eHI Explains
CARES ACT

eHEALTH INITIATIVE

Coronavirus Aid, Relief, and Economic Security (CARES) Act

Background: On March 27th, Congress passed the Coronavirus Aid, Relief, and Economic Security *(CARES) Act*. The legislation is the third bill Congress has passed to address the spread of COVID-19 and is the largest economic stimulus bill in U.S. history. The $2-trillion bill includes provisions to boost the economy and provide support to those fighting COVID-19.

Below is a summary of health IT-related provisions.

Division A

- **Sec. 3212 – Telehealth network and telehealth resource centers grant programs**

  - Reauthorizes the HRSA's Telehealth Resource Centers grant program at $29/m year for fiscal years 2021-2025

- **Sec. 3221 – Confidentiality and disclosure of records relating to substance use disorder**

  - Amends 42 CFR Part 2, which governs the sharing of substance use disorder treatment patient records

  - Allows for one-time consent to be given for future sharing of information

  - Sharing of information must be allowed currently under HIPAA (sharing for purposes of treatment, payment, and operations)

- **Sec. 3224 – Guidance on protected health information**

  - Requires the Secretary of HHS to issue guidance within 180 days on the sharing of patient health information during the public health emergency

- **Sec. 3701 – Exemption for telehealth services**

  - Allows high-deductible health plans with health savings accounts (HSAs) to cover telehealth services prior to a patient reaching the deductible

- **Sec. 3703 – Increasing telehealth flexibilities during emergency period**

  - Removes the COVID-19 telehealth waiver requirement that a provider must have seen the patient within the last 3 years (which CMS has already stated they would not enforce)

- Removes the definition of telehealth under the waiver as real-time audio/visual technology, allowing the Secretary of HHS to give flexibility to providers to use audio-only telehealth

- Allows flexibility to open the waiver to additional providers

• **Sec. 3704 – Enhancing Medicare telehealth services for Federally qualified health centers and rural health clinics during emergency period**

- Adds FQHCs and RHCs as "distant site" providers for purposes of the COVID-19 telehealth waiver, allowing them to bill for telehealth services under the waiver

• **Sec. 3706 – Use of telehealth to conduct face-to-face encounter prior to recertification of eligibility for hospice care during emergency period**

- During the COVID-19 public health emergency period telehealth can be used to fulfill the hospice face-to-face recertification requirements

• **Sec. 3707 – Encouraging use of telecommunications systems for home health services furnished during emergency period**

- Requires the Secretary of HHS to issue clarifying guidance encouraging the use of telecommunications systems, including remote patient monitoring, to furnish home health services during the COVID-19 public health emergency period

Division B – Supplemental Appropriations

• **$200 million** for the Federal Communications Commission to support the efforts of health care providers by providing telecommunications services, information services, and devices necessary to enable the provision of telehealth services during the COVID-19 emergency period

• **$1 billion** for the Indian Health Service, for activities including telehealth, electronic health record modernization, and other information technology upgrades

• **$27 billion** for the Public Health and Social Services Emergency Fund, for activities including telehealth access and infrastructure

• **$180 million** for Health Resources and Services Administration to carry out telehealth and rural health activities

• Allows the Secretary of the VA to enter into short-term agreements or contracts with telecommunications companies to provide temporary, complimentary or subsidized, fixed and mobile broadband services for the purposes of providing expanded mental health services to isolated veterans through telehealth or VA Video Connect during the public health emergency

• Requires the Secretary of the VA to ensure that telehealth capabilities are available during the public health emergency for case managers, and homeless veterans participating in, the Department of Housing and Urban Development – Department of Veterans Affairs Supportive Housing program

March 30, 2020

CARES Act Brings Much-Needed Relief (and New Obligations) for Benefit Plans

As people across the country react to the quickly changing COVID-19 pandemic, Congress passed another piece of legislation providing guidance and relief on a variety of issues — the Coronavirus Aid Relief and Economic Security (CARES) Act, signed into law on March 27, 2020. This new legislation includes provisions that will affect employers and employees alike. Following are brief summaries of what employers should know about key benefits-related components of the CARES Act. Plan sponsors should review their plans to assess the impact of these changes and take appropriate steps to implement the changes (some of which are required). While formal plan amendments may be adopted retroactively in many instances, plan sponsors will need to take steps quickly to ensure proper plan administration and send relevant participant communications.

Retirement Plan Distributions

Eligible retirement plans can allow Coronavirus-Related Distributions. If permitted by the plan, these new distributions can be made even to employees who are under 59 1/2 and currently employed.

Additionally, Coronavirus-Related Distributions are given special tax relief:

- The 10% additional tax imposed on withdrawals prior to age 59 1/2 will not apply.
- The distributions will not be subject to mandatory withholding and because they are not eligible rollover distributions, the rollover notice is not required.
- The distributions may be repaid to an eligible retirement plan as a rollover contribution during the three-year period following the distribution.
- Unless the participant elects otherwise, the distribution will be taxed over a three-year period.

"Coronavirus-Related Distributions" are distributions that are made: (i) during 2020; (ii) in an amount not exceeding $100,000 (in the aggregate from all plans in the plan sponsor's controlled group); (iii) from an eligible retirement plan (e.g., a 401(k) plan, 403(b) plan or IRA); and (iv) to a "qualified individual."

A "qualified individual" is someone who has been diagnosed with the virus SARS-CoV-2 or the coronavirus disease 2019 (each referred to herein as "COVID-19"); whose spouse or dependent has been diagnosed with COVID-19; or who experiences adverse financial consequences stemming from COVID-19 as a result of being quarantined, furloughed, laid off, having reduced work hours, being unable to work due to lack of child care, the closing or reduction of hours of a business owned or operated by the individual, or other factors as determined by the Department of Treasury. The CARES Act provides that plan administrators may rely on an employee's certification that these conditions are satisfied for purposes of receiving a Coronavirus-Related Distribution.

Note: Coronavirus-Related Distributions are different than the hardship withdrawals allowed in connection with a disaster declared by the Federal Emergency Management Agency (FEMA). Plans may permit hardship withdrawals due to an immediate and heavy financial need based on expenses and losses (including loss of income) incurred on account of a disaster declared by FEMA if the participant's principal residence or principal place of employment at the time of the disaster was located in an area designated by FEMA for individual assistance with respect to the disaster (FEMA Safe Harbor). The following table compares hardship withdrawals taken under the FEMA Safe Harbor and Coronavirus-Related Distributions:

	FEMA Safe Harbor	Coronavirus-Related Distributions
Scope	Limited to FEMA declared disaster areas (for COVID-19, likely by state)	Nationwide
Maximum	Amount of the financial need plus taxes — could be over $100,000	$100,000
Repayment Allowed	No	Yes
Mandatory 20% Withholding	No	No
10% Penalty if Under Age 59 1/2	Yes	No

When Included in Gross Income	Year of distribution	Over 3 years

Plans are permitted, but not required, to provide for Coronavirus-Related Distributions. Plan sponsors implementing this new distribution right have until the last day of the first plan year beginning on or after January 1, 2022 (2024 for governmental plans), to adopt the plan amendment. For non-governmental calendar year plans, this means that plan sponsors have until December 31, 2022, to adopt a retroactive amendment to the plan, provided the plan has been operating as though the amendment were in effect as of the amendment's effective date.

Retirement Plan Loans

The CARES Act includes special retirement plan loan provisions for "qualified individuals":

- The loan limit under Code Section 72(p) is increased to $100,000 (or, if less, 100% of the participant's vested account balance) for a loan taken between March 27, 2020, and September 23, 2020. As a reminder, the $100,000 limit is reduced by outstanding plan loan balances pursuant to the normal loan rules.
- Loan payments that are due March 27, 2020, through December 31, 2020 (whether for an existing loan or a new COVID-19 loan), may be delayed for one year. Interest still accrues during this tolling period, and remaining payments will be re-amortized over the extended period. The one-year delay will not cause a loan to exceed the maximum loan period (i.e., five years other than for residential loans).

For purposes of these options, "qualified individual" has the same meaning as for Coronavirus-Related Distributions (see above), except that the definition of qualified individual for purposes of the special retirement plan loan provisions does not clearly provide that plan sponsors can rely on employee certification when determining eligibility for special rules.

Plans are permitted (but not required) to implement the increased loan limit. However, it is not clear whether the one-year delay in loan repayments is optional.

Plan sponsors should take care in implementing these special retirement plan loan rules. In particular, the delayed repayment rule may create recordkeeping and participant communication challenges and should be coordinated with any rules a plan has regarding when a loan is considered in default and therefore a deemed distribution required to be included in the participant's taxable income. For example, because employees who are terminated are among those for whom this relief is targeted, it would seem that a qualified individual who is terminated during the one-year delay period should continue to be provided the repayment relief until the earlier of (i) the end of the one-year delay period, or (ii) the date the participant takes a distribution.

Guidance from the IRS would be helpful as to: (1) whether employees can self-certify that they meet the conditions to be a qualified individual; (2) whether a plan is required to provide the one-year delay for loan repayments; and (3) whether the relief applies to loans which would otherwise be defaulted.

Plan sponsors should coordinate loan administration with the plan's third-party administrator and amend the plan document and the plan's loan procedures as needed. As with the new Coronavirus-Related Distributions, retroactive amendment rules apply to the formal plan amendments implementing these special retirement plan loan rules. For example, non-governmental calendar year plans have until December 31, 2022 to amend their plan documents.

Required Minimum Distributions (RMDs)

Defined contribution plans (including 401(k), 403(b) and 457(b) governmental plans) may permit participants to suspend receipt of RMDs that were otherwise required to be made in 2020, including by those who reached their "required beginning date" during 2019. For years after 2020, an individual's required beginning date and the distribution periods applicable to beneficiaries should be determined without counting 2020. Under the CARES Act, distributions during 2020 that would have been an RMD except for this waiver should not be considered eligible rollover distributions. However, when similar RMD waivers were allowed in response to the financial crises of 2008, the IRS provided some exceptions to this general rule. It is not clear yet whether similar guidance will be issued for 2020 RMD waivers. As with the RMD waivers allowed in response to the financial crises in 2008, plan sponsors are permitted, but not required, to allow RMD waivers in 2020. Similar to the retroactive amendment rules for Coronavirus-Related Distributions and the special retirement plan loan rules, calendar year plan sponsors electing to allow the RMD waiver must amend their plan documents by December 31, 2022 (2024 for governmental plans).

Defined Benefit Plan Minimum Funding Relief

The CARES Act provides for two types of relief specific to single employer defined benefit plans: (i) minimum required contributions are not due until January 1, 2021 (but interest will accrue), and (ii) the defined benefit plan's Adjusted Funding Target Attainment Percentage (AFTAP) for 2019 can be used for 2020.

As background, Internal Revenue Code Section 430 provides rules that apply for the minimum funding of single-employer defined benefit plans. Specifically, if the value of the plan assets is less than the funding target, certain minimum contributions are required. Generally, the payment of any required minimum contribution is due within 8 1/2 months after the end of the plan year, and any funding shortfall for prior years must be made up by making quarterly payments of 25% of the required annual payment.

Under the CARES Act, these minimum funding contributions will not be due until January 1, 2021, even for plans that use a plan year other than the calendar year. This will provide some relief to plan sponsors having liquidity issues and concerned about making their minimum required contributions. However, it is important to note that interest (based on the plan's interest rate) will accrue from the original date the amount of the minimum required contributions is due until the date the payment is actually made. Furthermore, absent additional funding relief (e.g., interest rate relief or longer amortization periods for shortfalls), plan sponsors could face significantly higher contribution requirements in 2021.

The Pension Protection Act of 2006 added Section 436 to the Internal Revenue Code, providing for restrictions on benefits in defined benefit plans (e.g., accruals and forms of benefits such as lump sums) if a single employer defined benefit plan was underfunded by more than a specified percentage. These restrictions are determined by the plan's AFTAP. The AFTAP is generally determined by looking at the assets and liabilities funding ratio, subject to certain adjustments and certified by the plan's actuary.

The CARES Act provides that the plan sponsor of a defined benefit plan can elect to treat the plan's AFTAP for the last plan year ending before January 1, 2020, as the AFTAP for plan years which include calendar year 2020. This means that for a plan with a plan year ending December 31, the plan sponsor can choose to use the 2019 plan year AFTAP for the 2020 plan year. This should be more advantageous for plan sponsors and not require certain benefits restrictions that would result in using the 2020 AFTAP. However, alternatively, that also means that if the plan was subject to benefit restrictions in 2019, those benefit restrictions will continue so long as the 2019 AFTAP is used.

Plan sponsors likely do not need to amend their plans to take advantage of this minimum funding and AFTAP relief, but should coordinate their approach with the plan's actuary.

Group Health Plans and COVID-19 Diagnostic Testing

The CARES Act expands coverage for COVID-19 diagnostic testing that a group health plan must cover with no cost-sharing (e.g., deductibles, copayments and coinsurance), prior authorization or medical management requirements. This was first mandated by The Families First Coronavirus Response Act passed earlier this month (see our March 19, 2020 blog post, "Health Plan COVID-19 Testing Coverage"). The diagnostic tests that a health plan must cover include the following: tests that are FDA-approved; tests for which the developer has requested or intends to request FDA emergency use authorization, unless the FDA denies the request; tests that are developed and authorized by a state with notice to the Secretary of Health and Human Services (HHS); and any other tests the Secretary of HHS approves in guidance.

In addition, the CARES Act mandates that a group health plan must reimburse the "provider of the diagnostic testing" at one of the following rates: (i) the rate the health plan had negotiated with providers before the public health emergency, or (ii) if the health plan does not have a negotiated rate in place, then at the cash price for such service as listed by the provider on a public internet website, or the health plan may negotiate a reduced rate with such provider. During the public health emergency, providers must publish the cash price of the diagnostic tests on a public internet site or face significant penalties.

It appears the no cost-sharing requirements apply to both in-network and out-of-network diagnostic testing. It is not entirely clear whether the cash price payment requirement is limited to the diagnostic test itself, or also is applicable to other items and services furnished during the office, urgent care or emergency room visit related to obtaining the COVID-19 diagnostic test.

Sponsors of self-funded group health plans should review these requirements with their third-party administrators to identify any considerations related to the new payment terms, and to ensure immediate compliance. Plan sponsors should also work on applicable plan amendments and participant communications regarding these and related group health plan changes described in this alert.

Group Health Plan Coverage of Preventive Services and Vaccines

Group health plans must cover qualifying coronavirus preventive services at no cost sharing if in-network, within 15 business days after a recommendation is made relating to the qualifying coronavirus preventive service (plans typically have a year to incorporate preventive care recommendations). A qualifying coronavirus preventive service is an item, service or immunization that is intended to prevent or mitigate COVID-19 and that is (i) 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 (ii) 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.

Once a vaccine or other preventive care recommendations related to COVID-19 are identified, this new provision will significantly reduce the time it takes for any such vaccine or recommended preventive care to become accessible to individuals under their group health plans with no cost-sharing. As with COVID-19 diagnostic testing coverage, sponsors of self-funded group health plans should review these requirements with their third-party administrators to identify how new recommendations are tracked and incorporated into the health plan's preventive services coverage.

Telemedicine and Health Savings Account (HSA) Eligibility

The CARES Act provides that coverage of "telehealth and other remote care services" without a deductible will not cause a medical plan to fail to be treated as a high-deductible health plan (HDHP) for purposes of determining HSA eligibility. This "safe harbor" provision is effective immediately but will remain so only for plan years beginning on or before December 31, 2021. This is a much needed change that allows an HDHP to cover all telehealth services, not just those relating to COVID-19, prior to a patient reaching the deductible. It ensures that HDHP participants will not jeopardize their eligibility to contribute to an HSA for seeking telehealth treatment of COVID-19 as well as unrelated conditions. This provision is likely meant to encourage the use of telemedicine right now in order to both increase access to medical care for patients who may have the COVID-19 virus and protect other patients from potential exposure to the virus. While plan sponsors are not required to provide all telemedicine services without a deductible, giving plan sponsors the ability to do so without jeopardizing HSA eligibility will likely alleviate the administrative issues associated with providing telemedicine claims for COVID-19 diagnosis and detection without a deductible.

Over-the-Counter Drugs and Menstrual Care Products

The CARES Act eliminates the requirement that individuals obtain a prescription in order to be reimbursed for over-the-counter medicines and drugs under HSAs, health flexible spending accounts (health FSAs), health reimbursement arrangements (HRAs) and Archer MSAs. It also makes over-the-counter menstrual care products (i.e., tampons, pads, liners, cups, sponges or similar products used by individuals with respect to menstruation or other genital tract secretions) eligible medical care expenses for purposes of these accounts. Previously, menstrual care products were generally not considered to be eligible medical care expenses. These provisions are effective for expenses incurred after December 31, 2019. The elimination of the limitation on reimbursing over-the-counter drugs under HSAs, health FSAs, HRAs and Archer MSAs is significant, especially in light of the current increase in purchases of over-the-counter drugs in the wake of the COVID-19 pandemic. While this is not a required change, plan sponsors should act quickly to amend their health FSAs and HRAs if they want to expand the definition of eligible medical expenses to include over-the-counter medicines and/or menstrual care products. They should also review and revise relevant participant communications.

Employer-Provided Tax-Free Student Loan Repayments

The CARES Act enables employers to provide a student loan repayment benefit to its employees on a tax-free basis by expanding the type of permitted expenses under an "educational assistance program" to include student loan repayments made by an employer on behalf of an employee. This means that if an employer has or adopts an educational assistance program, the employer may make student loan payments on behalf of an employee up to $5,250 annually and such payments would be excluded from an employee's taxable income. The $5,250 cap applies to the aggregate of the student loan payments and any other permitted qualified education expenses provided under the employer's educational assistance program. The tax-free benefit for the student loan repayments applies only for payments made after March 27, 2020, and before January 1, 2021.

It is important to note that the payments must be made under a Code Section 127 educational assistance program, which is a type of tax-qualified benefit program that allows an employer to provide up to $5,250 per employee each year for educational expenses at the associate, undergraduate and graduate level on a tax-free basis. To qualify for the tax-free treatment, an educational assistance program must meet certain requirements, including that it is a separate written plan that covers a non-discriminatory group of employees, that the employees are given reasonable notice of the program, and that the employees can substantiate that payments or reimbursements made under the program constitute educational assistance.

In addition, the income exclusion is limited to certain types of educational expenses. For student loan repayments to qualify for the tax-free treatment, they generally must be for a student loan that was incurred to pay for "qualified higher education expenses" of the employee within a reasonable period of time before or after the loan was taken (e.g., if the expenses relate to a particular academic period and the loan proceeds were disbursed within a period that began 90 days before and ended 90 days after such academic period). "Qualified higher education expenses" generally include the costs of attending a college, university or vocational school including tuition, room and board, books and supplies, and certain other miscellaneous expenses of the student.

To the extent an employee's student loan is paid on tax-free basis by his or her employer under an educational assistance program, the employee cannot claim the student loan interest deduction.

Plan sponsors with existing educational assistance programs should evaluate whether their programs should be amended to address the CARES Act rules permitting repayment of student loans under such programs. Others should evaluate whether they want to adopt such a program now. While the CARES Act student loan repayment option is for a very limited time, many employers have been looking for tax-favored mechanisms to assist their employees who have student loan debt.

Compensation Limits for Certain Employees

Eligible businesses entering into loans or loan guarantees under the CARES Act are subject to restrictions on compensation and severance payments to officers and other high paid employees during the period beginning on the date the loan agreement is executed and ending on the date that is one year after the loan or loan guarantee is no longer outstanding (the “applicable period”). Specifically, during the applicable period, eligible businesses are prohibited from increasing the total compensation of any officer or employee whose total compensation in calendar year 2019 (2019 total compensation) exceeded $425,000. Also, during the applicable period, an eligible business is prohibited from paying severance pay or other benefits upon termination of employment which exceed twice the maximum 2019 total compensation received by the officer or employee. These restrictions on compensation increases and severance pay do not apply to employees whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020. In addition, during any 12 consecutive month period of the applicable period, no officer or employee whose 2019 total compensation exceeded $3 million may receive more than $3 million plus 50% of the amount of 2019 total compensation that exceeded $3 million.

For this purpose, an eligible business includes (1) passenger air carriers, eligible businesses certified and approved to perform inspection, repair, replace or overhaul services and ticket agents; (2) cargo air carriers; and (3) businesses critical to maintaining national security. Total compensation is defined as salary, bonuses, awards of stock and other financial benefits provided by the eligible business.

The definition of total compensation for these purposes will likely be the subject of interpretational questions, particularly questions of whether and to what extent it includes noncash remuneration and how deferred compensation is treated. We hope to receive regulatory guidance on how to implement these compensation limitations.

Loan Program to Support Payroll and Benefits for Small Businesses

The CARES Act includes a loan program for small businesses (less than 500 employees, higher for some industries) affected by the COVID-19 pandemic. The program, known as the Paycheck Protection Program, expands an existing SBA loan program to add loans for qualifying employers on an expedited basis to maintain certain payroll and health plan coverage. The program also offers forgiveness for the portion of the loan used for qualifying payroll, benefits and certain other costs during the eight-week period following loan origination. Loans under this program are available through June 30, 2020, and employers must commit to using loan proceeds to retain workers and maintain payroll (along with certain mortgage interest, rent and utility payments). Borrowers will apply through banks, credit unions and other lenders. Treasury hopes to expand the group of existing SBA-qualified lenders to make these loans available at most FDIC-insured banks.

DOL Can Postpone Deadlines

The CARES Act amends Section 518 of the Employee Retirement Income Security Act of 1974 (ERISA) to include a public health emergency declared by the Secretary of Health and Human Services. This will provide the Department of Labor (DOL) with the requisite authority to extend certain deadlines required under ERISA. We anticipate guidance from the DOL in the coming weeks providing relief for upcoming deadlines (e.g., filing of the Form 5500).

The CARES Act includes numerous changes to benefit plans (some optional, some required). As guidance from regulatory agencies is issued on these topics, and our clients strive to address a rapidly changing work environment, we will continue to monitor the situation and issue alerts and blog posts to assist our clients. You can subscribe to our Spotlight on Benefits blog here or subscribe to receive client alerts here. If you have specific questions about how these changes apply to particular situations, please reach out to a member of the Benefits and Executive Compensation team or your regular Faegre Drinker contact.

Faegre Drinker's Coronavirus Resource Center is available to help you understand and assess the legal, regulatory and commercial implications of COVID-19.

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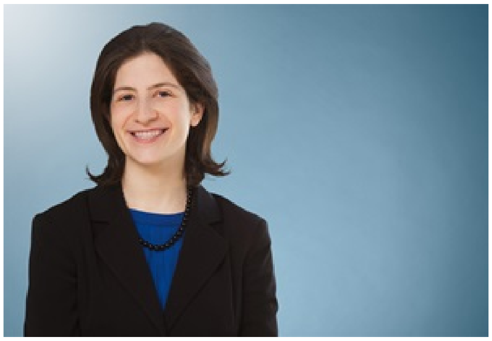

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