HDHPs Will Not Lose HSA Qualified Status for Covering COVID-19 Expenses & Other Benefits Questions

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Coronavirus Disease 2019 (COVID-19) has been labeled a pandemic by the World Health Organization (WHO), and as of March 12, 2020 the United States Centers for Disease Control and Prevention (CDC) has estimated 1,215 cases of the virus within the United States. Not surprisingly, employers have many questions about the impact of the virus on employer-sponsored benefit plans. In this Issue Brief, we will review the recent IRS notice regarding HSA eligibility when high deductible health plans (HDHPs) cover COVID-19 related testing and treatment. We will also address important questions we have been receiving in response to the spread of the virus.

Impact of Virus Testing and Treatment on HSA Eligibility

In response to the spread of COVID-19, several states have mandated coverage for testing and treatment of the virus to be provided with no cost-sharing requirements to individuals. These state insurance mandates apply to fully-insured group health plans issued within the state. An HDHP providing this coverage could cause employees to be ineligible to make Health Savings Account (HSA) contributions. In general, in order to maintain qualified status to permit participants to continue contributing to HSAs on a tax-favored basis, HDHPs must not provide first-dollar coverage for any expenses unless the expense is considered "preventive."

The IRS has responded in IRS Notice 2020-15 allowing HDHPs to provide this type of coverage without making an employee ineligible for HSA contributions. Specifically, the notice states that "until further guidance is issued, a health plan that otherwise satisfies the requirements to be a [HDHP]… will not fail to be an HDHP…merely because the health plan provides health benefits associated with testing for and treatment of COVID-19 without a deductible, or with a deductible below the minimum deductible for an HDHP. Therefore, an individual covered by the HDHP will not be disqualified from being an eligible individual…who may make tax-favored contributions to [an HSA]."

This relief applies to both fully-insured HDHPs required to cover COVID-19 due to state mandates and also to employer-sponsored plans (fully-insured and self-insured) that voluntarily choose to provide this coverage.

Health Insurance Portability and Accountability Act (HIPAA)

The privacy of individually identifiable health information that is created or received by a health plan (PHI) is protected under HIPAA. Although employers may be motivated to help prevent the spread of COVID-19 within their workforce, staff members with access to an employer's group health plan's medical records are required to use and disclose only the minimum necessary PHI for purposes of payment, treatment, and health-care operations.

There are limited exceptions to this rule for situations involving public health. However, in almost all cases, staff members should refrain from accessing or disclosing an employee's COVID-19 related PHI for employment purposes, or for other reasons not specifically allowed by HIPAA regulations, unless a valid authorization is received from the patient.

Employee Leave

Illness related to COVID-19 will usually qualify as a serious health condition under the Family Medical Leave Act (FMLA). Therefore, FMLA eligible employees taking leave due to their own COVID-19 diagnosis, or to care for a family member with the diagnosis, would qualify for job and benefit protection. FMLA also requires employers to continue to offer medical benefits to an employee out on FMLA leave under the same terms as when they were actively at work. If an employee does not qualify for protected leave (or it has been exhausted), the employee no longer meets the plan eligibility rules, and there is no applicable employer leave policy that would extend benefit eligibility, then coverage should be terminated and COBRA (or state continuation) should be offered as applicable.

Other Important Employee Benefit Issues

Depending on the type of benefits and size of the employer, there are other benefits related issues that may be affected:

- Employers who provide paid leave to employees who miss work due to an illness need to remember to count that time as hours of service when determining full-time status for purpose of the Section 4980H employer shared responsibility rules (the "employer mandate").
- Employers who use the look-back measurement method to determine full-time status may need to continue coverage for employees put on paid or unpaid leave for the remainder of the applicable stability period.
- Some employers who suffer economically from the effect of the virus may not be able to afford to continue to pay their group health insurance premiums. If a plan is terminated due to non-payment, employees who lose group coverage will not be eligible for COBRA continuation coverage. In this situation every effort should be made to help these employees understand their options to purchase individual health insurance coverage. Employees can be directed to Healthcare.gov or their local state-run health insurance exchange.
- Applicable large employers (ALEs) who are not able to continue to offer group coverage may also put themselves at risk for penalties under the employer mandate. While it is possible that the IRS may extend some kind of relief in the future to employers in this situation, to date nothing official has been announced.

The impact of COVID-19 is likely to get worse before it gets better. Employee access to health insurance during a difficult time like this is more important than ever. Most employers are likely to take extraordinary steps to try to help employees with health care and health insurance. However, in doing so, employers must pay close attention to existing laws and regulations, plan eligibility rules, and coverage details.