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>> COVID-19 ALERT

Health and Welfare Considerations for Plan Sponsors Amid the COVID-19 Pandemic

As employers make changes to their workforces in response to COVID-19, particularly in light of recent legislation under the Families First Coronavirus Response Act (FFCRA) and the recently passed Coronavirus Aid, Relief, and Economic Security Act (CARES Act), employers should pay careful attention to their health and welfare plans.

THE BOTTOM LINE

>> Employers should work closely with their ERISA counsel to ensure that their obligations with respect to health and welfare plans continue to be fulfilled, and that they are taking the appropriate steps to protect their employees and plans.

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PLAN COVERAGE ISSUES

Many employers have cut the number of employees, either through layoffs or furloughs, while remaining employees may have to take periods of leave in order to deal with the effects of COVID-19. As a result, employers should address the following issues:

Plan Terms

Regardless of what an employer calls the workforce change, they should check the terms of their plans to determine when and if coverage remains in force, and amend the plan as needed. Coverage in the event of any period of employee absence, whether initiated by the employee or the employer, is governed by the terms of the plan.

Oftentimes in these situations, the provisions of the plan will mandate a loss of coverage triggering Consolidated Omnibus Budget Reconciliation Act (COBRA) obligations, unless applicable law mandates otherwise, such as under the Family and Medical Leave Act (FMLA). Plan documents will generally not address any temporary layoff or furlough and coverage would, therefore, terminate, contrary to the employer's wishes.

Check With Insurers

Due to the coronavirus, some insurers (including stop-loss insurers for self-insured plans) have indicated that they are willing to extend the period of active coverage under certain circumstances. Employers should check with their insurance carrier about extended coverage and amend their plans as necessary to reflect this.

Sponsors of self-insured plans will need to coordinate with their stop loss carriers to confirm coverage for any extended period. If an employer extends coverage and the carrier has not agreed to such an extension, the carrier may refuse to pay for incurred claims, leaving the employer responsible.

Some states, including California, have placed a 60-day moratorium on the cancellation of insurance policies due to nonpayment of premiums. Employers should confirm the requirements before cancelling any employee's policy, whether active or continuation.

COBRA Election Notices

Once coverage ends, including as a result of any extension noted above, affected employees must be provided with COBRA election notices. Employers can elect to pay for COBRA coverage for a period of time, but should be aware that this may impact employees' ability to enroll in the exchange once the COBRA subsidy expires. This can act as a disincentive for companies to subsidize COBRA or otherwise extend active coverage following a layoff.

Affordable Care Act

Employers must consider the Affordable Care Act (the ACA), which mandates that certain employers provide health care coverage to full-time employees and imposes a number of requirements that may be impacted by leaves of absence, including:

- For any employer using the look-back method to determine full-time status, coverage will generally have to continue, subject to payment of premiums, for any employee who goes on leave during a stability period unless and until the employment relationship is terminated. Care must be taken to consider whether coverage must be offered to employees who are told they are being "furloughed" rather than laid off.
- Any periods of paid leave will need to be counted for purposes of determining whether an employee is full-time.
- If any termination, including a furlough, is less than 13 weeks, the employee will be counted as a continuing employee under the ACA and cannot be required to satisfy any applicable waiting periods when they return to work. If an employee goes on an unpaid leave and then returns, it may be treated as a termination and rehire or a period of leave may be disregarded, depending on the type of leave taken and the length of time of the leave.
- Failure to maintain coverage when necessary exposes the employer to penalties under the ACA, including a potentially substantial penalty if the failure to provide coverage causes the employer to make offers of coverage to less than 95 percent of its employees.

COVERAGE OF COVID-19 TESTING AND TREATMENT

The FFCRA, signed into law on March 18, 2020, treats COVID-19 testing as preventative medicine and requires all group health plans, including self-insured plans and health insurance issuers, to provide coverage for testing and related services without any cost-sharing requirements, including deductibles, copayments, and coinsurance. Importantly, the FFCRA suggests that telehealth visits must also be covered.

Employers should ensure that testing and related services are being treated as preventative. Employers need to coordinate with their insurance issuers to determine what telehealth services are available and how coverage is being provided.

The FFCRA does not require specific levels of coverage for treatment for COVID-19, which would generally be subject to a plan's normal cost sharing requirements absent changes to the plan. Several states have separately passed legislation regarding coverage, which fully-insured plans will need to comply with.

Additionally, the CARES Act does include requirements that plans, including self-funded plans, cover items, services, or immunizations that are intended to "mitigate or prevent" COVID-19.

HIGH DEDUCTIBLE HEALTH PLANS AND HSAS

Under normal circumstances, providing testing for COVID-19 without applicable coinsurance and deduction requirements potentially threatens the status of high deductible health plans (HDHPs). However, on March 11, 2020, the Internal Revenue Service clarified that until further notice HDHPs that otherwise satisfy the requirements to be an HDHP can provide testing and treatment for COVID-19 without requiring participants to first satisfy the applicable deductible without jeopardizing the plan's HDHP status.

Additionally, the CARES Act includes a provision that plans can provide telehealth services with no deductible without jeopardizing HDHP status for plan years beginning on or before December 31, 2021.

HIPAA PRIVACY CONSIDERATIONS

The Health Insurance Portability and Accountability Act (HIPAA) requires covered entities (such as health plans, healthcare providers and healthcare clearinghouses) and business associates to protect the privacy and security of protected health information (PHI). The CARES Act directs the Secretary of Health and Human Services to release regulations regarding the sharing of PHI during the COVID-19 crisis, but until those regulations are released, covered entities and business associates should assume that all HIPAA obligations continue to apply. Failure to comply with HIPAA can result in onerous penalties.

HIPAA Disclosures

Without an authorization from the patient, PHI can only be disclosed in limited circumstances, including:

1) To a public health authority authorized to collect or receive the PHI in order to prevent or control disease, injury or disability;

2) To family, friends or other people identified by the patient as involved in his or her care; and

3) In order to prevent or lessen a serious and imminent threat to the health and safety of a person or the public, provided such disclosure is consistent with applicable law.

HIPAA Coverage

Most employers are not covered entities, but may have access to information protected by HIPAA, especially if they sponsor a self-funded plan. HIPAA covered entities and business associates must be careful that they are complying with HIPAA while they work to combat the current pandemic.

Generally, if an employer receives information that an employee has been infected with or exposed to the coronavirus, the use and disclosure of such information is not subject to HIPAA, unless the employer has received the information in connection with the administration of its group health plan. Even though not subject to HIPAA, the use and disclosure of such information may be subject to other privacy requirements.

FLEXIBLE SPENDING ACCOUNTS

Requirements regarding using flexible spending accounts (FSAs) for qualified medical expenses remain in place, but many expenses related to COVID-19 should fit within this definition. However, if employees are required to take extended periods of unpaid leave, they will not be able to fund their FSAs through payroll deductions.

Under the FMLA, there are alternatives for FSAs when an employee takes unpaid leave:

1) Pre-pay contributions before going out on leave;

2) Continue making contributions while out on leave, typically on an after-tax basis; or

3) Make up the missed payments when they return to work.

Given the fast moving nature of the current crisis, pre-paying may not be an option for most employees. Plan sponsors should determine what their practice has been with respect to unpaid leaves of absence and discuss their options with counsel.