



COVID-19 Impact On Employee Benefit Plans

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COVID-19 Pandemic: National Response

- ★ Due to the urgent crisis the U.S. is facing because of the COVID-19 pandemic, the President has:
 - > (1) declared a national emergency, and
 - > (2) made a major disaster declaration for New York, California, Washington, Iowa, Louisiana, Texas, Florida, North Carolina and New Jersey
- ★ Federal and state governments have passed legislation to protect and encourage the health and well-being of individuals
- ★ Employers are protecting their workers, amending plans and offering new benefit programs

Agenda: Overview

- ★ The purpose of the webinar is to discuss federal initiatives passed or proposed in response to the COVID-19 pandemic and to provide examples of some additional measures employers are taking to provide support to employees and their communities
- ★ The webinar will be broken into two parts:
 - > (1) Health and Welfare Plan Issues and
 - > (2) Retirement Plan Issues

Agenda: Health and Welfare Plan Topics

- ★ Health Plan Provisions in the Families First Coronavirus Response Act
- ★ The CARES Act (not yet passed by the House)
- ★ HDHP/HSA Guidance
- ★ Major Disaster Programs
- ★ Additional Creative Benefits Offered by Employers

Agenda: Retirement Plan Topics

- ★ The CARES Act (not yet passed by the House)
- ★ IRS Notice 2020-18
- ★ Access to Funds Outside of the CARES Act
- ★ Administrative Concerns and Considerations
- ★ Other Potential Relief

Health and Welfare Plans: Impact of COVID-19

Families First Coronavirus Response Act

- ✦ Passed on March 18, 2020
- ✦ 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 – COVID-19 diagnostic testing
 - > #2 – Related items and services (as explained on the next slide)

Families First Act

- > 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

In each case, that results 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

Families First Act

- ✦ 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
- ✦ Families First Act does not require that the actual treatment for COVID-19 be covered
- ✦ 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

Families First Act

- ✦ Unclear if this requirement applies just for in-network providers/services or for both in-network and out-of-network providers/services
 - > Note that it is not added to the preventive care provisions of the ACA, which allows for cost-sharing for out-of-network services
 - > CARES Act contains additional provisions, but this has not yet been passed in the House
- ✦ This requirement became effective on March 18, 2020 and will remain in effect until the Secretary of HHS determines that the public health emergency has expired

Coronavirus Aid, Relief and Economic Security (CARES) Act

- ✦ The Republicans and Democrats in both houses of Congress have reached an agreement on the legislative stimulus package. That stimulus package includes approximately \$2 trillion and is referred to as the CARES Act
- ✦ It was passed by the Senate on March 25, 2020
- ✦ It has not yet been passed by the House
- ✦ One potential issue is that the House is on recess and would need to approve this via a remote vote
- ✦ It is very likely that this will be passed soon, with few changes to the health plan provisions

CARES Act—Proposed Legislation

- ✦ Expands the no-cost sharing for COVID-19 diagnostic testing to include:
 - > Tests provided by clinical labs on an emergency basis;
 - > State-developed labs; and
 - > Other tests that the Secretary determines appropriate (in guidance)
- ✦ This is intended to address the concern of the lack of testing supplies

CARES Act—Proposed Legislation

- ★ For network providers/providers with agreements with the plan – the plan would reimburse the provider of the COVID-19 test based on the rate negotiated between the plan and the provider
- ★ When there is no negotiated rate, the plan would fully reimburse the provider based on the provider's own "cash price"
 - > This "cash price" must be publicly available and listed on a public website

CARES Act—Proposed Legislation

- ★ Adds that access to testing and a coronavirus vaccine (after it is developed – soon!!!) would be covered without cost-sharing on a permanent basis
- ★ (Recall that the Families First Act’s cost-free testing provision is for a limited period of time – only while there is a declared public health emergency)

CARES Act—Proposed Legislation

- ★ The CARES Act contains numerous provisions regarding Health Savings Accounts (“HSAs”). Some of those provisions include the following:
 - > All telehealth and other remote care services can be covered pre-deductible without violating federal rules for high deductible health plans (“HDHPs”) paired with an HSA
 - > This is only permitted for plan years that begin on or before 12/31/2021

CARES Act—Proposed Legislation

- > It is a permissive rule and a plan amendment should be adopted if the plan sponsor wants to include this provision
- > We understand from several of the large third-party administrators that they currently do not have the systems in place to trace the reason for the telemedicine visit, so that plans may be required to adopt this amendment given that telemedicine visits for the evaluation of the need for COVID-19 testing must be covered by a plan

CARES Act—Proposed Legislation

- ✦ For HSAs, the CARES Act also:
 - > Eliminates the rule that limits the use of HSAs to *prescribed* medicines or drugs
 - > Allows for “menstrual care products” to be reimbursed from an HSA (tampons, pads, lines, cup, sponge and similar products)
- ✦ The two (2) provisions above also apply to health flexible spending arrangements and health reimbursement arrangements (applies to expenses incurred after 12/31/2019)

CARES Act—Proposed Legislation

★ Treatment of Student Loans:

Expands the definition of employer-provided educational assistance that is excluded from gross income to include up to \$5,250 in student loan payments made by an employer between the date of enactment and the end of 2020

CARES Act: Additional Outstanding Issues

- ✦ In its current draft form, the CARES Act does not address several things, which may be addressed in later legislation:
 - > Covering the cost of treatment for COVID-19
 - > COBRA subsidies for terminated workers so that they can afford to maintain coverage under their employer-sponsored plan
 - > Additional money for the exchanges to bolster the individual market and ensure that coverage remains accessible and affordable

IRS Notice 2020-15

- ★ On March 11, 2020, the Internal Revenue Service (IRS) issued IRS Notice 2020-15
- ★ This Notice addressed HDHPs and expenses related to COVID-19
- ★ It 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

IRS Notice 2020-15

- ★ As a result, an individual 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 an HSA
- ★ This guidance permits HDHPs to offer COVID-19 testing and benefits before the plan's deductible is met – but it does not require it
- ★ This was issued before the Families First Act was passed. Now plans are required to cover COVID-19 testing at no cost. Again, there are no rules currently that require coverage of the treatment

IRS Notice 2020-15

- ★ 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 proposed CARES Act contains a provision about telehealth
 - > Again, the CARES Act has not yet been passed by the House

Major Disaster Leave-Sharing Plans

- ★ 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)
- ★ 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

Major Disaster Leave-Sharing Plans

- ✦ That IRS Notice provides that so long as the leave-sharing plan is in writing and satisfies eight (8) enumerated requirements, the IRS will not assert that the leave donor realizes income or has wages with respect to his/her donated leave
- ✦ 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

Major Disaster Leave-Sharing Plans

- ✦ At a high-level, 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

Major Disaster Leave-Sharing Plans

- > 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

Major Disaster Leave-Sharing Plans

- > 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

Major Disaster Leave-Sharing Plans

- ★ The term “major disaster” is defined to mean a major disaster as declared by the President under §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

Major Disaster Leave-Sharing Plans

- ✦ On March 13, 2020, President Trump issued a letter in which he declared a national emergency under Section 501 of the Stafford Act
- ✦ The Letter provided that States could request a major disaster declaration under Section 401 of the Stafford Act
- ✦ In order for a State to qualify for a “major disaster” declaration, a State must make that request to the President and it must be granted

Major Disaster Leave-Sharing Plans

- ★ President Trump approved major disaster declarations for the States of New York, California, Washington, Iowa, Louisiana, Texas, Florida, North Carolina and New Jersey
- ★ We believe that at this time – and until further guidance is issued by the IRS – 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 Internal Revenue 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 paid to or for the benefit of employees in order for them to cover reasonable and necessary personal, family, living or funeral expenses incurred as a result of a qualified disaster

Qualified Disaster Relief Payments

- ✦ 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, New York, California, Washington, Iowa, Louisiana, Texas, Florida, North Carolina and New Jersey received approval from the President for major disaster declarations

Qualified Disaster Relief Payments

- ✦ There are no regulations issued under Code Section 139, but the IRS did issue 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

Qualified Disaster Relief Payments

- ✦ It is unclear what kinds of benefits could be included under Code Section 139
- ✦ Possible benefits could include:
 - > 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)
 - > Extra costs for grocery delivery (not the costs of the actual groceries)

Qualified Disaster Relief Plans

- ✦ 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 also unclear if Code Section 139 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 related to the COVID-19 pandemic
- ★ We have included examples of some of the programs that we have seen employers consider and/or adopt

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

DCAPs: Employer Contributions

- ✦ 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
- ✦ Employers considering whether to make such employer contributions to the DCAP should determine whether the employer will need to decrease DCAP elections for the remainder of the year to ensure that the employee does not exceed the statutory maximum for the DCAP

Medical Plan Mid-Year Elections

- ✦ At annual enrollment, some employees 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
- ✦ We believe that 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

Medical Plan Mid-Year Elections

- ★ 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 confirm with the plan's third-party administrator if it can support a mid-year election event
- ★ A plan amendment will also be required

Medical Plan Mid-Year Elections

- ✦ 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.”
 - > 11 State Exchanges plus the DC Exchange adopted a similar rule. This has not been adopted by the federal exchange. 32 States rely exclusively on the federal exchange through healthcare.gov
 - > UnitedHealthcare will open a special enrollment period for some of its existing commercial customers – from March 23 to April 6, 2020. UHC stated that self-funded customers may choose to amend their eligibility requirements to align with the special enrollment period

Grace Periods 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
- ★ 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”) Plans

- ✦ 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 it would impact any State mandated benefits paid under the plan. Similar issues would arise for insured plans

Suggested Actions

- ✦ Document any newly adopted plans
- ✦ Before making any optional amendments to existing plans, consider if such amendments are permitted under the applicable rules and if such amendments could be administered by the plan's third-party administrator or insurance carrier
- ✦ Continue to be creative! Your support for your employees and your community is critical!
 - > We see how much you are doing and we thank you

Retirement Plans: Impact of COVID-19

THE CARES ACT AND OTHER GUIDANCE

CARES Act

- ★ The CARES Act includes provisions impacting defined contribution plans, defined benefit plans and individual retirement accounts (IRAs)
- ★ It allows increased access to retirement plan funds on a more tax advantageous basis and provides other relief to participants and retirement plans adversely impacted by the COVID-19 pandemic

CARES Act – CRD Distributions

- ✦ It provides for a new tax-favored withdrawal, referred to as a coronavirus-related distribution (CRD)
- ✦ A CRD is a distribution from an eligible retirement plan made on and after January 1, 2020 and before December 31, 2020 to a qualified individual
- ✦ The plan administrator may rely on the employee's certification that he or she satisfies one of the eligibility conditions

CARES Act – CRD Distributions

- ★ CRDs are subject to the following tax benefits:
 - > The 10% early distribution excise tax is not applicable
 - > Income tax is spread ratably over three year unless the participant elects otherwise
 - > Not subject to 20% mandatory withholding and the 402(f) notice requirements
- ★ CRDs cannot in the aggregate exceed \$100,000
 - > May be multiple distributions
 - > The aggregate limit applies to all plans of the employer and its controlled group

CARES Act – CRD Distributions

- ✦ The participant may repay the distribution at any time during the 3-year period beginning on the day after the distribution date
 - > May make 1 or more contributions (not in excess of aggregate amount of distribution)
 - > Contributions may be made to any eligible retirement plan
 - > Treated as having transferred the amount to an eligible retirement plan in a direct trustee-to-trustee transfer in 60 days

CARES Act – Plan Loans

- ✦ It makes the following changes to plan loans for qualified individuals:
 - > It increase the maximum loan limit for qualified individuals to the lesser of: (1) \$100,000 (from \$50,000); or (2) the greater of \$10,000 or 100% (from 50%) of the present value of the participant's vested benefit
 - This increased loan amount is available for loans made during the 180-day period beginning on the date of enactment
 - > Any loan repayments due during period of the date of enactment through December 31, 2020 are delayed 1 year

CARES Act – RMDs

- ✦ Required minimum distributions (RMDs) due for 2020 are waived
 - > Only applies to defined contribution plans and IRAs
 - > Applies to 2019 RMDs due by April 1, 2020 and to 2020 RMDs
 - > Waived RMDs may be rolled over if a distribution is taken

CARES Act – Defined Benefit Plan Relief

- ★ The due date for single employer defined benefit plan minimum required contributions otherwise due during 2020 is delayed until January 1, 2021
- ★ A plan's funded status for determining the application of the 436 benefit restrictions for the 2020 plan year is based on the plan's funded status for the 2019 plan year

CARES Act – Plan Amendments

- ★ The plan amendment deadline for adopting any of the relief provided above is the last day of the first plan year beginning on or after January 1, 2022 (January 1, 2024 for governmental plans)
- ★ Must operate plan as if amendment was in effect and amendment apply retroactively to such period

CARES Act – Expansion of DOL Authority

- ♦ It provides the Department of Labor with expanded authority to postpone certain deadlines under ERISA

IRS Notice 2020-18

- ★ IRS extended the April 15, 2020 tax deadline to July 15, 2020 in response to COVID-19
- ★ As a result, the following also are extended:
 - > The deadline for making 2019 IRA contributions
 - > The deadline for payment of the 10% early distribution excise tax
 - > The due date for an employer to make deductible retirement contributions for 2019 if the employer's tax return due date is April 15, 2020
- ★ Note that 2019 excess deferrals still must be distributed by April 15, 2020

ACCESS TO FUNDS OUTSIDE OF CARES ACT

Hardship Withdrawals

- ✦ New “Seventh Safe Harbor Hardship Distribution Condition”
 - > A participant may obtain a hardship distribution for expenses and losses incurred on account of a FEMA-designated disaster
 - > Principal residence or principal place of employment at the time of disaster must be in the FEMA-designated disaster zone
- ✦ Facts and circumstances analysis for plans that have not adopted safe harbor
- ✦ 20% tax withholding, 10% early distribution penalty, and limited to amount of need

Other Design Based Distributions from DC Plans

- ✦ Plans may permit in-service distributions of elective deferrals at age 59½
- ✦ Plans may permit in-service distribution of employer contributions that have been in the Plan for at least two years, or all employer contributions if the employee has participated in the Plan for five years
- ✦ Plans may permit in-service withdrawal of rollover contributions at any time
- ✦ Protected benefit considerations associated with adding such features

ADMINISTRATIVE CONCERNS AND CONSIDERATIONS

Mid-Year Reductions in Employer Contributions

- ★ Mid-year terminations/reductions of matching contributions or profit-sharing contributions in safe harbor plans require the safe harbor notice permit such a termination/reduction
- ★ Mid-year terminations/reductions of matching contributions in safe harbor plans require a 30-day advance notice
- ★ All reductions/terminations of employer contributions require Code section 411(d)(6) compliance

Analyzing New or Uncommon Benefits Under Definition of Compensation

- ★ Employer incentives, assistance and other “new” payments to employees during COVID-19 should be reviewed under the Plan definition of compensation to determine whether they are eligible for deferral
- ★ Plan definitions of compensation may need to be amended to meet the goals or objectives of the incentives
 - > Special considerations for safe harbor plans

Lay-offs and Furloughs

- ★ Consider whether employees impacted by a reduction in force have a distributable event
 - > Distributions should only be made if there is a bona-fide severance from employment
- ★ Consider impacts on employer contributions
 - > Review Plan for last day requirements for various forms of contributions and true-ups
- ★ Consider impacts on Plan loans
 - > Review terms of Plan regarding outstanding loans as well as the ability to take out a new loan

Partial Plan Terminations

- ✦ Reductions in force may trigger partial plan terminations if 20% or more of employees are laid off or otherwise terminate employment during the year
- ✦ A partial plan termination requires 100% vesting of all participants terminating during the year

Spousal Consent

- ★ “Social distancing” raises logistical concerns with obtaining spousal consent. Many plans require multiple witnesses or a notary for spousal consent
 - > Consider temporary waivers of this condition and exercise creative solutions
 - > Some states are authorizing temporary “virtual notary” services

Investments and Fiduciary Duties

- ✦ Plan fiduciaries must use care, skill, prudence and diligence in carrying out investment decisions, and should be sure to work with their investment professionals to do so
- ✦ Plan fiduciaries should be working with their investment professionals to:
 - > Monitor market fluctuations
 - > Analyze whether any pending fund transitions will result in out-of-market time which may create risk
 - > Avoid any unnecessary blackout periods during market volatility

Other Potential Relief?

- ✦ Multiemployer defined benefit plan relief
- ✦ Limit the per-participant flat and variable rate premiums for the 2020 plan year to 2019 amounts
- ✦ Delay the 403(b) restatement deadline (March 30)
- ✦ Delay the defined benefit plan restatement deadline (April 30)
- ✦ Extend the nondiscrimination testing deadline

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