers with less than 500 employees, primarily because there are tax credits to assist employers in paying employees. In the meantime, below are highlights of state action and other guidance for employers related to COVID-19.

State Mandates and Related Guidance

Some states have begun directing insurance companies to eliminate cost-sharing for COVID-19 testing. These insurance mandates apply directly to fully insured group health plans; self-insured ERISA plans would not be subject to any state insurance mandates, although third party administrators may be making certain changes automatically unless the employer opts-out. Likewise, some health insurance carriers in non-mandated states have indicated that they will voluntarily waive charges for COVID-19 testing for participants in fully insured group health plans or individual market plans.

IRS / HSA-Qualified HDHPs

The IRS has provided that, until further guidance is issued, a high deductible health plan (HDHP) will not fail to be HSA-qualified merely because the health plan provides health benefits associated with testing for and

treatment of COVID-19 without regard to whether the minimum deductible has been satisfied. This extends to all medical care services received and items purchased associated with testing for and treatment of COVID-19 that are provided by a health plan.

Part of the government's response to COVID-19 is removing barriers to testing for and treatment of COVID-19. Therefore, the IRS has extended this relief due to the nature of this public health emergency, and to avoid delays or financial disincentives that might otherwise impede testing for and treatment of COVID-19 for participants in HDHPs.

All other HSA eligibility requirements are maintained at this time. Employers sponsoring HDHPs or other health plans should consult with their broker to determine how their insurance carrier or third party administrator will handle benefits for testing and treatment of COVID-19, including the potential application of any deductible or cost sharing.

Note that the IRS did not go so far as to change HDHP rules to except telehealth generally for non-COVID-19 related illnesses. In other words, employers who waive all telehealth copays may during the pandemic may jeopardize HSA eligibility. That said, we have seen some insurance carriers and telehealth vendors willing to waive copays for all telehealth visits for a limited duration (e.g., 2-3 months). Those employers with HSA-qualified plans who wish to broaden their telehealth program to include all visits should consider doing so only for a limited duration and understand that the IRS does not seem to be fully on board with that approach yet. In addition, an employer extending no-cost telehealth for all visits should consider whether to extend the same treatment for virtual behavioral health visits.

Note that many physicians, providers, and health care systems are extending (or have already extended) telehealth visits to their patients. These are coded the same or similar as an office visit and require copay or deductible amounts to be met. A virtual visit with a member's own primary care physician may not have the same HDHP restrictions as a telehealth visit with an external vendor.

CMS / Essential Health Benefits (EHBs)

- The EHB package required to be offered as part of all non-grandfathered plans for sale in the individual or small group market includes coverage for the diagnosis and treatment of COVID-19
    - Exact coverage details and cost-sharing amounts for individual services may vary by plan, and some plans may require prior authorization
    - Many health plans have publicly announced that COVID-19 diagnostic tests are covered benefits and will be waiving any cost-sharing that would otherwise apply to the test
    - Many states are encouraging carriers to cover a variety of COVID-19 related services, including testing and treatment, without cost-sharing
    - Some states are requiring health plans to cover the diagnostic testing of COVID-19 without cost-sharing and waive any prior authorization requirements for such testing
- Quarantine outside of a hospital setting, such as a home, is not a medical benefit, nor is it required as EHB; however, other medical benefits that occur in the home that are required by and under the supervision of a medical provider, such as home health care or telemedicine, may be covered (pursuant to prior authorization and/or cost-sharing or other limitations)
- While a COVID-19 vaccine does not currently exist, current law and regulations require specific vaccines to be covered as EHB without cost-sharing, when recommended by the federal government
    - Plans are not required to cover a recommended vaccine until the beginning of the plan year that is 12 months after the recommendation is issued; however, plans may voluntarily choose to cover a vaccine for COVID-19, with or without cost-sharing, prior to that date

EEOC / ADA

Now that COVID-19 is a pandemic as reported by the World Health Organization and the CDC, employers may take certain actions without violating the ADA, which applies to employers with 15 or more employees.

- Employers may send employees home if they display flu-like symptoms (e.g., fever, cough, shortness of breath) during a pandemic
- Employers may ask employees who report feeling ill at work or who call in sick if they are experiencing flu-like symptoms
    - Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA
- When the CDC recommend that people who visit specified locations remain at home for several days until it is clear they do not have symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal
- Making disability-related inquiries or requiring medical examinations of employees without symptoms is prohibited by the ADA; however, when a pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract the virus
    - In these circumstances, employers may make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of complications
- Employers may require employees to adopt infection-control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal at the workplace
- Employers may require employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of infection.
    - If an employee with a disability needs a reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship
- When employees return after a pandemic, employers may require a doctor's note certifying fitness to return to work; however, as a practical matter, health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation

Department of Labor / FMLA

The DOL released an FAQ to assist employers who are subject to the Family and Medical Leave Act (generally, an employer with at least 50 employees within 75 miles). Employees are eligible to take FMLA leave if they have worked for their employer for at least 12 months and have at least 1,250 hours of service over the previous 12 months (and work at an FMLA-covered location). As a reminder, under the FMLA, covered employers must provide employees job-protected, unpaid leave for specified family and medical reasons. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same terms as existed before they took FMLA leave.

- Employees are entitled to leave to care for themselves or a sick family member; however, leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA (under current law)
- Employers may require employees to use paid sick and paid vacation/personal leave during periods of unpaid FMLA

- Federal law generally does not require employers to provide paid leave to employees who are absent from work due to COVID-19
  - State or local laws should be considered as well
  - Some federal contractors may be required to provide paid leave
- Employers may change their paid sick leave policy (in accordance with state law) if employees are out and they cannot afford to pay them all, as long as it is done in a manner that does not discriminate between employees because of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status

What Employers Should Expect Next

In addition to the federal guidance noted above, employers who are reducing hours or laying off employees should review the terms of their plans to determine how benefits are affected. Group health plan coverage may terminate due to the reduction in hours; if so, COBRA must be offered. Employers may generally subsidize COBRA premiums, and employees may wish to avail themselves of premium tax credits, should they opt for Marketplace coverage. Subsidizing COBRA coverage has the added benefit of ensuring that employees who are in a stability period as full-time continue to be offered "affordable" coverage for purposes of the ACA's employer shared responsibility provision.

Ancillary plans (e.g., life insurance, long-term disability) may terminate once employees are no longer actively at work, or the policy may contain an extension of coverage for a certain period of time (typically one or two months). Employers who would like to extend coverage to laid-off employees should consult with their broker or consultant and ensure the carrier agrees with their approach.

We expect additional guidance at the state and federal levels that may impact employee benefit plans as well as employee leave requirements. It is also important for employers to stay up-to-date on their state notices, as some are providing for required paid leave, as well as other insurance requirements. In addition, employers need to be cognizant of local and state emergency regulations that may affect how employers in certain industries, such as food services, operate during a public health emergency.

For more information on COVID-19, see:

- https://www.cdc.gov/coronavirus/2019-ncov/index.html
- https://www.who.int/emergencies/diseases/novel-coronavirus-2019

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