COVID-19: COVID-19 CONSIDERATIONS: EMPLOYER SPONSORED HEALTH AND WELFARE PLANS

Date: 9 April 2020

U.S. Benefits, ESOPs, and Executive Compensation Alert

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In the wake of the COVID-19 pandemic and the resulting economic uncertainty, many employers are searching for ways to be financially prepared in the weeks and months to come while simultaneously balancing the well-being of their employees. This article highlights some things employers may wish to keep in mind when making decisions with respect to their employer-sponsored health and welfare plans.

HOW TO PROVIDE COMPANY-PAID HEALTH INSURANCE DURING UNPAID LEAVE, AFTER TERMINATION, OR DURING REDUCED HOURS.

Most employer-sponsored health benefit plans require employees to work full-time to be eligible for coverage. Consequently, employees who terminate employment as well as employees who have their hours reduced often lose health plan coverage. Although loss of health plan coverage may be a consequence of reduced hours or termination, it does not have to be. There are certain situations in which an employer can (or may have to) continue to provide health benefit coverage despite the change in an employee's status. Further, employers may, but are not required to, develop plans that provide continued health coverage.

If an employee goes out on a qualifying leave under the Family and Medical Leave Act of 1993 (“FMLA”), the employer is generally required to maintain group health plan benefits for that employee on the same terms and conditions, including premium cost, as if the employee were still active. This continuation requirement applies to “group health plans,” and so would be equally applicable to health flexible spending accounts (“FSAs”) and health reimbursement accounts , but likely not health savings accounts (“HSAs”). The Families First Coronavirus Response Act (the “FFCRA”), which was signed into law on March 18, 2020, includes the Emergency Family and Medical Leave Expansion Act, which amends the FMLA to require private employers with fewer than 500 employees to provide paid emergency FMLA leave to certain employees effected by COVID-19 through December 31, 2020. For more information on FFCRA's emergency paid sick and family medical leave provisions, see K&L Gates Alert, *COVID-19: Analysis of the COVID-19 Pandemic Congressional Response: Employer Requirements Under the Families First Coronavirus Response Act (FFCRA)*.

Not all leave an employee experiences due to COVID-19 will be protected leave under the FMLA. During non-protected leave, although employers are not required to provide continuation coverage, they may do so under the terms of their plan. Health benefit plans may be drafted to provide continued coverage for employees who have taken an authorized leave of absence. Depending on the specific plan terms, furloughed employees may be

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considered to be on an authorized leave of absence and therefore may maintain benefit eligibility. Employers should consult the terms of their health and welfare plans to see if eligibility is maintained while on an authorized leave of absence. If a plan's terms fail to provide for continuation coverage during leave, sponsors of self-insured plans may amend the plan's terms to provide for such coverage. On the other hand, if a plan sponsor of a fully insured plan wishes to amend its plan to provide for continuation coverage for leave, authorization from the applicable insurance carrier would be necessary.

The Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("COBRA"), also imposes certain coverage continuation requirements on a health plan when an employee loses coverage due to a qualifying event. An employee, and his or her dependents, who loses health plan coverage due to a reduction in hours or termination of employment generally experiences a qualifying event under COBRA and must be provided the opportunity to continue to participate in the employer's plan for a period of time. Often this opportunity is made available at the full premium cost. While it is common for COBRA coverage to be paid entirely by the employee or his or her covered dependents, an employer may agree through the terms of a severance plan or other arrangement to subsidize all or a portion of the COBRA premium. Whether the COBRA subsidy or continued health plan coverage may be provided on a pre-tax basis depends on whether the program is self-insured or insured and whether the offering is available to a wide range of employees. Please consult your benefits counsel to consider. Alternatively, an employer may amend its group health plans to defer the start of the COBRA continuation period until a date later than when coverage would ordinarily be lost. As with amending a plan to provide for continuation coverage during an authorized leave of absence, insurance carrier approval is necessary for fully insured plans seeking to amend their terms to provide for deferred COBRA periods.

What to Keep in Mind: Employers that are considering a reduction in force or a reduction in hours should consider their options with respect to continuing to provide health plan coverage to employees who may otherwise be without coverage.

A FURLOUGH OR REDUCTION IN HOURS MAY SUBJECT AN EMPLOYER TO ASSESSABLE PAYMENTS UNDER THE AFFORDABLE CARE ACT.

Pursuant to the employer mandate provisions of the Patient Protection and Affordable Care Act of 2010 (the "Affordable Care Act" or "ACA"), applicable large employers ("ALEs") may be subject to excise taxes or employer shared responsibility payments (i) if the ALE does not offer health insurance coverage to at least 95 percent of its full-time employees or (ii) generally, if the health insurance coverage offered is not affordable and the employee who was not provided affordable coverage receives a premium tax credit. Depending on the circumstances, a furlough or reduction in hours may complicate the coverage analysis required under the Affordable Care Act. In some cases, a furlough or reduction in hours may cause an employee to lose health insurance coverage under an ALE's group health plan, but, for purposes of the Affordable Care Act, such employee may still be treated as a "full-time employee" during the furlough period or the reduced hours period. Consequently, the failure to offer coverage to the affected employee could trigger an assessable payment.

Whether an employee who is furloughed or whose hours are reduced is treated as a full-time employee for purposes of the Affordable Care Act depends on how full-time employment status is determined. The look-back measurement method essentially allows an employer to count an employee's hours of service in a prior year (the

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"look-back year") to determine how the employee will be treated in the subsequent year (the "stability period"). Accordingly, the look-back method generally will require an employee who is determined to be a full-time employee based upon service in the look-back year to be treated as a full-time employee during any portion of the furlough or period of reduced hours that occurs during the following 12-month stability period, even though such employee may not be working full time during the period of the furlough or reduced hours.

Although offering COBRA continuation coverage may satisfy an employer's ACA obligation to offer health insurance coverage to full-time employees, in order to prevent the possibility of all ACA penalties, offering coverage alone is not sufficient; the coverage offered must also be affordable. Typically, employers require employees to pay the entire premium cost of their COBRA continuation coverage. However, that may make such coverage "unaffordable" under the Affordable Care Act and could subject the employer to an assessable payment if the employee were to receive a premium credit. Employers that satisfy their ACA obligations through COBRA may need to consider subsidizing the COBRA premium.

What to Keep in Mind: Before making a determination regarding whether to furlough employees, employers should consider the impact that such a decision could have under the Affordable Care Act.

POTENTIAL HIPAA VIOLATIONS IN CONNECTION WITH TAKING COVID-19 PRECAUTIONS.

Many employers are taking steps to protect the health of their employees during the COVID-19 pandemic. However, some employers may be concerned that in taking such steps they may violate the Health Insurance Portability and Accountability Act ("HIPAA"). HIPAA imposes certain requirements on employers and health plans related to protecting employees' health information.

Based on statements made by the Department of Health and Human Services in the preambles to the 2002 privacy rules under HIPAA, employers generally will not be in violation of HIPAA if they condition employment on receipt of an authorization from the employee that would allow the employer to obtain personal health information, like COVID-19 testing information, subject to restrictions that may be imposed by other laws, like the Americans with Disabilities Act ("ADA").

If an employee's personal health information is obtained by an employer, under most circumstances the employer will not be required by HIPAA to keep such information private. Employers who offer health benefits, but only through insured plans, generally will not be regulated by HIPAA because employers independently are not covered entities subject to HIPAA. For the same reason, HIPAA does not prevent an employer from asking questions about COVID-19 symptoms or conducting COVID-19 screenings.

Likewise, under the ADA, an employer's precautionary activities with respect to COVID-19 are generally permissible. The Equal Employment Opportunity Commission (the "EEOC") has issued guidance in light of COVID-19 that makes clear that during a pandemic, ADA-covered employers may ask employees if they are experiencing symptoms of the pandemic virus without violating the ADA and may screen job applicants for such symptoms after making a conditional job offer. Employers must maintain all information about employee illness as confidential.

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What to Keep in Mind: While employers should proceed with caution, many precautionary steps taken to protect the workforce from exposure to COVID-19 will not create issues under HIPAA or the ADA.

COVID-19 TESTING AND HDHP/HSAS.

The FFCRA requires employer-sponsored group health plans to cover the cost of COVID-19 testing and health care provider visits (including telehealth, urgent care, and emergency room visits) and prohibits any form of deductible or cost sharing. For participants in high-deductible health plans ("HDHPs") or HSAs, this poses a problem. HSAs are only available to persons with an HSA-eligible HDHP, which require a "high" deductible. Generally, the only first dollar coverage permitted under the HDHP is for ACA-required preventive care.

IRS Notice 2020-15 provides that HDHP status and HSA-eligibility will not be jeopardized if COVID-19 testing or treatment is provided without satisfying the HDHP's minimum deductible or any deductible at all (i.e., first-dollar coverage). Previous IRS guidance provides a similar first-dollar safe harbor for preventative screenings (not for an existing illness or condition) made on a first-dollar basis. Notice 2020-15 makes clear that vaccines are preventative care.

The Coronavirus Aid, Relief, and Economic Security Act, signed into law on March 27, 2020, permits HDHPs to provide telehealth or remote care absent any deductible, thereby allowing participants to maintain HDHP and HSA eligibility. This safe harbor applies to plan years beginning on or before December 31, 2021. For HDHP and HSA participants to take advantage of these changes, the plan must be amended and a summary of material modifications must be provided to participants within 210 days after the close of the plan year in which the change is adopted.

What to Keep in Mind: Employers should take care to ensure that benefits are not extended for non-COVID-19-related reasons (e.g., flu, cold, etc.) that do not satisfy these safe harbors. If non-covered services and items are offered before satisfying the required deductible, this may render an employee ineligible to participate in the HDHP or HSA.

MID-YEAR CAFETERIA PLAN CHANGES.

Employees may wish to change an election under an employer-sponsored cafeteria plan due to COVID-19-related changes in circumstance. There have been no COVID-19-specific changes to the general cafeteria plan rules under § 125 of the Internal Revenue Code of 1986, as amended (the "Code"). However, the following describes COVID-19-related considerations employers should keep in mind when deciding whether to allow a mid-year cafeteria plan election change.

General rule – Elections are Irrevocable

Cafeteria plans can include a number of different qualified benefits, such as group health plans, health FSAs,

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dependent care assistance programs, health savings accounts, and adoption assistance, among others. Per Code § 125, a cafeteria plan election regarding coverage generally must be made before the start of the plan year and must be irrevocable for the duration of the plan year, unless a permitted election change event occurs (i.e., mid-year election changes are generally prohibited). Failure to adhere to the irrevocability requirement is an operational failure that could result in the entire cafeteria plan losing its qualified status and all employees being taxed on elections made under the plan. There is no formal correction program currently available for cafeteria plans.

Permissible Mid-Year Election Change Events

The cafeteria plan rules permit an employee to change his or her cafeteria plan elections mid-year in a number of circumstances. The mid-year election change must correspond to the event resulting in the election change. The events identified below include some, but not all, election change events under the cafeteria plan rules that may be trigged by COVID-19-related changes in circumstance. Most mid-year election changes that a cafeteria plan permits are a matter of plan design, so employers must carefully review their plan document to determine what their plan allows.

- An employee who experiences certain changes in employment status that affect eligibility for coverage, such as changes to worksite, hours, or other similar employment changes, may make a mid-year election change. Teleworking or remote work would only trigger a change in employment status allowing a mid-year election change if the change in worksite (e.g., remote work) affects the employee's eligibility for coverage, which is usually not the case.
- An employee who experiences a change in coverage under another employer plan, such as an employee losing coverage under his or her spouse's health plan, or loss of health coverage under a governmental plan or an educational institution's plan, may make a mid-year election change to add coverage under the employer's plan for the benefits lost under the other plan. Mid-year election changes based on this event do not permit changes to a health FSA election.
- An employee on FMLA leave may revoke an existing election of accident or health plan coverage and make another election for the FMLA period.
- An employee whose hours of service are reduced below 30 hours per week as a result of a change in employment status may make a mid-year election change to drop health coverage under the employer's plan (whether or not eligibility for coverage is affected is by the reduction in hours) if the employee intends to enroll in another plan offering minimum essential coverage and other specific conditions are met. This event is separate from a reduction in hours that constitutes a change in employment status and is not dependent on loss of coverage.

Dependent Care Assistance Programs ("DCAP")

Election change rules apply more liberally to DCAPs than other cafeteria plan benefits. In addition to changes in employment status described above, an employee may make a mid-year change to a DCAP election due to a

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change in day care providers, change in the frequency of use of a day care provider, or a change in a daycare provider's fees (other than a cost change imposed by the employee's relative).

Due to COVID-19, a number of daycare, preschools, and after-school programs are closed. Employees may revoke their DCAP elections prospectively as a result of these closures. Likewise, employees who experience new costs for daycare that are more expensive than pre-COVID-19 costs can enroll in the DCAP or increase a current election. On the other hand, employees who experience new costs that are less expensive than pre-COVID-19 costs (e.g., working from home or a spouse working from home reduces childcare costs) can revoke a DCAP election or decrease a current election.

Mid-Year Election Changes for HSAs and with After-Tax Dollars

Employees may make mid-year election change absent a permissible election change event on a prospective basis under an HSA as well as for benefits that the employee contributes to on an after-tax basis.

What to Keep in Mind: Changing employee circumstances due to the COVID-19 pandemic will inevitably result in employee requests to make cafeteria plan election changes. Employers should be mindful to comply with the rules applicable to cafeteria plans under Code § 125 and the terms of their plan document to ensure the plan's tax-favored status is not jeopardized.

TAX-FILING/PAYMENT EXTENSIONS.

IRS Notice 2020-18 extends the deadline for tax return filings and payments due on April 15, 2020 (not any other date) to July 15, 2020. A recent IRS FAQ entitled, “Filing and Payment Deadlines Questions and Answers,” clarifies this extends the deadline for making 2019 HSA and Archer MSA contributions to July 15, 2020. No separate or additional forms need to be filed with any government agency to take advantage of the extended deadline.

What to Keep in Mind: Employers that need more time to make their 2019 HSA or Archer MSA contributions should consider taking advantage of the extended deadline.

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