

Benefits Compliance Implications for the Current Coronavirus Crisis



As the world grapples with the global outbreak of COVID-19, many employers have questions about their benefits compliance obligations pertaining to employees who may be affected by the virus. While we will attempt to address at a high level some of the issues that have been brought to our attention, it's important to note that employers should consult with legal counsel about any specific legal obligations they may have in conjunction with their business plans.

Paying for the COVID-19 Test or Treatment

Some employers have questioned whether they can pay for their employees to receive COVID-19 testing or treatment, either through their group health plan or outside the plan on a taxable or pre-tax basis. Additionally, many states and even insurance carriers have taken measures to mandate that COVID-19 diagnosis and treatment be provided to participants without cost-sharing. (Work with your adviser to determine if any of these state laws or insurance carrier measures apply to your specific plan.)

Fortunately, on March 11, 2020, the IRS released Notice 2020-15 which makes it clear that HDHP participants who receive COVID-19 testing or treatment without cost-sharing will not lose HSA eligibility. As background, HDHP participants are ineligible for HSA contributions if they receive first-dollar coverage for any health care that is not preventive services. The IRS Notice has the effect of declaring that COVID-19 testing and treatment will not, alone, cause participants to be deemed HSA-ineligible. The notice also confirmed that any COVID-19 vaccination that is formulated will be considered preventive care like other vaccinations. Because of this guidance, employers and group health plans can proceed in offering these benefits to employees without being concerned about the HSA-eligibility of their participants.

See Notice 2020-15 for more information <https://www.irs.gov/pub/irs-drop/n-20-15.pdf>

Benefits-related FMLA and Leave Considerations

As many employers are contemplating the effects of the virus, some have been faced with making decisions about employees who may need to take time off to either receive treatment or go into quarantine, or to care for a family member who must do so. Others have even considered placing employees on furlough or paid leave to avoid the virus being spread among employees. Congress is currently considering measures that would require a certain amount of paid leave be provided to deal with national health emergencies such as COVID-19. However, until any such federal law is passed, the implications of leave have more to do with state and local laws and the employer's leave policy. Keep in mind, though, that federal law does prohibit employers from discriminating based on race, color, sex, national origin, religion, age (40 or over), disability, or veteran status; an employer must consider that prohibition before making decisions that could be perceived as discrimination towards certain employees.

As it pertains to benefits and leave, some employers have questioned their responsibility to continue offering health coverage to employees that take leave for coronavirus and COVID-19 emergencies. But for those purposes, the rules are essentially going to be the same as they are with other serious illnesses. Namely, if an employee is taking leave due to a serious illness or to care for a family member with a serious illness, FMLA would apply and would require that the employer continue benefits during that leave. If FMLA is not applicable – either because the person is not entitled to it or because the person has not actually been diagnosed

with COVID-19 – then the employer would have to turn to the plan terms to determine when an employee would need to be terminated from benefits and offered COBRA. Also note that continued coverage may be a non-issue where someone is only out for a couple weeks (if, for example, they had to be quarantined for two weeks), as many plans don't terminate active employees' eligibility until a period of 30 or 60 days of inactive status.

For more information on the FMLA implications of COVID-19, see the DOL's Wage and Hour FMLA Q&A: <https://www.dol.gov/agencies/whd/fmla/pandemic>

HIPAA Privacy & Security Rules

Due to the contagious nature of the virus, some employers may feel the need to notify other employees when an employee has contracted the virus or is suspected to have contracted the virus. However, employers that are covered entities under HIPAA must consider the fact that HIPAA privacy rules limit when this information can be shared. While there are exceptions to the rules that would allow for the employer to notify the government or to notify those who may be at risk, the employer should be careful to comply with HIPAA's rules and only share the minimum information necessary to mitigate the risk to others. So before an employer shares information about an employee's diagnosis or possible exposure to coronavirus with any entity, they should consult with legal counsel to ensure that they are in compliance with their HIPAA obligations.

HHS has also provided a guide that discusses the HIPAA rules with the Coronavirus in mind: <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>

Employment Law Questions

Finally, questions concerning the continued employment of employees who may come into contact with coronavirus should be addressed by outside legal counsel. As mentioned above, employers must not discriminate against employees, and legal counsel would be best suited to ensure that the employer is appropriately considering their requirements under the various federal or state laws that may apply.

Any other decisions the employer chooses to make with regard to their workforce and their business facilities is outside of the scope of what we can advise on. However, employers should look to the various guidance provided by the federal government as it pertains to other business issues that may be affected by COVID-19.

For more information, see:

The CDC Interim Guidance for Businesses and Employers

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

The DOL Occupational Safety and Health Administration (OSHA) Guidance on Preparing Workplaces for COVID-19

<https://www.osha.gov/Publications/OSHA3990.pdf>

The DOL Wage and Hour Division Fair Labor Standards Act (FLSA) Guidance

<https://www.dol.gov/agencies/whd/flsa/pandemic>

In closing, the guidance and information provided by the government is rapidly changing. The NFP Benefits Compliance team will continue to monitor any developments in the government's response to the virus and will communicate regarding any potential changes to benefits compliance that result from such guidance.