COVID-19 Stimulus Package

The CARES Act

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On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") into law. It provides support to individuals and businesses that are trying to cope with the coronavirus disease 2019 ("COVID-19") pandemic. We will likely continue to see additional legislation enacted in response to the COVID-19.

The majority of the 800 pages of legislation are aimed at providing relief for individuals and businesses that have been negatively impacted by the pandemic. This Bulletin will focus is on the parts of the CARES Act that are directed towards employee benefit plans and employee leaves of absence.

Briefly, the legislation:

- Expands coverage of COVID-19 testing and preventive services.
- Clarifies that plans and carriers will pay either the negotiated rate or the cash price, as listed on a provider's website, for COVID-19 testing.
- Allows high deductible health plans ("HDHPs") that are compatible with health savings accounts ("HSAs") with plan years before December 31, 2021 to cover telehealth visits prior to satisfaction of the minimum deductible.
- Provides that over-the-counter medicines and drugs are "qualified medical expenses" and may be reimbursed through a health FSA, HRA or HSA on a tax-favored basis without a prescription and expands the definition of "qualified medical expenses" to include menstrual products.
- Includes changes to paid sick leave and family leave provisions created under the Families First Coronavirus Response Act ("FFCRA").

The following provides highlights of the final enacted legislation with respect to employee benefit plans and employee leaves of absence and is not an exhaustive summary.

Coverage of Testing

The CARES Act builds on the insurance coverage provisions included in the FFCRA.

The FFCRA requires all employer-sponsored health plans to provide coverage for testing and other services related to COVID-19 without cost sharing, prior authorization, and other medical management requirements.

The tests and services include:

- In vitro COVID-19 diagnostic products that are cleared or authorized by the FDA, including their administration, and
- Items and services furnished to an individual during health care provider office visits (including telehealth visits), urgent care center visits, and emergency room visits that result in an order for, or administration of, an in vitro diagnostic product, described above.

The CARES Act broadens coverage for COVID-19 tests and services under private plans beyond FDA-approved testing to also include coverage, without cost-sharing, for in vitro COVID-19 diagnostic products for which the developer has requested, or intends to request, emergency use authorization from the FDA, or that a state (which has told HHS it is reviewing such test) has authorized.

The CARES Act provides guidance that leaves open coverage for any "other test that the Secretary determines appropriate."

Reimbursement Rate for Testing

The CARES Act requires that group health plans (or insurers) reimburse providers at the negotiated cost of testing, where applicable, and for out-of-network providers, the group health plan (or insurers) must reimburse the provider at the cash price of the diagnostic testing, as reflected on the website. Providers are required to publicize the price of testing on a publicly available website. Providers who fail to publicize the price of testing will be subject to a fine not to exceed $300 per day.

Preventive Services

The CARES Act provides that if a preventive measure, defined as an "item, service, or immunization that is intended to prevent or mitigate COVID-19" (e.g., a COVID-19 vaccine) becomes available, group health plans must cover such preventive measure with no-cost sharing. The item or service must meet criteria under current U.S. Preventive Services Task Force ("USPSTF") guidelines or have a recommendation from the CDC with respect to an individual for whom the services are intended.

HSAs, FSAs and HRAs

The CARES Act provides much needed clarity with respect to Health Savings Accounts ("HSAs" and telemedicine. For plan years beginning on or before December 31, 2021, the CARES Act includes a safe harbor for high deductible health plans ("HDHPs") that permits pre-deductible coverage for telehealth and remote care services. As a result, HDHPs can allow all services provided through telemedicine or other remote care services to be covered prior to meeting the health plan deductible without jeopardizing an individual's HSA eligibility.

The CARES Act also repeals a rule enacted under the Affordable Care Act that prohibited over-the-counter medicines and drugs, other than insulin, from being qualified medical expenses without a prescription. For expenses incurred after December 31, 2019, participants may utilize HSAs, health flexible savings accounts ("FSAs,") or health reimbursement arrangements ("HRAs") to cover over-the-counter medicines and drugs (e.g., ibuprofen, cold medicines), without a prescription.

The CARES Act further provides that HSAs, health FSA, and HRAs, may be used to purchase certain menstrual care products (e.g., pads and tampons) on a tax-favored basis. These products will be treated as qualified medical expenses under the new legislation. This change applies to expenses incurred after December 31, 2019.

Paid Sick Leave and Expanded Family Medical Leave

The CARES Act provides a few clarifications and makes some relatively small changes to the paid sick leave and extended family leave provisions under FFCRA. The CARES Act:

- Provides for the exclusion of certain US government employers and executive branch employees for good cause;

    - Creates a new rule to define when a rehired employee may be considered an "eligible employee employed for at least the last 30 calendar days" under FFCRA. Under the CARES Act, a rehired employee, who would otherwise qualify as an "eligible employee employed by the employer" includes an employee who:
    - Was laid off by the employer on March 1, 2020 or later;
    - Had worked for the employer for at least 30 days in the last 60 calendar days prior to the lay-off; and
    - Has been rehired by the employer.

- Clarifies the amount of the paid leave benefit is "per employee" (e.g., $511/day/per employee).

The CARES Act includes provisions that are meant to improve the ability of employers to obtain advances on anticipated tax credits for employers for costs associated with paid sick and family leave. The Act allows employers to receive an advance tax credit from the IRS rather than having to be reimbursed on the back end. The CARES Act also provides penalty relief for failure to deposit tax amounts in anticipations of the credits.

Additional guidance from the IRS and DOL providing instructions on the process to obtain the tax credits and addressing additional questions and details on the expanded FMLA and paid sick leave provisions under FFRCA is expected in April.

Employer Action

Employers should:

i. ensure coverage for associated testing for COVID-19 is provided without cost-sharing or other limitation.

ii. confirm the health plan will pay either the plan's negotiated rate for the test, or the providers listed cash price. It appears this would limit a plan from imposing cost-sharing or balance billing in the event an individual received testing from an out-of-network provider; however, we await further guidance.

iii. consider waiving any copays associated with telehealth plans for plan years that begin before December 31, 2021 when offering an HDHP/HSA arrangement as such first dollar coverage is not disqualifying for a limited time.

iv. update documents and announce to employees that over-the-counter medicines and drugs can be reimbursed through tax favored accounts without a prescription and the expanded tax-free treatment of menstrual products.

v. review the FFCRA paid sick leave and expanded family leave requirements and note the changes made by the CARES Act.

We are monitoring developments and will continue to update you.