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Employee Benefits Newsletter

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EMPLOYEE BENEFIT/EXECUTIVE COMPENSATION CHANGES MADE BY THE CARES ACT

On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (the "***CARES Act***"). This historic $2 trillion relief package received bipartisan support and is part of the third wave of federal government support as the nation copes with the acute economic fallout from the coronavirus (COVID-19) pandemic. Some of the key provisions of the CARES Act that apply to health and welfare plans, educational assistance programs, retirement plans, executive compensation programs, and employment and payroll taxes are outlined below.

Health and Welfare Plans

Q1. *What COVID-19 testing and treatment is our company's employer-sponsored group health plan required to cover?*

The Families First Coronavirus Response Act ("***FFCRA***") requires an employer-sponsored group health plan (including a grandfathered plan under the Affordable Care Act ("***ACA***")) (a "***Plan***") to provide coverage for COVID-19 diagnostic testing and services related to the diagnostic testing without any cost sharing (including deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements.

- The CARES Act expands the diagnostic testing that is required to be covered under the FFCRA to include tests that are not approved under the Federal Food, Drug, and Cosmetic Act.

- A Plan must reimburse providers of the diagnostic testing and related services:

    - At the negotiated rate, if there was a negotiated rate in effect between the Plan and the provider before the public health emergency was declared; or

    - If there is no negotiated rate, in an amount equal to the cash price for such service as listed by the provider on a public internet website, or the Plan can negotiate with the provider for less than such cash price. Providers are required to post the cash price for COVID-19 diagnostic testing on a public internet website.

- The CARES Act requires a Plan to cover a "qualifying coronavirus preventive service" within 15 business days after the date on which a new qualifying coronavirus preventive service recommendation is issued. Employers should note that, generally, a Plan is not required to cover a newly recommended preventive care service until at least a year after it has been issued. In addition, it appears this could apply to a grandfathered plan under the ACA, which is generally not required to cover preventive care services; however, future guidance should clarify this. A ''qualifying coronavirus preventive service'' means an item, service, or immunization that is intended to prevent or mitigate COVID-19 and that is:
    - an evidence-based item or service that has in effect a rating of ''A'' or ''B'' in the current recommendations of the United States Preventive Services Task Force; or
    - an immunization that has in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved.
- Employers should ensure their group health plan documents and summary plan descriptions permit this coverage, paying particular attention to experimental/investigational exclusions, preventive care provisions, and reimbursement provisions.

Q2. *Can our high-deductible health plan cover costs associated with telehealth without requiring the participant to pay a deductible?*

For plan years beginning on or before Dec. 31, 2021, a health plan may still qualify as a high-deductible health plan for health savings account ("***HSA***") purposes if the plan covers telehealth and other remote care services without application of a deductible.

Q3. *What medical care costs will now be considered "qualified medical expenses"?*

After December 31, 2019, amounts paid for non-prescribed over-the-counter drugs, as well as menstrual care products will be treated as qualified medical expenses for purposes of HSAs, healthcare flexible spending accounts ("***Health FSA***"), health reimbursement accounts ("***HRA***"), and Archer Medical Savings Accounts ("***Archer MSA***").

Q4. *Has any new guidance been issued by the federal government regarding the uses and disclosures of a group health plan participant's "protected health information" under HIPAA ("**PHI**") as related to the COVID-19 outbreak?*

The federal Department of Health and Human Services ("***HHS***") has issued guidance related to COVID-19 which applies to HIPAA covered entities generally, not just employer-sponsored group health plans, as discussed in an article previously prepared by Haynes and Boone's Healthcare and Life Sciences Practice Group group. In addition, the CARES Act requires HHS to issue, not later than 180 days after the date of enactment of the CARES Act (*i.e.*, by September 23, 2020), guidance on the sharing of individuals' PHI during the COVID–19 public health emergency. Such guidance is to include information on compliance with the HIPAA privacy regulations and applicable policies, including such policies that may come into effect during such emergency.

Q5. *Does the CARES Act contain any provisions which may be applicable to employer-sponsored group health plans, but are not related to COVID-19?*

- The CARES Act amends provisions of the Public Health Service Act that govern the confidentiality and disclosure of records related to substance use disorders ("***SUD Statute***").

- The SUD Statute and its regulations (collectively, the "***SUD Rules***") generally impose restrictions upon the disclosure and use of substance use disorder patient records ("***SUD Records***") that are maintained in connection with certain federally-assisted programs which provide substance use disorder diagnoses, treatment, or referrals for treatment (referred to in the SUD Rules as "part 2 programs"). The SUD Rules predominantly apply to the providers of part 2 programs but may also apply to group health plans and their third-party claims administrators to the extent that they receive SUD Records from a part 2 program.

- The CARES Act amends the SUD Statute to confirm that if a part 2 program provider obtains the prior written consent of the patient, (i) the contents of the patient's SUD Record may be disclosed by the provider to a group health plan covered entity under HIPAA or its HIPAA business associate for purposes of treatment, payment, and health care operations, as permitted by the HIPAA regulations, and (ii) any SUD Records so disclosed by the part 2 program provider may then be redisclosed by the covered entity or business associate in accordance with the HIPAA regulations.

- The CARES Act further amends the SUD Statute to adopt definitions consistent with HIPAA for "treatment", "payment", and "health care operations" and adds several provisions to the SUD Statute which are analogous to those under HIPAA, including breach notification and privacy notice provisions. The amendments to the SUD Statute become effective with respect to uses and disclosures of SUD Records occurring on or after the date that is 12 months after the date of enactment of the CARES Act (*i.e.*, March 27, 2021).

Educational Assistance

Q1. *My employees are no longer able to make loan repayments on their student loans – is there anything I can do as an employer to help them?*

- Yes. The definition of "educational assistance" under Section 127(c) of the Internal Revenue Code of 1986, as amended (the "***Code***") has been expanded to allow employers, on a pre-tax basis, to pay the employee's principal or interest payments on the employee's qualified education loan (within the meaning of Code Section 221(d)(1)) due from now until January 1, 2021.

- The employer can either reimburse the employee for these payments or make payments directly to the employee's lender.

- If an employer pays the employee's interest through an educational assistance program, the employee cannot receive a corresponding deduction on his or her tax return for the interest payments.

- Employers will need to amend their educational assistance plans to allow for payments of principal and/or interest (or implement an educational assistance plan, if it does not already have one in place).

Retirement Plans

Q1. *Is my plan obligated to make required minimum distributions in 2020?*

The general requirement to make required minimum distributions has not been eliminated. However, Code Section 401(k) plans, other defined contribution plans, Code Section 403(a) and (b) plans, and certain Code Section 457(b) plans can waive the required minimum distribution requirement for participants whose required beginning date is in 2020, including participants who did not commence receiving distributions prior to 2020 but were otherwise to commence by April 1, 2020. This waiver also applies to IRAs.

Q2. *I read that the CARES Act provides for enhanced plan loans and has offered benefits for certain "coronavirus-related distributions." Who is eligible for these benefits?*

Generally, to be eligible for the enhanced plan loans and distributions provided in the CARES Act, a participant must be a "***Qualified Individual***" which means:

- The individual or the individual's spouse or dependent is diagnosed with the SARS-CoV-2 virus or with COVID-19 disease by a test approved by the U.S. Centers for Disease Control and Prevention; or

- The individual experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off, or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors as determined by the Secretary of the Treasury.

Q3. *What is the maximum amount of a plan loan that can be offered to Qualified Individuals?*

A plan loan generally must be limited to an amount not greater than the lesser of $50,000 or 50% of the participant's vested account balance. However, the CARES Act increased these limits temporarily to $100,000 and 100%, *but only for plan loans taken by Qualified Individuals during the 180-day period starting on March 27, 2020*.

Q4. *If an employee has an outstanding plan loan, can that employee delay repaying the loan?*

If the employee is a Qualified Individual, any repayments that are due from March 27, 2020, through December 31, 2020, can be delayed for one year, but will be subject to adjustment for interest. In addition, for Qualified Individuals, the period from March 27, 2020, through December 31, 2020, is excluded when determining the five-year term for repaying a plan loan.

Q5. *What is a "coronavirus-related distribution"?*

A coronavirus-related distribution is a distribution from January 1, 2020, through December 31, 2020 to a Qualified Individual. An employee may receive more than one coronavirus-related distribution, but the maximum aggregate amount of all coronavirus-related distributions that can be made to the employee from all plans maintained by the employer and its controlled group is $100,000.

Q6. *What are the benefits of a "coronavirus-related distribution"?*

- The 10% excise tax that applies to early distributions from a tax-qualified retirement plan does not apply to coronavirus-related distributions, and the income realized by the receipt of a coronavirus-related distribution can be spread over a three-year period for tax purposes.

- Furthermore, a participant who takes a coronavirus-related distribution is permitted (but is not required) to repay the distribution to an eligible retirement plan in one or more payments up to three years from the date of the distribution. The repayment will be treated as an eligible rollover distribution.

Q7. *Does the CARES Act provide any relief for sponsors of defined benefit plans?*

- Yes. The CARES Act delays the due date for "minimum required contributions" otherwise due during 2020 until January 1, 2021. Sponsors of single-employer defined benefit plans who take advantage of this delay will be required to pay the 2020 contributions plus interest. The interest accrues from the original due date to the actual payment date using the effective rate of interest for the plan for the plan year which includes such payment date. If the plan has a credit balance that can be elected for a quarterly payment, plans should consult their actuary on possible use of that credit balance.

- Additionally, for plan years that include calendar year 2020, for purposes of determining the adjusted funding target attainment percentage ("***AFTAP***") under Code Section 436, sponsors of defined benefit plans are permitted to use the plan's AFTAP for the last plan year ending before January 1, 2020.

Q8. *What is the deadline to amend our retirement plan to incorporate the changes instituted by the CARES Act?*

Generally, plans must be amended by no later than the last day of the first plan year beginning on or after January 1, 2022 (*e.g.*, December 31, 2022 for calendar year plans) to incorporate any changes instituted by the CARES Act.

Executive Compensation

Q1. *If an employer receives a loan or loan guaranty from the Treasury Secretary through a Federal Reserve program under Title IV of the CARES Act, or is an air carrier or related contractor receiving financial assistance, what compensation limits will be imposed on executives and highly compensated employees of such employer?*

- Title IV of the CARES Act provides the Treasury Secretary with the authority to make loans or loan guarantees up to an aggregate of $500 billion to certain businesses severely impacted by the coronavirus pandemic, as well as other forms of direct assistance to air carriers and related contractors. Eligible businesses that receive such loans or assistance are subject to certain compensation caps for its officers and highly compensated employees. Under these caps, no officer or employee whose compensation in 2019 exceeded $425,000 (other than an employee whose compensation is determined through an existing collective bargaining agreement) may receive:

    - In any 12-month period, compensation in excess of the compensation paid in 2019;

  - Severance that exceeds two times the compensation the officer or employee received in 2019; and

  - If the officer or employee's compensation in 2019 exceeded $3,000,000, then in any 12-month period, compensation in excess of $3,000,000 plus 50% of the officer or employee's compensation in excess of $3,000,000 paid in 2019.

- The term "compensation" includes salary, bonuses, stock awards, and other financial benefits paid to the officer or employee. These restrictions must remain in place while the loan remains outstanding and for the 12-month period following repayment of the loan (or, for air carriers and related contractors accepting assistance, during the two-year period from March 24, 2020 through March 24, 2022).

Employment Tax

Q1. *What is the employee retention tax credit and the requirements to claim it?*

- The employee retention tax credit is a credit (i) equal to 50% of the "qualified wages" an employer pays between March 13, 2020 and December 31, 2020, and (ii) taken against the Social Security portion of the employer's quarterly payroll taxes. The credit is available on the first $10,000 of compensation (including the value of pre-tax health benefits) paid to an employee.

- An employer is eligible for the credit if the employer carried on a trade or business in 2020 and either (i) its operations were fully or partially suspended due to a COVID-19-related government shut-down order, or (ii) its gross receipts declined by more than 50% compared to the same quarter in 2019.

- Whether wages will constitute qualified wages for purposes of the tax credit depends on how many full-time employees (determined in the same manner as under the ACA's employer mandate provisions) the employer had in 2019.

  - More than 100 full-time employees: Only wages paid to employees who are unable to provide services to the employer because of the COVID-19-related circumstances described in either (i) or (ii) above.

  - 100 or fewer full-time employees: All wages paid to employees other than sick or family leave wages paid pursuant to the FFCRA.

  Qualified wages cannot exceed the amount of wages an employee would have been paid for working the same amount of time in the prior 30-day period.

- Note that (i) the amount of tax credit claimed in any calendar quarter cannot exceed the total amount of Social Security taxes due (after reduction for certain other tax credits, including, without limitation, the tax credit available for paid sick or family leave wages under the FFCRA) with respect to the all of its employees for that quarter, and (ii) an employer who receives a small business interruption loan under the CARES Act is not eligible to claim this tax credit.

Q2. *Has the due date changed for employers to remit any federal payroll taxes to the IRS?*

- Yes. Payment of the employer portion of Social Security taxes otherwise due on wages earned between March 27, 2020 and December 31, 2020 can be delayed as follows: 50% of such amounts must be remitted to the IRS no later than December 31, 2021, and the remaining 50%, no later than December 31, 2022.

- Note that an employer is not eligible for this relief if it receives a small business interruption loan or has certain loans forgiven under the CARES Act.