



COVID-19: Coronavirus Response Act and Employee Benefits

Benefit Concepts, Inc.

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Stacy Barrow

sbarrow@marbarlaw.com

(617) 830-5457

Agenda



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- Employer Responses
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 - CMS re: Essential Health Benefits
 - EEOC re: Americans with Disabilities Act
 - DOL re: Family and Medical Leave Act
- Families First Coronavirus Response Act
- COVID-19 and Employee Benefits Issues
- COVID-19 and Employment Law Issues

COVID-19 Background



- Virus is “SARS-CoV-2”
- Disease it causes is “coronavirus disease 2019” or “COVID-19”
- Timeline:
 - Jan. 30: World Health Organization (WHO) declared the outbreak a “public health emergency of international concern”
 - Jan. 31, U.S. Health and Human Services declared a public health emergency to aid the nation’s healthcare community in responding to COVID-19
 - Mar. 11, WHO publicly characterized COVID-19 as a pandemic (a global outbreak of disease)
 - Mar. 13, President Trump declared the COVID-19 outbreak a national emergency
 - Mar. 14, CDC has reported more than 2,000 cases from 49 states and Washington, DC

COVID-19 Background



- Reported illnesses have ranged from very mild (including some with no reported symptoms) to severe, including illness resulting in death
 - Symptoms including fever, cough and shortness of breath may appear 2-14 days after exposure
- While information so far suggests that most COVID-19 illness is mild, serious illness occurs in a substantial number of cases
 - Older people and people with severe chronic medical conditions — like heart disease, lung disease and diabetes — are at higher risk of developing serious COVID-19 illness
 - Nearly 40% of patients sick enough to be hospitalized were aged 20-54
 - The virus that causes COVID-19 spreads easily from person-to-person via coughs and sneezes

COVID-19 Background



- Vaccine for COVID-19 not expected until 2021 at the earliest
- Preventive measures: Social distancing to reduce contact of infected persons with large groups
 - School and workplace closures, large gatherings cancelled
 - Self-quarantining to reduce the chances of infection in locations with an outbreak
 - Washing hands often, and avoid touching the face with unwashed hands
- According to the WHO, the use of masks is only recommended if a person is coughing or sneezing or when one is taking care of someone with a suspected infection

Employer Responses



- Educate employees on COVID-19, spread prevention techniques
- Enforce stay-at-home policies if employees are sick or symptomatic
- Many employers are having employees work from home until further notice
 - Make sure employees have proper technology and that it's secured
 - Some employees may feel isolated; it's up to management to keep things lively – consider videoconferences to keep people engaged as a team

Employer Responses (Cont.)



- Limit visitors and cancelling in-person meetings
- Restrict non-essential travel
 - If employee has traveled to an area with an outbreak, employer may request the employee work from home for 14 days
- Require employees to contact HR if they (or a family member) may have been exposed or if they intend to travel or attend large gatherings

Employer Responses (Cont.)



- Some businesses have been screening all visitors, asking them if:
 - They have returned from any of the countries listed on www.cdc.gov within the last 14 days
 - They have been in close contact with anyone who has traveled within the last 14 days to one of the countries listed on www.cdc.gov
 - They have had close contact with or cared for someone diagnosed with COVID-19 within the last 14 days
 - They have experienced any COVID-19 symptoms in the last 14 days (to include fever, cough, difficulty breathing)
- If any answer is yes, entry is denied

Federal Government Responses



- Federal government has issued (or re-issued) guidance for employers
- Agency guidance includes the following:
 - IRS: [High Deductible Health Plans and Expenses Related to COVID-19](#)
 - IRS: [Relief for Taxpayers Affected by Ongoing COVID-19 Pandemic](#)
 - CMS: [FAQs on Essential Health Benefit Coverage and the Coronavirus](#)
 - EEOC: [Pandemic Preparedness in the Workplace and the ADA](#)
 - DOL: [COVID-19 or Other Public Health Emergencies and the FMLA](#)
- Other government resources:
 - <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
 - <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

IRS Response re: High Deductible Health Plans



- Notice 2020-15: An HDHP will not fail to be HSA-qualified merely because the plan provides benefits for testing and treatment of COVID-19 without regard to whether the minimum deductible has been satisfied
 - Applies to all medical care and items for testing and treatment of COVID-19
- All other HSA eligibility requirements are maintained at this time
- Employers sponsoring HDHPs or other health plans should determine how their insurance carrier or TPA will provide benefits for treatment of COVID-19, including whether any cost sharing will apply

IRS Response re: High Deductible Health Plans



- IRS did not change rules to except telehealth for non-COVID-19 illnesses
 - Waiving telehealth copays for all visits may jeopardize HSA eligibility, although some insurance carriers and telehealth vendors are offering to do so for a limited duration
 - Employers with HSA plans who wish to broaden their telehealth program to include all visits at no cost should do so only for a limited duration and be aware that the IRS does not seem to be fully on board with that approach yet
 - An employer extending no-cost telehealth for all visits should consider whether to extend the same treatment for virtual behavioral health visits
- Many physicians and health care systems are extending telehealth to patients
 - These may be coded the same or similar as an office visit
 - 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

IRS Response – Tax Relief



- Notice 2020-17: Anyone with a federal income tax payment due April 15, 2020, is affected by the COVID-19 emergency
- Therefore, the IRS has postponed the due date for making federal income tax payments from April 15, 2020 to July 15, 2020
 - Up to \$10,000,000 may be postponed for each consolidated group of employers or for each C-corp that does not file a consolidated return
 - Up to \$1,000,000 for all other affected taxpayers, regardless of filing status
 - For example, single and married filers may postpone up to \$1,000,000
- IRS has also extended the April 15, 2020 tax *filing* deadline for all taxpayers to July 15, 2020

IRS Response – Tax Relief



- Relief is available solely with respect to federal income tax payments (including SS and Medicare taxes for self-employed individuals)
 - Interest and penalties for failure to pay taxes postponed by the notice will not begin to accrue until July 16, 2020
- No extension is provided for the payment of any other federal tax, or for the filing of any information return
 - Employers filing 1095-C's electronically must do so by March 31, 2020
 - An automatic 30-day extension is available by completing Form 8809
 - Under certain hardship conditions an additional 30-day extension may apply; however, requests for additional extensions of time to file information returns are not automatically granted

CMS Response re: Essential Health Benefits



- The “EHB package” that is 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
 - All plans must provide free *testing* for COVID-19 under the Coronavirus Response Act, with no prior authorization
 - Many states are encouraging carriers to cover a variety of COVID-19 related services, including treatment, without cost-sharing
- Health insurers in Massachusetts will cover the full cost of testing, counseling, treatment, and vaccination for the novel coronavirus
 - This is why insurance companies have reserves

CMS Response re: Essential Health Benefits



- Quarantine outside of a hospital setting, such as a home, is not a medical benefit; however, other medical benefits that occur in the home, such as home health care, may be covered (pursuant to prior authorization and/or cost-sharing or other limitations)
- While a COVID-19 vaccine does not currently exist, current rules 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, although plans may voluntarily choose to cover a vaccine for COVID-19, with or without cost-sharing, prior to that date

EEOC Response re: Americans With Disabilities Act



- Now that COVID-19 is a pandemic as reported by the WHO and the CDC, employers may take certain actions without violating the ADA
 - ADA applies to employers with 15 or more employees and prohibits medical exams or disability-related inquiries unless job-related
 - However, when a pandemic becomes more severe according to the assessment of public health officials, employers may have sufficient objective information 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

EEOC Response re: Americans With Disabilities Act



- 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 recommends 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

EEOC Response re: Americans With Disabilities Act



- Employers may require employees to:
 - adopt infection-control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal; and
 - wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of infection
- When employees return after a pandemic, employers may require a doctor's note certifying fitness to return to work; however, the CDC recommends against requiring a doctor's note

DOL Response re: Family and Medical Leave Act



- DOL released an FAQ to assist employers who are subject to FMLA
 - FMLA applies to 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)
- 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 continue group health plan benefits
- Employees may take leave to care for themselves or a family member
 - Leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under FMLA *or the new expanded FMLA*

Families First Coronavirus Response Act



- 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 paid family and medical leave
- The Act passed the Senate and was enacted on March 18
- Act includes Emergency FMLA and Emergency Paid Sick Leave provisions, free testing for coronavirus, increased funding for unemployment assistance, food aid, and Medicaid

Families First Coronavirus Response Act



- Provisions include **Emergency FMLA** and **Emergency Paid Sick Leave**
 - These provisions apply to employers with fewer than 500 employees and public employers of any size
 - Effective no later than 15 days after enactment; sunset at the end of 2020
- Paid leave provisions apply to employers with less than 500 employees, primarily because there are tax credits to assist employers in paying employees
 - Tax assistance made via a refundable payroll tax credit, which is good news for non-profits, as they wouldn't benefit from an income tax credit
 - Health insurance premiums may be allocated to qualified sick leave wages (as described in regulations to be published by the IRS)

Families First Coronavirus Response Act



- Coronavirus Testing: All group health plans and health insurance issuers in the individual and group markets (including grandfathered plans) must provide COVID-19 testing with no cost-sharing or prior authorization requirements
 - Effective now through end of public health emergency as declared by HHS
 - Includes services for urgent care, emergency room, or provider visits that result in an order for or administration of a covered diagnostic test

COVID-19 Testing



- There is a national shortage of COVID-19 laboratory testing materials
- Access to testing may be limited to those who meet certain criteria established by state Departments of Health
- Public health officials are urging those who have symptoms to stay home and contact their doctors by phone, rather than showing up at a medical facility asking to be tested

Families First Coronavirus Response Act



- **Emergency Family and Medical Leave Act**
- Amends FMLA to provides up to 12 weeks of job-protected leave for “a qualifying need related to a public health emergency” to employees who have been employed for at least 30 days
- A “qualifying need” is when an employee is unable to work (or telework) due to a need to care for a minor child if the child’s school or place of care has been closed or is unavailable due to a public health emergency
- After a 10-day elimination period, the rest of FMLA leave is paid at two-thirds of the employee’s regular rate based on normally scheduled hours, capped at \$200 per day and \$10,000 in total
 - Employees may, but cannot be required to, use paid leave during elimination period

Families First Coronavirus Response Act



- **Emergency Family and Medical Leave Act (Cont.)**
- Exceptions may apply for small employers (under 50 EEs) if the required leave would jeopardize the viability of their business
 - Available for the Emergency Paid Sick Leave part as well
- An exception to the reinstatement requirement under FMLA is available to employers with fewer than 25 employees, if the employee's position no longer exists after the pandemic ends
- Employers may exclude employees who are health care providers or emergency responders from this emergency FMLA entitlement

Families First Coronavirus Response Act



- **Emergency Paid Sick Leave**

- Provides paid sick time to an employee who is unable to work (at office or remotely) because:
 1. the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 2. the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 3. the employee has COVID-19 symptoms and is seeking medical diagnosis;
 4. the employee is caring for an individual who is subject to a quarantine or isolation order;
 5. the employee is caring for a child if the school or day care center has been closed, or the child care provider is unavailable, due to COVID-19 precautions; or
 6. the employee is experiencing any other substantially similar condition specified by the regulatory agencies

Families First Coronavirus Response Act



- **Emergency Paid Sick Leave (Cont.)**
- Employees may be entitled to 80 hours of paid sick time (pro-rated for part-time employees)
 - All employees are immediately eligible for this leave
- Leave is paid at the employee's regular rate, up to \$511 per day (\$5,110 in the aggregate) when leave is taken due to an employee's own illness or quarantine), and paid at two-thirds of the regular rate, up to \$200 per day (\$2,000 in the aggregate) when leave is taken to care for others
- Act includes anti-retaliation provisions; failure to pay required sick leave will be treated as a failure to pay minimum wages in violation of the FLSA

COVID-19 and Employee Benefits Issues



- If employees are laid off, review plan documents to determine if COBRA applies or if another extension of coverage is available
 - Potential ACA employer mandate exposure if employee is in a stability period
 - W-2 “Affordability” Safe Harbor may be impacted by layoffs
- Info provided to an employer by an employee is not subject to HIPAA
 - For example, that the employee is self-quarantining because of exposure to the virus
 - However, if the employer uses health plan information to determine if an employee has the virus, that information would be subject to HIPAA
 - Even if not subject to HIPAA, treat as sensitive personal information
- Employees may seek to stop dependent care FSA elections due to school closures; such changes are permissible based on the change in provider cost (the cost is \$0 when day care is closed)

COVID-19 and Common Benefits Questions



- Furloughs and layoffs: What are they and how are employee benefits affected?
 - When must COBRA be offered?
- When do employees lose eligibility for benefits?
 - Does it matter if they're expected to be rehired?
- How should employee contributions be handled during leave?

COVID-19 and Employment Issues



- Are we required to pay employees out on leave?
- What should we do if an employee informs us that they've been exposed or tested positive for COVID-19?
 - Shut down office/area and clean/sanitize
 - Identify coworkers who may have been exposed
 - Inform affected coworkers—without identifying the employee—and recommend they speak to a health care provider and self-quarantine for at least 14 days
 - Encourage employees to contact HR with questions and advise the further communication will be forthcoming



Questions?

Stacy H. Barrow

sbarrow@marbarlaw.com

(617) 830-5457

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