




Covid-19

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**Coronavirus / COVID-19
Response Team**


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1

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**The CARES Act Makes
Important Changes to
Employee Benefit Plans**

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3

Agenda

- Health & Welfare Provisions of the CARES Act
 - Provisions that relate to COVID-19
 - Provisions that do not relate to COVID-19
- Retirement Provisions of the CARES Act

4

COVID-19 Diagnostic Testing

- Diagnostic Testing of COVID-19
 - FDA-approved tests are required to be covered by group health plans as of March 18, 2020 under the Families First Coronavirus Response Act with no participant cost-sharing (includes grandfathered group health plans)
 - Includes diagnostic testing in any setting (doctor's office, urgent care, emergency room, telehealth, ect.)
 - Includes the evaluation of COVID-19, even if the actual test is deemed unnecessary

COVID-19 Diagnostic Testing

- The CARES Act expanded this testing requirement to include:
 - Tests by developers who have requested (or intend to request) an emergency use authorization from the FDA
 - Tests developed under state authorization
 - Other tests deemed necessary by HHS
- Administrative requirements:
 - Plan documents should be amended by the end the current plan year to add the covered diagnostic tests and services

COVID-19 Diagnostic Testing

- Participant notification requirements:
 - Summary of Material Modification:
 - An SMM is likely required to explain the addition of the these diagnostic tests and covered services
 - Since the addition of these tests and covered services is not a material reduction in covered benefits or services, the deadline to provide the SMM is 210 days after the end of the plan year in which the modification took effect
 - If a new SPD is distributed during the annual open enrollment period, this will likely eliminate the SMM requirement
 - SBC – Review your SBC to determine if these requirements change the information on the SBC

COVID-19 Diagnostic Testing

- Coverage by High Deductible Health Plans
 - IRS Notice 2020-15 indicates that a HDHP will not fail to be a HDHP because it covers testing and treatment of COVID-19 without the application of a deductible or participant cost-sharing
 - As a result, coverage of COVID-19 testing before the satisfaction of the minimum HDHP deductible will not jeopardize an individual's HSA eligibility

COVID-19 Diagnostic Testing

- Payment by group health plans for COVID-19 Diagnostic Testing
 - Group health plans may rely on negotiated rates with providers in place as of January 27, 2020 for the entire duration of the public health emergency declared by HHS
 - Group health plans without negotiated rates
 - Must pay the cash price for the diagnostic test published by the provider on a publically accessible website
 - A lower rate may be negotiated (but not a higher rate)
 - Providers must publish these cash prices on the internet or be subject to a fine

COVID-19 Treatment

- A group health plan may impose cost-sharing on the treatment of COVID-19
- Treatment of COVID-19 is an Essential Health Benefit under the ACA. So it will likely be covered by most health plans
 - Required to be covered by fully insured plans issued in the individual and small group markets
 - Most fully insured group health plans issued in the large group market and self-funded group health plans will cover, except for MEC-only (skinny) self-funded plans

Telehealth and HDHPs

- Difficulty in determining whether telehealth services are provided for the required COVID-19 testing or other medical services
- Most carriers are covering all telehealth services with no participant cost-sharing
 - Coverage of all telehealth services with no deductibles appeared to jeopardize a health plan's HDHP status/HSA eligibility of its participants
 - Until plan years beginning on or after January 1, 2022, coverage of all telehealth services (or services in other remote settings) with no deductibles is permissible by HDHPs

COVID-19 Preventive Care Services

- New preventive care services recommended under the ACA must generally be covered by non-grandfathered group health plans beginning with the first plan year that begins on or after the date that is one year after the recommendation is issued
- New preventive care services or immunizations that are COVID-19 related must be covered by the 15th business day after the recommendation is issued

COVID-19 Related PHI

- HIPAA governs the permissible uses and disclosures of PHI of covered entities, including group health plans
- By September 23, 2020, HHS must issue guidance on the disclosure of PHI that is COVID-19 related during
 - The public health emergency period declared by HHS
 - The emergency declaration by the President

Non-COVID-19 Provisions of the CARES Act

- The following items of services can be covered by various account-based health plans as of January 1, 2020
 - Over-the-counter drugs without a prescription (under the ACA, OTC drugs—other than insulin—could only be covered with a prescription)
 - Menstrual care products (tampons, pads, liners, cups, sponges or similar products)

Non-COVID-19 Provisions of the CARES Act

- The account-based health plans include:
 - Health savings accounts
 - Health flexible spending accounts (“FSAs”)
 - Health reimbursement arrangements (“HRAs”)
 - Archer medical savings accounts
- Coverage of these additional items is optional for FSAs and HRAs.
- Employers will likely need to amend FSA and HRA plan documents to cover these items and services

Non-COVID-19 Provisions of the CARES Act

- Tax-free reimbursement of student loan payments under an Educational Assistance Plan:
 - Only includes repayments of “qualified education loans,” which means the proceeds of the loan were only used for:
 - Tuition and fees
 - Room and board
 - Books, supplies, transportation and miscellaneous expenses
 - Borrowers are required to certify these uses to lenders. Employers may want to require the same

Non-COVID-19 Provisions of the CARES Act

- Only includes loan payments due between March 27, 2020 and December 31, 2020
- Subject to the calendar limit of \$5,250 in combination with any other tuition expenses reimbursed under the Educational Assistance Plan
- Because of cash-flow issues, limited duration, limited amount, and qualified loan requirement, these tax-free loan reimbursements may not gain much traction with employers
- Future implications?

Non-COVID-19 Provisions of the CARES Act

- Substance use disorder information
 - Patient records created by providers that receive federal financial assistance are subject to the Confidentiality of Substance Use Disorder Patient Record regulations. Like HIPAA these regulations govern the use and disclosure of information contained in these records
 - Generally, the regulations permitted disclosure, with authorization, to third-party payers, like group health plans
 - The regulations prohibited re-disclosure by third-party payers (e.g., third-party administrators of group health plans)

Non-COVID-19 Provisions of the CARES Act

- In 2018, the Substance Abuse and Mental Health Services Administration amended these regulations to allow third-party payers to re-disclose this information to contractors and subcontractors, as long as there was a contractual requirement between the parties requiring the contractor/subcontractor to comply with these regulations
- Contractual requirement is effective February 2, 2020

Non-COVID-19 Provisions of the CARES Act

- CARES Act amends the statutes that govern the use of substance use disorder patient records by these providers. As amended these statutes align with HIPAA and they permit the use, disclosure and re-disclosure of this information as long as these activities comply with the HIPAA privacy rule
 - Includes breach notification requirement in the event of an unauthorized use or disclosure of this information
 - Effective March 27, 2021
 - SAMHSA must issue regulations

Retirement Plan Provisions of The CARES Act

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Agenda

CARES Act new rules regarding

- Voluntary Distributions
- Loans
- Minimum Required Distributions

Plan Distributions

Plan Distributions

- Allows distributions of up to \$100,000 to be made until December 31, 2020 from most defined contribution retirement plans as a result of COVID-19, even if the participant does not satisfy the usual hardship distribution rules
 - The participant must certify that he, his spouse or one of his dependents tested positive for COVID-19 or suffered adverse financial consequences as a result of COVID-19

Plan Distributions

- It is not clear whether distributions may also be made from pension plans (including cash balance plans and money purchase pension plans) and whether employer contributions made to profit sharing plans may be distributed without the participant satisfying additional requirements.

Plan Distributions

- The distribution is not subject to mandatory income tax withholding or the 10% penalty tax even if the participant is less than age 59-½
- May repay the distribution to the plan (or an IRA) within three years without being taxed on it
- If not repaid, is treated as regular income spread equally over the three year period from the date of the distribution for Federal income tax purposes

Loans

Loans

- Participants may receive loans of up to \$100,000 (or 100% of their account balance in the plan, if less) until September 28, 2020
- Payments due in 2020 on loans currently outstanding and new loans taken out during the remainder of 2020 may be put on hold for one year
 - It is not clear whether plan sponsors are required to delay these loan payments if participants request the delay

Loans

- Five year repayment period is also extended to 6 years
 - Interest continues to accrue on the loan during the one year grace period on repayment
 - 10% penalty tax is not generally waived if participant later defaults, so a distribution may be better option.

Loans and Distributions

- Plan amendments can be delayed until 2022, but employers will want to determine if they will allow any of these provisions to be available to their employees and notify the employees of the new rules to the extent the employer makes them available

Should Employers Offer These New Options?

Should Employers Offer These New Options?

- Most employers should not be rushing to implement or promote these options at this time for several reasons
 - The participant will be selling assets at the worst possible time, whether the participant takes a distribution or a loan

Should Employers Offer These New Options?

- Encouraging participants to pull money out of their retirement plan accounts now will only make their future retirement income deficit worse and these options should be seen as an absolute last resort in most cases

Should Employers Offer These New Options?

- The most beneficial thing about these changes is that they may make participants more comfortable continuing to contribute to their plan for the remainder of 2020, since they will know that if things get worse before the end of the year and they need access to the money in their account, they will be able to get it without penalty

Should Employers Offer These New Options?

- Participants who can afford to should consider a Roth conversion. The taxes due on the conversion will be significantly less as a result of the decline in the value of the participant's account and the future growth in the assets will be income tax free

Should Employers Offer These New Options?

- COVID-19 should serve as an important reminder that employees should establish an emergency fund of at least 3 months income before they begin investing in risky short term assets like stocks
- If they are going to use the plan as their emergency fund, they should make Roth contributions and invest them in conservative investments until they reach their goal.

Other Provisions

Other Provisions

- Minimum required distribution requirements that apply to defined contribution retirement plans (but not defined benefit plans) and IRAs are waived for the 2020 plan year
- Sponsors of defined benefit pension plans receive some relief from the minimum funding requirements for 2020

Other Provisions

- The final thing employers should be considering immediately is whether to reduce employer contributions to their retirement plans if necessary.
- 30 day advance written notice is generally required if plan is a safe harbor plan.
- But, may still elect nonelective safe harbor on or before December 1, 2020 if conditions improve before end of year.



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