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INFORMATION MEMO
EMPLOYEE BENEFITS LAW

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COVID-19: Employee Benefits Consideration

The swift impact of the Coronavirus Disease 2019 (COVID-19) in New York and across the country has forced employers to evaluate the impact of the virus on their workforces. This information memo addresses some of the more important employee benefit plan issues for employers to consider in connection with COVID-19.

- **Coverage for COVID-19 Testing.** New York is one of a handful of states that have directed insurers to waive cost-sharing requirements with respect to COVID-19 testing. Pursuant to guidance from the New York Department of Financial Services, insurers are prohibited from (1) imposing cost-sharing on an in-network provider office or urgent care center visit when the purpose is to test for COVID-19, and (2) imposing cost-sharing on an emergency room visit when the purpose is to be tested for COVID-19.

  Because self-insured health plans are governed by the Employee Retirement Income Security Act (ERISA) and are not subject to state insurance mandates, these requirements are not applicable to such plans. However, the U.S. House of Representatives has passed legislation that would require group health plans and health insurance issuers to impose similar restrictions on cost-sharing for COVID-19 testing. The legislation requires group health plans and health insurance issuers to waive cost-sharing requirements or prior authorization or other medical management requirements regarding approved COVID-19 tests and the administration of such tests in connection with health care provider office visits, urgent care center visits, and emergency room visits. The legislation is expected to be quickly taken up by the Senate this week.

  One issue raised by a cost-sharing waiver is whether it poses problems for a plan that is considered a high deductible health plan (HDHP) under the Internal Revenue Code (Code) and is paired with a Health Savings Accounts (HSA). In general, in order for an individual to be eligible to make a contribution to an HSA, the individual may not be eligible for other coverage that would pay for health costs incurred prior to the individual satisfying the applicable HDHP deductible.

  To address this issue, the IRS issued Notice 2020-15, which provides that, until further notice, a health plan that otherwise satisfies the requirements to be a HDHP will not fail to be an HDHP merely because the plan provides benefits associated with testing for and treatment of COVID-19 without a deductible, or with a deductible below the minimum deductible otherwise required by the Code. Accordingly, a group health plan participant enrolled in an HDHP may receive testing and treatment for COVID-19 and such coverage will not cause the participant to lose the ability to make contributions to an HSA.

- **HIPAA.** The Health Insurance Portability and Accountability Act (HIPAA) privacy rule requires covered entities and their business associates to protect the privacy and security of protected health information (PHI). HIPAA covered entities include group health plans, as well as health care providers and healthcare clearinghouses. The Office for Civil Rights at the U.S. Department of Health and Human Services recently issued a bulletin addressing how PHI may be shared during a period of emergency under the HIPAA privacy rules. The bulletin reminds business associates and covered entities that HIPAA privacy protections are not set aside during an emergency. The bulletin outlined the following circumstances where PHI may be disclosed without authorization: (1) to providers for the purpose of treatment; (2) to public health authorities; (3) to a foreign government agency at the direction of a public health authority; (4) to persons at risk of contracting or spreading a disease or condition, if otherwise authorized by law; (5) to family members, friends and other individuals involved in a patient's care as directed by the patient or if in the best interest of the patient; and (6) with respect to health care providers, to a person in a position to prevent or lessen an imminent threat (provided the disclosure is consistent with applicable law and applicable standards of ethical conduct). For most disclosures, a covered entity must take reasonable measures to ensure that the disclosed information is the minimum amount necessary to accomplish the intended purpose of the disclosure. With respect to COVID-19, covered entities may rely on representations from a public health authority or other public official that the requested information is the minimum amount necessary.

  Employee health information that is in employment records outside of the health plan (e.g., in circumstances where an employee self-discloses a positive COVID-19 diagnosis) is not protected by HIPAA but may be protected by other confidentiality laws.

- **Continued Health Coverage for Employees Who Experience a Reduction in Hours.** It is possible that an employer may experience a slowdown in business due to economic impact of COVID-19, resulting in the necessity to furlough employees or place them on leave. Typically, such a reduction in hours results in a loss of coverage under the employer's group health plan (either immediately or following a plan-specified continuation period). If an employer desires to continue coverage following the end of such period, it should coordinate with the applicable insurer or stop-loss carrier (if the plan is self-funded) to ensure that such additional coverage may be provided without interruption. Otherwise, a COBRA notice must be provided in connection with the loss of coverage. Employers may wish to consider subsidizing COBRA for a period of time to mitigate the impact of the loss of coverage (self-funded plans considering this option should analyze the impact of nondiscrimination rules under Section 105(h) of the Internal Revenue Code before doing so).

- **401(k) and 403(b) Plan Considerations.** With the market fluctuations, employers may want to consider employee communications using plan resources that may be available from recordkeepers and investment advisors. For example, information regarding investment education and the benefits of diversification likely will be of value to participants at this time. As with all participant communications, employers should take steps to ensure that such communications are limited to providing investment education, rather than investment advice.

  Plan participants may inquire as to whether a hardship withdrawal is available under the plan to cover medical costs associated with treating COVID-19, as well as expenses and losses due to COVID-19 (e.g., loss of income due to a layoff or unpaid leave period). In general, under the hardship safe harbor rules, a distribution must be made on account of an immediate and heavy financial need, must be necessary to satisfy that need, and must fall within one of a number of permissible hardship events. Expenses to treat COVID-19 will satisfy these hardship distribution requirements, provided they are not reimbursable from another source (e.g., a group health plan).

  While a hardship distribution is permissible to pay for expenses and losses (including loss of income) incurred by an employee on account of a federally declared disaster, the COVID-19 pandemic has been designated a national emergency and not a federal disaster. Accordingly, subject to further guidance from the government, plans utilizing the safe harbor hardship rules will be limited to distributions based on other enumerated hardship events, such as amounts necessary to prevent eviction and foreclosure, and qualifying medical, tuition, and funeral expenses.

Bond continues to monitor the impact of COVID-19 and will be providing weekly updates regarding the latest federal and state guidance impacting employers and businesses. You can register for the complimentary webinar here.

If you have any questions about this memorandum, please contact any member of our Employee Benefits and Executive Compensation Practice Group listed below.

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