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Employee Benefits Advice Related to COVID-19 Pandemic in the United States

The Covid-19 pandemic is having a dramatic impact on employment and investments, which raises numerous questions for employee benefit plan sponsors and administrators. This alert highlights a number of these issues and will be supplemented as further legislation and guidance is issued:

Employer Provided Group Health Plans

Covid-19 Coverage and HSAs

Under H.R. 6201 group health plans are required to provide testing for COVID-19 without authorizations or medical management requirements and without co-payments. The required coverage includes *in vitro* diagnostic for the detection of SARS-CoV-2 or the diagnosis of the virus that causes COVID-19 that are approved, cleared, or authorized by the FDA, the administration of such in vitro diagnostic products, and terms and services furnished to an individual during health care provider office visits (including in-person visits and telehealth visits), urgent care center visits, and emergency room visits that result in an order for or administration of an in vitro diagnostic product related to the furnishing or administration of such product or to the evaluation of such individual for purposes of determining the need of such individual for such product. IRS Notice 2020-15 allows a high-deductible health plan to provide this coverage without jeopardizing participant contributions to HSAs.

Health Coverage During Emergency Paid Sick Leave

H.R. 6201 requires employers with fewer than 500 employees to provide two weeks of emergency paid sick leave for reasons related to COVID-19 and twelve weeks of emergency paid family and medical leave for employees who are unable to work because they need to care for children under 18 years of age whose school or place of care has been closed. This paid leave is part of FMLA leave, which includes a requirement that the employer allow the employee to remain enrolled in any group health coverage under the same terms as an active employee. This is important relief for benefits administrators because it allows the administrators to continue health benefits for parents who would otherwise lose health coverage, even due to reduced hours needed to address childcare issues.

Networks and Health Care Access

Workers may be faced with a situation where insurance coverage is available, but there is no provider access. Elective procedures have already been postponed in certain circumstances and shortages of health care providers and equipment is anticipated. This will likely impact access to care, which may be reflected in higher health care costs under a supply and demand theory. On the other hand, existing cost controls and government restrictions

or negotiations may prevent such escalations so that care will resemble catastrophic care, leaving minor ailments untreated. Current health coverages and contracts are not structured for this circumstance and the obligations to provide robust networks, certain preventative benefits, reauthorizations, and other health care management might become the subject of legislation or contract disputes. Self-funded plans in particular may want to contact their vendors to obtain assurances regarding their services during the crisis and should consider amending their plans temporarily if necessary to reflect the new reality.

Furloughs and Layoffs When Emergency Paid Sick Leave Does Not Apply

H.R. 6201 does not extend beyond the first two weeks to individuals without children even if the employer has furloughed workers, implemented layoffs, or implemented hour reductions. Generally, unless a group health plan bases eligibility on a lookback period and provides a stability period, such reductions in hours might cause employees to lose group health coverage eligibility and trigger COBRA or state based continuation coverage. Insurance carriers appear to be responsive to allowing coverage to continue due to this emergency situation. Such employers that want to ensure that coverage continues without the need to enroll employees in COBRA should contact their health insurance carrier outlining the intended continuation. For those plans that employ a lookback period with a stability period and utilize the W-2 Box1 affordability safe-harbor, the workers might maintain eligibility, but the employee portion would be unaffordable. As a result, the employer may be subject to penalties under the Affordable Care Act's employer mandate.

Health Plan Amendments

There are four amendments to health plans that should be considered immediately as a response to COVID 19:

1. Plans should be amended to reflect the new FMLA rules and Covid-19 testing rules.
2. If the carrier agrees to extend the coverage beyond the FMLA period, the employer should amend their plan to provide this coverage. For self-funded plans, the plan administrator should address the issue with the stop-loss carrier before implementing this change.
3. If the plan wants to extend Covid-19 testing without co-payments or cost sharing, the administrator should confirm with any carriers, including stop-loss carriers for self-funded plans, that this change can be made.
4. The affordability safe-harbor should be reviewed to determine whether it is appropriate for the circumstances and if not, whether an adjustment to employee premiums can be made to avoid Affordable Care Act penalties. For example, a maximum employee contribution that is a percentage of actual W-2 wages could prevent an affordability problem and that increase cost might be offset by tax credits as described below.

Tax Credits for Health Coverage During Emergency Paid Sick Leave

H.R. 6201 provides for a payroll tax credit to offset an employer's emergency paid sick leave and emergency paid

family leave costs and these credits include an amount to offset employer-paid health plan premiums and expenses allocated to employees on emergency paid sick or medical leave wages. The allocation method will be described by regulations, but until regulations are issued the allocation is *pro-rata* for employees and period of coverage. The credit is available for both insured and self-funded plans. There are a number of questions raised by this credit. First, do employee cafeteria plan contributions count as employer deferrals as they do under other tax law provisions? Second, does *pro-rata* allocation for employees take into account the coverage cost? For example, can the increase cost of providing family coverage be included in the offset since the largest portion of the cost will be reflected in the emergency paid family leave costs? Third, for self-funded plans, will the costs be annualized, actual costs, or can COBRA premium calculations be used? Fourth, will dental and vision costs be included? Fifth, can an employer receive the credit if the cost-sharing provisions are amended to shift costs away from the employee and to the employer? Regulations will be issued soon and will hopefully address these questions.

Short-Term Disability

Current short-term disability plans offered through insurance companies are not structured to take into account the pressures involved with Covid-19. Discussions with carriers anecdotally suggest that carriers will apply existing criteria on a case-by-case basis. Hopefully the prediction that most individuals contracting Covid-19 will recovery relatively quickly and completely proves accurate and short-term disability will not be needed in most cases. Some disability plans provide a quarantine benefit rider that may provide coverage that would not be available under other plans. Governmental short-term disability plans on the other hand have been expanded to provide better coverage during this crisis. California SDI guidance specifically covers Covid-19 and waives the normal one week waiting period that would otherwise apply to benefit payments. New York also provides expanded coverage.

EAPs and Existing Support Benefits

Many employers have broad employee assistance plan ("EAP") coverage for their employees. Employers should contact their EAP providers to ensure that they are fully operational, but assuming that the coverage is available, employees can access EAPs for a wide range of assistance. Most importantly, employees who are facing challenges with family issues related to Covid-19 pressures or changes and employees struggling with anxiety or depression can benefit from telephone counseling offered through most EAP services. Employers that offer EAP coverage should include the access number on Covid-19 correspondence and updates.

Wellness programs can also be leveraged to provide employee support during this time period. Employers who have step programs or wellness challenges should consider modifying their programs to address the reality changes associated with Covid-19. Wellness vendors should be able to find creative ways to use technology to keep employees focused on health and connected during social distancing.

USERRA

As the national guard is mobilized to respond to Covid-19, employers should ensure that their USERRA policies are followed. Health and pension plan coverage for service members is provided for by USERRA. Individuals performing military duty of more than 30 days may elect to continue employer sponsored health care for up to 24 months; however, they may be required to pay up to 102 percent of the full premium. For military service of less than 31 days, health care coverage is provided as if the service member had remained employed. USERRA clarifies pension plan coverage by making explicit that all pension plans are protected.

Retirement Plans

The market downturn magnified by Covid-19 will dramatically impact retirement plans. Many groups are focused on obtaining relief from the government and regulators.

- The National Association for Manufacturer updated and expanded NAM COVID-19 Policy Action Plan Recommendation includes recommendations to the IRS to treat the impact of COVID-19 as an “economic loss” that allows the temporary suspension of employer contributions to certain retirement accounts, to suspend contributions to pension plans for at least calendar year 2020 with a period of years for employers to make catch-up contributions, to extend “pension smoothing”, to increase the allowable corridor from 10% to 25%, and to reduce IRS and PBGC burdens on plan sponsors.
- The American Retirement Association (ARA) is advocating for retirement plan relief patterned after the disaster relief in the Further Consolidated Appropriations Act, 2020 (which contained the SECURE Act) and the 2008 economic recovery legislation. This relief could waive the Section 72(t) additional 10% penalty tax on early withdrawals from retirement plans for Covid-19 impacted individuals; increase retirement plan loan limits; allow a one year delay in loan repayment; and allow income tax payments for loan defaults to be paid over three years.
- ARA and the AICPA jointly advocate for extension for a number of retirement plan filings including 5500s. The requested relief is outlined in a letter sent on March 16 to the Assistant Secretary of the Labor and the IRS Benefits Tax Counsel which can be accessed at <https://www.napa-net.org/sites/napa-net.org/files/IRS%20DOL%20Coronavirus%203-16-20.pdf>.

Until relief is issued, retirement plan sponsors and participants will need to work within existing rules. Actuaries will look for ways to address additional stresses on funding in defined benefit plans and defined benefit plan standard terminations are likely to be deferred while distress terminations are likely to increase, which will place increased burdens on the PBGC. If pension relief is not enacted, more defined benefit plans will enter critical status which will result in some pension benefit reductions.

Many 401(k) plans provide investment education and assistance to participants who are able to direct their own investments. Making sure that employees access this help can help address much of the stress

associated with the downturn. For employees that need current access to 401(k) funds, the availability of hardship withdrawals and loans will depend on the 401(k) plan terms. Plans that only allow one plan loan may want to remove that restriction to allow participants in financial need to take an additional loan instead of a withdrawal. Plans that incorporate regulatory “safe harbors” for hardship distribution will not cover a period of unpaid leave, but may cover medical care expenses; payments necessary to repair damage to, prevent the eviction from, or prevent foreclosure of the employee’s principal residence; or funeral expenses. If the 401(k) plan does not follow the safe-harbor, but uses a hardship standard based on relevant facts and circumstances, then prolonged financial instability may qualify. Most employers utilize safe harbor hardship rules, and shifting to a facts and circumstances approach should only be done if the employer has the administrative capacity to handle reviews of each participant’s financial situation. Plans that provide hardships withdrawals outside of the safe-harbor based on substantiated immediate and heavy financial need will be able to provide more access to 401(k) funds, but will face the added burden of administering requests. Any withdrawal will take money set-aside for retirement, leaving employees with less retirement savings and more future vulnerability.

If we can be of assistance and to discuss various options and specific situations, please feel free to contact any of the Buchalter Tax, Benefits, and Estate Planning attorneys below.



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