

Practice Update

Top 10 Employee Benefit Plan-Related Tips for Employers in a Time of Coronavirus

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In the face of a potential public health crisis such as the Coronavirus, prudent employers commit extraordinary resources to ensuring critical business continuity and IT infrastructure planning. The human resources departments of sophisticated multi-location employers face competing priorities and are stretched thin, however employee benefit plan compliance topics must remain top of mind. The below list of 10 representative benefit plan topics can serve as a quick reminder to employer plan sponsors that ensuring uninterrupted benefit plan operation and coverage should remain a priority for HR leadership in these trying times. While not exhaustive, these points illustrate some of the many benefit plan-related areas of focus during these coming weeks, and likely months.

Consistency of Coronavirus Policies with Existing Benefit Plan Terms

1. Employers should check that newly drafted epidemic policies sync with their employee benefit plan eligibility terms and conditions. Many employers are rushing to implement mandatory quarantine or absenteeism policies, but some are not thoughtfully linking those requirements to their benefit plan terms. For example, if a group health plan includes a waiting period before coverage

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begins for new employees, and those new hires are disallowed from the place of business due to health concerns, will that forced quarantine period be credited toward satisfying the plan's waiting period? ERISA plans will continue to be governed by their written terms, typically notwithstanding anything to the contrary in other employment policies and procedures, even those implemented in emergency situations.

2. Plan sponsors should remember that compliance obligations will continue to apply to their employee benefit plans, even if in the short term, the governmental agencies tasked with oversight of such plans are not addressing their typical initiatives. One example of a potential trap for the unwary relates to HIPAA's continued application to group health plans that are HIPAA Covered Entities. Well-intentioned plan sponsors may be tempted to use claim information generated by the group health plan to "keep tabs" on the health of its population during an epidemic, especially when normal communication channels are compromised. But extreme care must be exercised to avoid any breach of the plan's Protected Health Information. A plan's HIPAA Privacy and Security Officers should therefore be included in all employers' disaster preparedness team, and the employer/plan sponsor's general Coronavirus policies should never be permitted to trump a plan's HIPAA protections and protocols.

Design Decisions and Advance Participant Messaging

3. As a medical plan design question, employers should determine in advance whether any virus tests or future-developed vaccines would be covered by the plan, once available. Does the plan cover anti-viral medications that are expected to be needed in vast supply? For High Deductible Health Plans that are coupled with Health Savings Accounts (HSA), care must be exercised to design coverage in a way that does not disqualify HSA participation. If geographic networks are used for cost-containment

purposes, how would claims be handled in the event of a government-forced hospitalization in a distant location?

4. Within company-sponsored group life and disability plans, employers should proactively review and message any exclusions for pandemic-related illnesses and deaths. Other key policy terms should be reviewed as well, such as explaining how the plans' elimination periods and "actively at work" requirements will apply in the case of forced workplace closures. Employers are wise to develop careful messaging for employees on these points, most likely in the form of remotely-accessible FAQs or other formats that will remain helpful even if HR staff members are no longer themselves physically in the office when the majority of the questions are posed by concerned employees.

5. Within qualified and non-qualified retirement plans, how will requests for hardship withdrawals or plan loans be handled? Disaster experience reveals that people who suffer personal financial losses often look to retirement plans for financial assistance, not realizing that in many instances, distributions are not permitted under the plan and governing law. Best practice suggests that reminders on the limitations on in-service distributions be disseminated before the influx of requests arrive.

Operational Continuity

6. Any employee contributions to benefit plans that are typically handled through automatic payroll deductions should be carefully reviewed with redundancy in mind. Contributions must continue to be processed pursuant to valid plan elections. Payroll planning must be broad enough to encompass employee benefit plan components. In particular, if unpaid leaves of absence are anticipated, employers are wise to work within the plan terms to proactively promote employees to remit remote premium payments.

7. Employer plan sponsors should be actively working with all outside ERISA counsel, plan administrators, record keepers, trustees, vendors, consultants and/or insurers to anticipate any possible administrative, operational, or funding issues in the event that those outside service providers experience severe staff absenteeism of their own. For example, in the event of widespread business interruption, how will benefit claims continue be adjudicated remotely, timely, accurately and securely? ERISA allows certain delegations to outsiders but still requires plan fiduciaries to remain vigilant in monitoring their performance. Best practice in today's environment is to vet those companies' disaster plans ahead of time, and to document those contractors' key administrative capabilities, emergency communication and other contingency plans.

Contract Term Review and Advance Communications

8. For employers with self-funded group health plans, stop loss policies should be reviewed to confirm whether any caps or exclusions will functionally limit coverage in a global health crisis. Advance communications with company finance leaders on this point is advisable, so that a clear picture of the financial impact of health claims can be reached.

9. For plans that offer set/formulaic levels of benefits, such as defined benefit pension plans, employers may wish to proactively work with financial resources to project the likely financial impact of an unusually high number of retirements, terminations, or deaths. Similarly, would individuals who leave for a mandatory work stoppage due to Coronavirus be eligible for severance pay under existing plans, should they decide to never return? If yes, are normal funding options sufficient?

10. Certain benefit plan contracts will allow service providers to increase their charges if the number of

active employees materially decreases in a particular period of time. If dramatic workforce fluctuations are expected in the current uncertainty, advance conversations with those business partners is advised, to avoid any surprises later.

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