

Health and Welfare Plans — Guidance for Employers Navigating Challenges of the COVID-19 Pandemic

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Due to the urgent crisis the United States is facing because of the COVID-19 pandemic, the President has declared a national emergency, as well as declaring major disasters in California, Washington, New York, Iowa, Louisiana, Texas and Florida. Federal and state governments have passed legislation and issued executive orders in an effort to protect and encourage the health and well-being of individuals. As employers work to understand and comply with the requirements of the new legislation and guidance, they are being creative in adopting additional programs and practices to help employees and their communities.

This article provides an overview of: (1) the health plan provisions that were included in recent federal legislation, (2) recent guidance issued by the Internal Revenue Service (IRS) regarding health savings accounts (HSAs), and (3) other health and welfare benefits that employers may want to consider offering employees in response to the COVID-19 pandemic. Note that the House and Senate are currently working on additional legislation related to the COVID-19 pandemic, and that legislation contains health plan provisions. Hence, much more guidance will be issued over the coming weeks and months.

Families First Coronavirus Response Act

The Families First Coronavirus Response Act (“Families First Act”) was passed on March 18, 2020. It requires group health plans to provide coverage, and not impose any cost sharing requirements, prior authorization or other medical management requirements, for the following:



1. FDA-approved COVID-19 diagnostic testing; and
2. Items and services furnished to an individual during health care provider office visits (in-person and telehealth), urgent care center visits, and emergency room visits that result in an order or administration of the COVID-19 diagnostic testing, but only to the extent that such items and services relate to the furnishing of the COVID-19 diagnostic testing or to the evaluation of such individual for purposes of determining the need for COVID-19 diagnostic testing.

Trucker Huss Note: In addition to the testing being covered at no-cost, the visit related to the testing AND the visit related to an evaluation of determining the need for testing must be covered at no-cost. It is unclear if this is required just for in-network providers or for both in-network and out-of-network providers. It should also be noted that the Families First Act does not require that the actual treatment for COVID-19 be covered.

Plans Covered: The new rule applies to self-funded plans and fully-insured plans, regardless of whether they are grandfathered. Excepted benefit group health plans (such as vision-only plans and dental-only plans) and retiree-only health plans are not subject to the new rules.

Effective Date: The new rules became effective on March 18, 2020 and will remain in effect until the Secretary of Health and Human Services (HHS) determines that the public health emergency has expired.

High Deductible Health Plans

On March 11, 2020, the IRS issued IRS Notice 2020-15 regarding high deductible health plans (HDHP) and expenses related to COVID-19. The IRS Notice provided that, until further guidance is issued, a health plan that otherwise satisfies the requirements to be an HDHP, will not fail to be an HDHP merely because it provides benefits associated with the testing and treatment of COVID-19 without a deductible. As a result, individuals covered by such an HDHP that pays for COVID-19 testing and treatment before the deductible is met will not be disqualified from being an eligible individual who can make tax-favored contributions to a health savings account (HSA).

Trucker Huss Note: This guidance permits HDHPs to offer COVID-19 testing and benefits before the plan's deductible is met — but it does not require it. However, this was issued before the Families First Act was passed. As stated above, group health plans are required to cover COVID-19 testing at no cost. Again, there are no federal rules currently in effect that require cost-free coverage for the treatment of COVID-19.

Trucker Huss Note: This guidance does not allow plans to cover all telemedicine visits before the HDHP deductible is met — just telemedicine related to COVID-19. Many employers want to encourage employees to use telemedicine to support the policy of social distancing. The CARES Act, which has not yet been passed by Congress, amends the Internal Revenue Code (the "Code") to allow HDHPs to cover all telemedicine visits before the deductible is met, but limits its application to plan years beginning on or before December 31, 2021.

Disaster Relief Programs

Employers are considering offering additional benefits to their employees as they face the challenges of the COVID-19 pandemic. Below is an explanation of some of the disaster relief programs that could be offered to employees.

Major Disaster Leave-Sharing Plan: Under a leave-sharing plan, an employee donates his/her leave for use by another employee. In general, this would be considered an assignment of income that is taxable to the employee donating the leave (the leave donor). However, the IRS has recognized some exceptions to this general tax rule, such as major disaster leave-sharing plans which are described in IRS Notice 2006-59. That IRS Notice provides that so long as the leave-sharing plan is in writing and satisfies eight (8) enumerated requirements (described below), the IRS won't assert that the leave donor realizes income or has wages with respect to his/her donated leave. However, the employer must treat payments made to the leave recipient as wages for purposes of FICA, FUTA, and income tax withholding. A leave donor may not claim an expense, charitable deduction, or loss deduction on account of his or her donation of leave under the leave-sharing plan.

As a high-level overview, the eight (8) requirements that must be included in the written major disaster leave-sharing plan are as follows:

1. The plan allows a leave donor to deposit accrued leave in an employer-sponsored leave bank for use by other employees who have been adversely affected by a major disaster.
2. The plan does not allow a leave donor to deposit leave for transfer to a specific leave recipient.
3. The amount of leave that may be donated by a leave donor in any year generally does not exceed the maximum amount of leave that an employee normally accrues during the year.
4. A leave recipient may receive paid leave (based on his or her normal rate of compensation) from leave deposited in the leave bank.
5. The plan adopts a reasonable limit, based on the severity of the disaster, on the period of time after the major disaster occurs during which a leave donor may deposit the leave in the leave bank, and a leave recipient must use the leave received from the leave bank.
6. A leave recipient may not convert leave received under the plan into cash in lieu of using the leave.
7. The employer must make a reasonable determination, based on need, as to how much leave each approved leave recipient may receive under the leave-sharing plan.
8. Leave deposited on account of one major disaster may be used only for employees affected by that major disaster.

The term "major disaster" is defined to mean a major disaster as declared by the President under Section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the "Stafford

Act”), that warrants individual assistance or individual and public assistance from the federal government under that Act.

Trucker Huss Note: On March 13, 2020, President Trump issued a letter in which he declared a national emergency under Section 501 of the Stafford Act, but that letter also suggested that states could request a declaration of major disaster under Section 401 of the Stafford Act. We believe this means that, in order for a state to be granted a declaration of “major disaster,” the state must make that request to the President, and it must be granted. At the time this article was written, President Trump had approved a major disaster declaration for the States of California, Washington, New York, Iowa, Louisiana, Texas, and Florida (see www.fema.gov). Hence, at this time, we believe that only employees in those States can be covered by a major disaster leave-sharing plan.

Qualified Disaster Relief Payments: Code Section 139 was added to the Code in 2001 (after 9/11). It provides that gross income does not include any amount received by an individual as a “qualified disaster relief payment.” A qualified disaster relief payment includes amounts to reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster. An amount will not be treated as a qualified disaster relief payment, however, if it is paid for an expense that is “otherwise compensated for by insurance or otherwise.” The term “qualified disaster” includes any disaster subsequently determined by the President to warrant assistance by the federal government under the Stafford Act. As stated above, at the time this article was written, California, Washington, New York, Iowa, Louisiana, Texas and Florida received approval from the President for a major disaster declaration (which includes the provision of assistance by the federal government).

There are no regulations issued under Code Section 139. However, the IRS did issue IRS Revenue Ruling 2003-12, which analyzed different disaster relief programs. Based on those examples, it appears that the following terms should be included in any Code Section 139 program: (1) statement of the disaster to which the program relates, (2) description of which employees are eligible to receive the grants, (3) description of the expenses that may be covered by the program, (4) statement of when the program will end, and (5) description of any other administrative requirements.

Trucker Huss Note: It is unclear what kinds of benefits could be included under this Code Section. Possible benefits could include the costs associated with renting a hotel room for an employee who needed to be quarantined away from his/her family (temporary housing), additional commuter expenses so that an employee can avoid mass transit (transportation expenses) and the extra costs for grocery delivery (not the costs of the actual groceries).

Trucker Huss Note: It is unclear if additional childcare costs (above the \$5,000 allowed for dependent care flexible spending accounts) or costs associated with homeschooling children would be covered under Code Section 139. It is also unclear if this Code Section could include the costs of working-from-home equipment, such as desks and chairs. IRS guidance is needed on these issues.

Other Benefits

Employers have been creative regarding the benefits provided to employees as they deal with unprecedented challenges due to the COVID-19 pandemic. Some examples of such programs are below.

Dependent Care Assistance Flexible Spending Account Plans (DCAPs): Most employers have groups of employees who are considered critical to the operation of the business and are required to come to an employer's physical worksite. For those employees, daycares in their area may have closed, forcing them to hire in-home childcare. Both the closure of the daycare center and the hiring of in-home childcare would permit an election change for the DCAP. To assist with additional childcare costs, some employers have decided to make employer contributions to the DCAP for all employees still enrolled in that plan.

Trucker Huss Note: Employers considering whether to make such employer contributions to the DCAP should determine whether the employer will need to decrease any employee's DCAP election for the remainder of the year to ensure that the employee does not exceed the statutory maximum for the DCAP.

Mid-Year Election: At annual enrollment, some employees will waive coverage under the major medical plan. Employers are concerned that some of these employees may not have any medical coverage. One possible solution is allowing employees who have waived the employer-sponsored coverage to elect coverage now. However, in order for the employer to allow employees to make the mid-year election, the employee must pay his or her portion of the premium on a post-tax basis. For insured plans and HMOs, the employer will need to obtain approval from the insurance carrier to allow this mid-year election. For self-funded plans, approval will be needed by the stop-loss carrier (if applicable), and the employer should ask the plan's third-party administrator if it can support a mid-year election event. A plan amendment will also be required.

Trucker Huss Note: On March 20, 2020, Covered California announced that, "Effective immediately, anyone uninsured and eligible to enroll in health care coverage through Covered California can sign up through the end of June." Covered California has added a new mid-year enrollment right for those who do not have any health plan coverage.

Grace Period for COBRA Payments: Some former employees have requested an extended period for paying monthly COBRA premium payments. An employer could amend its plan to allow for this. However, as described above: For insured plans and HMOs, the employer will need to obtain approval from the insurance carrier, and for self-funded plans, approval will be needed by the stop-loss carrier (if applicable). A plan amendment will also be required.

Short-Term Disability (STD) Plan: We have been informed that in some states, employees have been unable to obtain medical certifications for their STD claims because physicians are focused on COVID-19 patients and services. Some employers are considering approving initial STD claims for the first 30 days, without any medical certification. For a self-funded plan, an employer would need to understand if its administrator could accommodate this request and how doing so would impact any state-mandated benefit paid under the plan. Similar issues would arise for insured plans.

Conclusion

Employers should clearly document any newly adopted plans. Before making any optional amendments to existing plans, employers should confirm that such amendments are permitted under the applicable rules and determine whether such amendments could be administered by the plan's third party administrator or insurance carrier. Trucker Huss will continue to provide periodic updates regarding legislative changes that are made in response to the COVID-19 pandemic. As of the date of this article, it appears that Congress will pass the CARES Act, which includes amendments for health plans. We will update you when that Act is signed into law.

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