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EMPLOYEE BENEFITS ADVISORY

CARES Act and Other COVID-19 Updates for Health and Welfare Plans

Employers have raised many questions regarding COVID-19's impact on health and welfare plans. This advisory contains a summary of recent legislation related to health and welfare plans as well as other important topics, including continuation coverage options and qualified disaster relief payments.

LEGISLATIVE UPDATE

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), passed on March 27, 2020, contains a number of provisions related to health and welfare plans as well as qualified retirement plans (see our prior Client Advisory for information on the CARES Act and its impact on qualified retirement plans). The CARES Act followed two other relief bills, the Families First Coronavirus Response Act (FFCRA), which prohibited cost-sharing requirements for certain COVID-19 testing, and the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, which provided funding to fight COVID-19. Below is a summary of current legislative provisions related to health and welfare plans.

HEALTH COVERAGE

Under the CARES Act, group health plans and health insurers must provide coverage without imposing cost-sharing, prior authorization, or other care management requirements for COVID-19 testing (including tests that have not yet received approval by the FDA), as well as items and services furnished during a provider visit, to the extent those items and services relate to the

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furnishing or administration of the testing or evaluation. A provider visit includes in-person office, telehealth, urgent care, and emergency room visits. The price of the testing is either a prenegotiated price or the cash price for the service as listed by the provider on a public internet website, or as negotiated (if at a lower price). The CARES Act requires that each provider post a price for testing on a publicly available website while there is a declared public health emergency. This rule does not change the coverage of COVID-19 treatment under group health plans and policies—treatment would still be subject to the general terms of each plan (including any applicable cost-sharing requirements).

In anticipation of the development of preventive services and vaccines for the coronavirus, the CARES Act requires group health plans and health insurers to cover, without cost-sharing, any qualifying coronavirus preventive services or vaccinations that are intended to prevent or mitigate COVID-19 within 15 days of a recommendation by the U.S. Preventive Services Task Force or the CDC's Advisory Committee on Immunization Practices.

For plan years beginning on or before December 31, 2021, the CARES Act creates a safe harbor for telehealth services provided under a high-deductible health plan (HDHP). Under this new law, an HDHP can provide coverage for all telehealth and other remote care services before the plan's deductible is satisfied without disqualifying a participant from participating in a health savings account. As reported in our prior Client Advisory, the IRS issued guidance allowing HDHPs to provide coverage for COVID-19 testing and treatment without cost-sharing without disqualifying participants from HSA participation.

The CARES Act also eliminates the rules that prohibited health plans, health savings accounts, health flexible spending accounts, and similar accounts from reimbursing expenses for over-the-counter drugs (other that insulin) without a prescription. Unrelated to COVID-19, the CARES Act also allows these plans to cover menstrual care products for the first time.

The CARES Act also requires the Health and Human Services (HHS) Secretary to issue guidance about sharing patients' protected health information (PHI) during the COVID-19 public health and national emergencies within 180 days of enactment. The Office of Civil Rights of Health and Human Services recently recognized a need for "unprecedented HIPAA flexibilities" in certain circumstances involving COVID-19, including:

- Allowing providers to serve patients where they are through commonly used apps like FaceTime, Skype, and Zoom to provide telehealth remote communications

- Empowering first responders and others who receive protected health information about individuals who have tested positive or been exposed to COVID-19 to help keep both first responders and the public safe

- Enabling healthcare providers to share information with the CDC, family members of patients, and others, to help address the COVID-19 emergency

Compliance with the guidance provided by HHS (as well as state mandates) still will be required. The CARES Act also provides that, once a patient in a federally subsidized substance use disorder treatment center has given written consent, covered entities and business associates may use and disclose information relating to that patient in accordance with the rules applicable under HIPAA.

EDUCATION ASSISTANCE PROGRAMS

Until January 1, 2021, the CARES Act enables an employer to pay the principal and interest on any qualified education loan of an employee without the payments being included in the gross income of that employee, under an education assistance program under Code Section 127. The program must still cap any tax-free payments to $5,250 per calendar year per employee.

FILING EXTENSIONS

The CARES Act also amends ERISA by adding public health emergencies to the circumstances under which the United States Department of Labor may postpone ERISA filing deadlines for up to one year. While the Act does not single out any specific filings, employers should keep an eye out for upcoming guidance that may extend deadlines for Forms 5500 and other ERISA-required reports and disclosures.

OTHER CONSIDERATIONS

While Congress has been busy issuing new guidance, employers should also remember prior guidance that may be helpful during this emergency, including the following:

CONTINUATION OF COVERAGE DURING FURLOUGHS, MANDATED LEAVES OF ABSENCE, AND REDUCED HOURS

Benefit plans often do not continue coverage during furloughs and leaves of absences, and reductions in hours can often impact an individual's continued eligibility for some plans. Employers will want to review plans, insurance contracts, and stop-loss policies to determine how to treat employees who lose eligibility in these circumstances. In many cases, employers will need to amend plan documents and

seek approval of insurers of insured plans if they want to continue to cover part-time or furloughed employees. In other instances, offering COBRA for group health plan coverage may be an option.

QUALIFIED DISASTER RELIEF PAYMENTS

Employers have been reaching out to learn more about helping employees under a provision of the Internal Revenue Code that was enacted in response to the 9/11 terrorist attacks. Under Code Section 139, employees may exclude "qualified disaster relief payments" from taxable income. Because the President has declared a national emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, employers can use Section 139 to reimburse or cover reasonable and necessary "personal, family, living, or funeral expenses" incurred as a result of COVID-19 without those amounts being taxable to their employees.

Because of its limited application, there is little guidance about how to apply Code Section 139, but many professionals believe that this provision can be used to cover reasonable and necessary expenses, including:

- Child care, where schools are closed due to COVID-19 or where parents must work extended hours for COVID-19 relief
- Work-from-home expenses, where working from home is necessary due to COVID-19
- Medical expenses not reimbursed by insurance or medical supplies related to COVID-19
- Housing, transportation, and living expenses incurred as a result of moving or isolation required by COVID-19

There is no cap on the amount of expenses that can be excluded from taxable income. For example, child care expenses related to COVID-19 under this Code Section would not be subject to the $5,000 per year limit imposed under Code Section 129. Employees are also not required to substantiate actual expenses in order to qualify for the exclusion, as long as the amount of payments from the employer can be reasonably expected to be commensurate with the expenses that are incurred. However, payments cannot be reimbursed or reimbursable by insurance or otherwise. Some employers are providing prefunded debit cards for employees to use for these expenses. Others are anticipating reimbursing expenses upon request.

Employers are not required to adopt a written plan in order to provide qualified disaster relief payments under Code Section 139, but a written policy may be helpful to set out eligibility requirements and limitations on benefits and other terms.

For any questions about this client advisory, please contact a member of the Sherman & Howard Employee Benefits Group.