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Senate Passes Massive Stimulus Bill

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On Wednesday, March 25, 2020, the Senate passed the *Coronavirus Aid, Relief, and Economic Security Act* (H.R. 748, the "CARES Act" or "the Act"). The Act is the largest economic stimulus bill in American history and provides unprecedented aid to individuals and businesses across the U.S. economy. The House is expected to pass the Act by voice vote on Friday, March 27, 2020, and all indications are that the President will sign it shortly thereafter.

The CARES Act provides direct financial aid to Americans in the form of $1,200 checks for individuals earning less than $75,000 ($2,400 for married households earning less than $150,000) with an additional $500 per child. The Act additionally provides expanded unemployment insurance, financial support for state and local governments, a loan program for small businesses and not-for-profits, a payroll tax deferral for employers, and financial assistance to small businesses and certain industries.

Importantly, the Act contains a number of provisions that affect healthcare, paid leave, retirement plans, and executive compensation. Those provisions are summarized below.

I. Health Provisions

A. Coverage of COVID-19 Testing (Section 3201)

Last week's Families First Coronavirus Response Act (**H.R. 6201**, **Groom summary**, "Families First Act") required group health plans and health insurance issuers of group or individual health insurance coverage (including grandfathered plans) to cover without cost-sharing Food and Drug Administration ("FDA")-approved diagnostic tests for COVID-19. The CARES Act expands the definition of covered diagnostic tests to include tests:

- for which "the developer has requested or intends to request emergency use authorization" from the FDA (until the request is denied or the developer does not submit the request within a reasonable time);
- that are "developed in or authorized by a State;" or
- that are deemed appropriate by the Secretary of Health and Human Services ("HHS").

GROOM INSIGHT: The expansion of the types of tests that plans and issuers must cover without cost sharing creates potential administrative burdens for plans and issuers. With

medical technologies becoming available on an accelerated basis due to the quickly evolving response to the pandemic, plans and issuers will face an array of coverage requirements with respect to COVID-19 testing and should consider implementing policies and procedures to effectively stay abreast of testing developments.

B. Testing Pricing (Section 3202)

As stated above, the Families First Act requires group health plans and health insurance issuers to cover COVID-19 testing and certain items and services without cost-sharing. The CARES Act specifies that plans and issuers must reimburse health providers of COVID-19 diagnostic testing at the same rate as previously negotiated before the emergency declaration by HHS for the duration of the declared emergency. If a plan or issuer did not have an existing, negotiated rate with a provider before the emergency declaration, the plan or issuer must pay the provider's cash price for the test as listed by the provider on a public website or may negotiate a lower rate.

During the emergency declaration period, the Act requires all providers of a COVID-19 diagnostic test to publish the cash price for the test on the provider's public website. Providers that fail to comply may be subject to a fine of up to $300 per day imposed by HHS.

GROOM INSIGHT: The Families First Act testing coverage requirement does not specify whether coverage is required for both in- and out-of-network services. This amendment to the Families First Act suggests that Congress at least contemplates that coverage is required for out-of-network services. We expect additional guidance to clarify the application of the testing coverage requirement in the coming days.

C. Rapid Coverage of Preventive Services and Vaccines (Section 3203)

The CARES Act requires group health plans and health insurance issuers to cover without cost-sharing any "qualifying coronavirus preventive service." The Act defines a qualifying service as "an item, service, or immunization that is intended to prevent or mitigate coronavirus disease 2019" and has a rating of "A" or "B" in the recommendation of the United States Preventive Services Task Force ("USPSTF") or is recommended by the Advisory Committee on Immunization Practices ("ACIP") of the Centers for Disease Control and Prevention. This requirement takes effect 15 *business days* after the date the recommendation is made.

GROOM INSIGHT: The 15-day period is a significantly shorter period than under the ACA's preventive services requirement, which generally makes preventive services

recommendations effective beginning the year following the year in which the recommendation was made. For a qualifying coronavirus preventive service, plans and issuers must act quickly to ensure that they meet the timing requirements with respect to any recommended coronavirus vaccinations or any other required items or services recommended by USPSTF or ACIP.

D. Confidentiality and Disclosure of Records Related to Substance Use Disorder (Section 3221)

The Act also conforms privacy rules that apply to substance use disorder ("SUD") information (referred to as the "Part 2 rules" because they are found in 42 U.S.C. Part 2) with the HIPAA privacy rules.

The Part 2 rules apply to certain health care providers who treat substance use disorders. The Part 2 rules require a provider to obtain a patient's consent to further disclose SUD information, including the fact that a patient was treated, even to another health care provider or health plan or insurer. The Part 2 provider must notify recipients that the information is Part 2 information and is subject to additional restrictions. Since Part 2 is stricter than the HIPAA privacy rules, a health plan or health care provider that receives Part 2 information has to track this information separately and apply two sets of privacy rules.

The Act:

- allows a Part 2 provider to obtain a single consent for future disclosures for treatment, payment, or health care operations, until revoked by the patient;
- allows a HIPAA covered entity or business associate to further disclose Part 2 information as otherwise permitted by HIPAA;
- adopts HIPAA's definitions for treatment, payment, and health care operations; and
- adds a number of HIPAA provisions to Part 2, including the HIPAA breach rules, the notice of privacy practices, and HIPAA's civil and criminal penalties.

These changes take effect for uses and disclosures 12 months after date of enactment. The Act directs the Secretary of HHS to issue regulations implementing these changes.

GROOM INSIGHT: Employer health plans do not typically receive SUD information subject to Part 2 restrictions, but insurers and TPAs often receive this information with respect to claims processing. In addition, EAPs or wellness programs may receive this information. Conforming the Part 2 rules to line up better with the HIPAA privacy rules is a welcome change for providers and payers so that they are able to focus on one set of federal

privacy rules. Also, the Part 2 rules had adopted a more narrow definition of "health care operations" that did not include care coordination, so it appears that the new rules will expand how health plans can communicate with enrollees for purposes of care coordination in the SUD context.

E. Protected Health Information ("PHI") Guidance (Section 3224)

Within 180 days of enactment, the Secretary of HHS must issue guidance regarding the sharing of patients' PHI during the COVID-19 public health emergency and compliance with HIPAA regulations and applicable policies.

F. Telehealth Guidance (Section 3701)

The Act creates a safe harbor for high deductible health plans ("HDHPs") that do not have a deductible for "telehealth and other remote care services." Under the safe harbor, an HDHP will continue to be health savings account ("HSA")-eligible even if it covers telehealth services before the plan's statutory minimum deductible has been met. This provision is effective upon enactment and for plan years beginning on or before December 31, 2021.

GROOM INSIGHT: While time-limited, this expansion of pre-deductible payments for telehealth services will provide greater flexibility for telehealth services and for HDHPs and HSAs, which is welcome news to plans and issuers that wanted to give individuals access to providers while at the same time limiting their potential exposure to the coronavirus. While not mandatory, this flexibility could significantly shift consumer behavior with respect to telehealth services.

G. Health Spending Accounts for Over-the-Counter Drugs and Products (Section 3702)

The Act allows individuals to use HSA, Flexible Spending Account, Health Reimbursement Account, and Archer Medical Savings Account dollars on over-the-counter drugs and on menstrual care products without a prescription. Under the changes made by the Affordable Care Act ("ACA") in 2010, over-the-counter drugs were not treated as qualified medical expenses unless they were prescribed or insulin. This provision is effective for expenses incurred after December 31, 2019.

GROOM INSIGHT: Unlike the changes to telehealth, this change is permanent. This provision reverses changes made by the ACA with respect to requiring prescriptions for

over-the-counter drugs. During a time when many will have increased medical expenses and healthcare needs, this change should be welcome news to participants.

H. Medicare Telehealth (Section 3703)

H.R. 6074, the first of the COVID-19 relief bills passed by Congress, expanded telehealth for Medicare recipients but required that the telehealth physician must have treated the patient within the last three years. The CARES Act removes the requirement for a pre-existing relationship between the physician and Medicare patient.

I. Adjustment of Medicare Sequestration (Section 3709)

During the period beginning on May 1, 2020 and ending on December 31, 2020, Medicare programs are exempt from reduction under any sequestration order issued before, on, or after the date of enactment of the Act. The Act also extends sequestration for one year, from the end of fiscal year 2029 to the end of fiscal year 2030.

GROOM INSIGHT: Depending on the terms of the plan or provider contract, this change could result in increased reimbursements that a group health plan or health insurance issuer must pay to both in-network and out-of-network providers. Plans and issuers should evaluate whether the removal of sequestration will result in increased plan payments. For Medicare Advantage plans, this change results in increased capitation payments for the remainder of the calendar year.

J. Vaccine Coverage under Medicare Part B (Section 3713)

The Act provides that Medicare Part B will cover the COVID-19 vaccine and its administration without cost-sharing. The provision is effective upon enactment and as soon as a vaccine is licensed under section 351 of the Public Health Service Act.

K. Prescription Refills for Medicare Part D Participants (Section 3714)

During the coronavirus-related public health emergency declared by HHS, the Act allows Medicare Part D participants enrolled in prescription drug plans or Medicare Advantage Part D ("MA-PD") plans to receive up to a three-month supply of a prescribed and covered Part D drug. However, the Act prohibits a prescription drug plan or MA–PD plan from permitting a Part D eligible individual to obtain a single fill or refill inconsistent with an applicable safety edit.

GROOM INSIGHT: For MA-PD plans, this temporary change in the law may impose additional administrative burdens related to filling prescriptions. We expect CMS to issue guidance in the near term on how MA-PD plans are to implement this provision.

II. Paid Leave Provisions

A. Paid Leave Provisions (Sections 3601 and 3602)

The Families First Act set compensation rates for paid leave under the *Emergency Paid Sick Leave Act* ("Emergency Paid Sick Leave") and under amendments to the *Family and Medical Leave Act* ("Expanded FMLA Leave"). The CARES Act clarifies that an employer's requirement to provide Emergency Paid Sick Leave does not exceed (a) $511 per employee per day, and $5,110 per employee in the aggregate, for an employee to care for himself or herself, or (b) $200 per employee per day, and $2,000 per employee in the aggregate, for leave related to caring for other individuals. It also clarifies that an employer's requirement to provide paid leave under the Expanded FMLA Leave provision does not exceed $200 per employee per day for leave related to the employee and $10,000 per employee in the aggregate.

GROOM INSIGHT: These limitations were contained in the Families First Act already, but the CARES Act clarifies that the aggregate limits apply on a per employee basis.

B. Paid Leave for Rehired Employees (Section 3605)

Under the Families First Act, employees who have been employed by the employer for at least 30 calendar days are eligible for Expanded FMLA Leave. The CARES Act amends the Expanded FMLA Leave rule to extend paid leave to employees who (1) were laid off on or after March 1, 2020, (2) had worked for the employer for at least 30 of the last 60 days prior to their layoff, and (3) were rehired by the employer.

C. Advance Refunding of Payroll Credit Required for Paid Sick Leave (Section 3606)

The Families First Act allows an employer to claim a refundable tax credit for Emergency Paid Sick Leave and Expanded FMLA Leave that the employer is required to provide. The CARES Act expands those provisions by:

(1) providing for an advance of the payroll tax credit, subject to the limits imposed by the Families First Act and calculated through the end of the most recent payroll period in the quarter;

(2) requiring the Secretary of the Treasury to prescribe forms and instructions necessary to permit the advancement of the credit; and

(3) requiring the Secretary of Treasury to waive penalties associated with the failure to deposit taxes required under Internal Revenue Code ("Code") Sections 3111(a) or 3221(a) if the failure was due to an employer's anticipation of the credit.

III. Retirement and Compensation Provisions

A. Qualified Plan and IRA Withdrawal and Loan Relief – Qualified Disaster Relief Extended to SARS and COVID-19 (Section 2202)

Similar to qualified disaster relief payments provided over the years for various hurricanes and natural disasters (such as Harvey, Irma, Maria, and California wildfires), the CARES Act provides:

- an increased limit on new loans (replacing $50,000 with $100,000 and 50% with 100% account balance limit);
- up to a one-year extension on existing loans; and
- temporary withdrawals of up to $100,000 (distributions can be taxed over three years with an ability to be repaid within three years, no 10% early withdrawal tax, not treated as eligible for rollover for tax withholding and rollover notice rules).

These special payments can be made available for an individual (1) who is diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the CDC, (2) whose spouse or dependent is so diagnosed, or (3) who experiences adverse financial consequences as a result of being quarantined; being furloughed or laid off or having work hours reduced to such virus; being unable to work due to a lack of child care due to the virus; closing or reducing hours of a business owned or operated by the individual due to the virus; or such other factors determined by Treasury. Importantly, an employee certification will be accepted for withdrawal purposes. These distributions may be made at any time during 2020, and the loans may be made through 180 days after enactment. This provision is optional for the plan sponsor and will require a plan amendment no earlier than the end of the 2022 plan year (2024 for governmental plans).

B. Waiver of 2020 Required Minimum Distributions ("RMD") (Section 2203)

Similar to the waiver approved in the wake of the 2008 economic downturn, the CARES Act provides for 2020 RMD distributions to be waived for defined contribution plans and IRAs due to the volatile financial markets. This includes 2020 RMD payments for individuals who already are receiving them (e.g., attained 70-1/2 before 2019), and individuals who have a required beginning date in 2020 (both

the 2020 RMD payment and the 2019 RMD payment to the extent it was not made by December 31, 2019 – e.g., who turned age 70-1/2 in 2019). For post-death distributions, this one-year period is disregarded for purposes of the five year post-death payout requirement. If the 2020 RMD payment is made, it is not treated as an eligible rollover distribution for certain purposes, but some amounts may be rolled over. We anticipate guidance similar to Notice **2009-9** and **2009-82** to reflect the available options to plan sponsors and participants.

C. Exclusion for Certain Employer Payments of Student Loans (Section 2206)

The CARES Act expands Code Section 127 to allow employers to contribute up to $5,250 toward employees' "qualified education loans." The provision allows the employer to make such payment either to the employee or to the lender. The provision is only effective for employer payments made after enactment through December 31, 2020.

D. DOL Authority to Postpone Deadlines (Section 3607)

The Act amends Section 518 of ERISA by adding "a public health emergency" declared by the HHS Secretary to permit the Labor Secretary through notice or otherwise to provide an extension of up to one year for actions required or permitted to be completed under ERISA.

E. Single-Employer Plan Funding (Section 3608)

The CARES Act provides that any single-employer plan contributions that would otherwise be due during calendar year 2020 are instead due on January 1, 2021. This provision applies to both quarterly contributions and the final contribution necessary to satisfy the annual minimum funding requirements, if the contribution is due to be paid in 2020.

For a calendar year plan, the following revised contribution schedule applies:

Contribution	Prior Deadline	New Deadline
First Quarterly Contribution for 2020 Plan Year	April 15, 2020	January 1, 2021
Second Quarterly Contribution for 2020 Plan Year	July 15, 2020	January 1, 2021
Final Contribution for 2019 Plan Year	September 15, 2020	January 1, 2021
Third Quarterly Contribution for 2020 Plan Year	October 15, 2020	January 1, 2021

Although the contributions will not be due until January 1, 2021, they will still accrue interest starting on the prior deadline. The interest charged would be at the plan's effective rate of interest, which is

generally calculated each year by the actuary based on the interest rates used to determine the plan's liabilities.

Additionally, for plan years that include any portion of 2020, the plan sponsor is permitted to elect to treat the plan's adjusted funding target attainment percentage ("AFTAP") as being equal to the percentage from the last plan year ending before January 1, 2020.

GROOM INSIGHT: Plan sponsors should be aware that taking advantage of the contribution relief will result in significantly higher contributions in 2021 under the Act. It is possible, but not certain, that Congress will provide additional funding relief in the future. For example, lawmakers considered a number of measures that did not make it into the final Act, including extended interest rate relief, longer amortization periods for shortfalls, and other measures that would ease minimum funding requirements. These may be considered in follow-up legislation.

Absent this AFTAP relief described above, plans with plan years that start after January might have reported unusually low 2020 AFTAPs because of the recent decline in the financial markets. These low AFTAPs could have triggered funding-related benefit restrictions, such as lump sum prohibitions and benefit accrual restrictions. With the relief, plan sponsors may be able to avoid these restrictions by utilizing this provision.

F. Charity Plan Funding Relief (Section 3609)

Under existing law, certain plans deemed to be Cooperative and Small Employer Charity ("CSEC") pension plans are subject to funding rules that are similar to those in place before the passage of the *Pension Protection Act of 2006*. CSEC plans also have lower PBGC premiums. The CARES Act expands the definition of a CSEC plan to include certain charitable employers that, among other things, perform or support medical research related to mothers and children.

IV. Restrictions Applicable to Companies Accepting Government Funds *(Sections 4003, 4004, 4114, 4116)*

The Act authorizes the Treasury Department to make loans, loan guarantees, and other investments to provide liquidity to businesses generally, as well as other forms of direct assistance to air carriers and related contractors for paying wages and benefits to their employees. This assistance comes with strings attached. Employers accepting direct loans or loan guarantees through these programs will face major restrictions on their executive pay practices until one year after the date the loan or loan guarantee is no longer outstanding (restricted period). Further, air carriers and related contractors accepting wage and benefit assistance will face similar restrictions during the two-year period from

March 24, 2020 through March 24, 2022. The Act also restricts assisted businesses from making stock repurchases and issuing dividends. Further, the Act includes various restrictions on layoffs, furloughs, and pay and benefit reductions for certain air and national security businesses receiving assistance.

Generally, during the applicable restricted period, no officer or non-union employee of an employer receiving assistance whose total compensation exceeded $425,000 in 2019 may be paid more than his or her 2019 total compensation during any 12-month period, or receive severance exceeding twice his or her 2019 total compensation. In addition, during the restricted period, no officer or employee whose total compensation exceeded $3 million in 2019 may receive total compensation exceeding $3 million plus 50% of the excess over $3 million the individual received in 2019. For example, if a CEO's total compensation in 2019 was $10 million, the CEO may not receive more than $6.5 million during any 12-month period in the restricted period.

GROOM INSIGHT: For purposes of these rules, "total compensation" is defined broadly to include salary, bonuses, stock awards, and "other financial benefits." One major open question is the role qualified and nonqualified deferred compensation plays in calculating the compensation limits. For example, is an individual who made $450,000 but deferred $50,000 in 2019 subject to these restrictions? Similarly, can a CEO whose pay is reduced receive a special deferred "make-up" bonus that will be paid at some point outside the restricted period?

V. Unfinished Business and Future Legislation

The Act is the third in a series of bills aimed at addressing the COVID-19 pandemic, and it is possible that Congress will consider additional measures in the future. As Congress considers a possible fourth bill, lawmakers will likely revisit policy changes that were not included in the Act. For example, there have been active discussions about extending contribution smoothing for single-employer retirement plans, providing relief for severely underfunded multiemployer pension plans, expanding the paid leave provisions, and further expanding HSAs. We expect it to be a month or more before Congress takes additional action.

If you have any questions, please do not hesitate to contact your regular Groom attorney or the authors listed below:

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