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COVID-19 Federal Guidance and Proposed Legislation

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Treatment of expenses with Qualified High Deductible Health Plans

Since many states and health insurance carriers have implemented rules and policies to cover COVID-19 treatment and testing without cost-sharing, there has been concern that such first-dollar coverage would adversely impact individuals covered by qualified high deductible health plans (QHDHPs) with health savings accounts (HSAs). The IRS has issued guidance that provides relief in this situation. The guidance allows QHDHPs to provide medical care services and items associated with testing for and treatment of COVID-19 without a deductible or with a deductible below the minimum statutory threshold (\$1,400 for self-only coverage and \$2,800 for family coverage). The guidance also clarifies that where a QHDHP provides reimbursement for such expenses before the minimum statutory deductible is satisfied, individuals covered under the QHDHP will not be disqualified from HSA eligibility. This relief provided by the IRS does not change prior guidance regarding QHDHP requirements other than regarding testing and treatment of COVID-19 and does

not expand the definition of preventive care. Should a vaccine for COVID-19 become available, it would be considered preventive care for QHDHP purposes because the guidance reminds us that vaccinations continue to be considered preventive care for the purpose of determining whether a health plan is a QHDHP.

COVID-19: Proposed Federal Legislation

The House passed legislation, called the Families First Coronavirus Response Act (the CRA), on March 14, 2020 that, if passed, would mandate testing for COVID-19, make changes to the Family and Medical Leave Act and make changes to paid sick leave policies. These provisions, if enacted, would only be temporary; taking effect within 15 days of enactment and continue through the end of 2020. The legislation will now move on to the Senate and the Senate Majority Leader has indicated that Republicans may support the House bill without further amendments. President Trump has also indicated he will sign this legislation.

With respect to testing, the CRA requires all employer-sponsored health plans to provide coverage for testing and other services that relate to COVID-19 without cost sharing, prior authorization and other medical management requirements. The CRA provides that the tests and services include FDA cleared or authorized in vitro COVID-19 diagnostic tests, as well as items and services provided to an individual during health care provider office visits, urgent care center visits and emergency room visits that result in ordering or administering an in vitro diagnostic product.

With respect to employees taking leave, the CRA expands the FMLA requirements for leave and creates a federal paid sick leave law for U.S. employers with less than 500 employees (“Covered Employers”). The CRA provides refundable payroll tax credits for employers providing these leaves under the CRA due to COVID-19 through the end of 2020.

The CRA does not require an employee to meet the usual FMLA requirements, including working for 12 months, working for 1,250 hours or working in a location with at least 50 employees in a 75-mile radius. The CRA requires Covered Employers to temporarily expand FMLA protections and benefits to employees employed at least 30 calendar days that need leave because of reasons relating to COVID-19. The reasons for the leave are set forth as follows:

1. Where a public health official or health care provider recommends or orders leave for the employee because the employee’s presence on the job would jeopardize the health of others; because of the exposure of the employee to COVID-19 or the employee exhibits symptoms of COVID-19 where the employee cannot perform their job and comply with the recommendation or order.
2. To care for a family member of the employee where a public health official or health care provider determines the family member’s presence in the community would jeopardize the health of other individuals in the community because of the family member’s exposure to COVID-19 or the family member’s symptoms of COVID-19.
3. To care for the employee’s child under the age of 18 if school or the child’s place of care has been closed, or the childcare provider of such child is unavailable because of COVID-19.

The CRA also provides for paid leave for affected employees, requiring Covered Employers to pay the employee at two-thirds of the employee’s regular rate of pay. The CRA does not require the first two weeks of leave be paid; employees can substitute PTO or other accrued leave for unpaid or partially paid periods, but Covered Employers cannot require this. The CRA does, however, provide for the possibility of regulations that could limit employers that the expanded FMLA provisions would apply to. These regulations could exclude certain health care providers and emergency responders from the definition of eligible employee; and could exempt businesses with under 50 employees if the CRA might jeopardize the viability of the business. With respect to job protection, the CRA does not require all Covered Employers to give such protection to all affected employees. A Covered Employer with less than 25 employees does not have to restore an affected employee to his or her position if the position ceases to exist, but such Covered Employer would be subject to other requirements such as including reinstatement to an equivalent position if one becomes available within a one year period.

The CRA would also require all Covered Employers (including those with less than 25 employees) to provide paid sick leave to all employees, even if employed less than 30 days. Covered Employers would be required to provide 80 hours of sick leave to full-time employees; and provide part-time employees with the number of hours averaged over a 2-week period. Such sick leave must be in addition to the sick leave the Covered Employer already provides. The CRA also includes a posted notice requirement regarding paid sick leave. Employees who would be eligible for the paid sick leave include those who need time off to:

- a. self-isolate because the employee was diagnosed with COVID-19;
- b. obtain a diagnosis or care if the employee is experiencing symptoms of COVID-19;
- c. comply with an official order or recommendation because the employee was exposed to COVID-19 or has symptoms, or to care for or assist a family member in connection with (a) or (b) above; or