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President Signs COVID-19, Health and Tax Provisions in End-of-Year Omnibus Bill

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On December 21, the House and Senate passed a $2.3 trillion omnibus appropriations and COVID-19 relief package, H.R. 133, the Consolidated Appropriations Act, 2021 (the "Act"). President Trump signed the Act into law on December 27 after initially criticizing the amount of direct payments to individuals and other aspects of the Act late last week.

The massive, 5,593 page document includes a $1.4 trillion appropriations package to fund the government through September 30, 2021, a long-debated $900 billion COVID-19 relief and stimulus package, funding for COVID-19 vaccines and testing, expanded food aid programs, emergency education relief, airline and transportation support, relief for farmers, broadband incentives, and extensions on eviction moratoriums.

Notably, it also includes a large surprise medical billing package, a health transparency and patients' rights package, various tax extenders and other tax and health provisions, and a few miscellaneous retirement provisions. This is the largest health care legislative package since the Affordable Care Act ("ACA") and includes more than 10 new patient protections with rapid effective dates, suggesting a very busy health regulatory year in 2021 with the new Biden administration holding the pen.

The package does not include relief for multiemployer pension plans facing insolvency or the single-employer defined benefit plan funding relief provisions previously included in the House-passed HEROES Act. It also does not include relief for states and local governments or the business liability protections that were primary areas of contention throughout the COVID-19 legislative negotiations since last spring. President-Elect Biden and Congressional Democrats have called for an additional COVID-19 relief and stimulus package next year.

Below is a high level summary of key provisions in the Act.

COVID-19 Business and Individual Relief Provisions

The Act includes numerous provisions to provide relief to businesses and individuals, including the following:

Small Business Relief Provisions. The Act includes $325 billion in funding for programs to assist small businesses, including $284 billion for forgivable Paycheck Protection Program ("PPP") loans and additional funding for Emergency Injury Disaster Loans. The Act also excludes forgiven PPP loans and loans and advances under other Treasury and Small Business Association programs from taxable income and provides that an employer can claim as a tax deduction business expenses paid using forgiven loans.

Extension and Expansion of the Employee Retention Tax Credit. The Act extends and expands the employee retention tax credit ("ERTC") included in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). Among other things, the Act extends the ERTC until July 1, 2021, increases the credit percentage from 50% to 70%, increases the per employee limit on qualifying wages to $10,000 per quarter, and expands the eligibility of qualifying employers.

Extension and Expansion of Paid Sick and Family Leave Tax Credit. The Act extends the paid sick and family leave credits (but not the mandate) enacted in the Families First Coronavirus Response Act ("FFCRA") and CARES Act for three additional months to March 31, 2021.

Airline Payroll Support. The Act provides an additional $15 billion for the airline payroll support program as well as other relief for contractor, airport and other transportation entities.

Unemployment Insurance Benefits Extension. The Act extends the various pandemic unemployment insurance programs (including the expanded coverage to self-employed and gig workers) and provides an additional $300 per week for workers receiving unemployment benefits through March 14, 2021.

Individual Payments. The Act provides $600 per individual ($1,200 for taxpayers filing jointly) payments directly to Americans, as well as $600 for each child dependent under the age of 17. The payments begin to phase out at an adjusted gross income of $75,000 for an individual and $150,000 for joint filers.

Payroll Tax Deferral Extension. The Act includes an extension of the voluntary payroll tax deferral provision in the Presidential memorandum and Notice 2020-65 so that affected individuals have until December 31, 2021, instead of April 30, 2021, to pay the deferred taxes.

Food and Beverage Expense Deduction. The Act increases an employer's deduction for the cost of food and beverage expenses related to its trade or business from 50% to 100% if the food and beverages are provided by a restaurant. This applies to expenses incurred after December 31, 2020 and before January 1, 2023.

Surprise Billing Package

The Act has parallel provisions that address surprise bills from certain non-network providers, air ambulances and for emergency services. One provision imposes coverage requirements on group health plans and health insurance issuers by amending the Public Health Service Act ("PHSA"), the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code ("Code"), which will be important for enforcement against plans and issuers. Another provision imposes prohibitions and requirements on providers.

Prohibition on Surprise Bills. Individuals covered by a group health plan or individual/group health insurance receiving non-emergency services at a network facility cannot be balance billed by a non-network provider, unless the non-network provider provides notice to the individual and the individual consents. There is an exception for "ancillary services," which is defined by the statute and includes anesthesiology, pathology, radiology (among other services). Non-network providers of ancillary services cannot balance bill with certain exceptions. The ability to balance bill with notice and consent also does not apply to unforeseen, urgent medical needs received at a network facility from non-network providers. The agencies are required to begin finalizing implementing regulations regarding the methodology for making payments by July 1, 2021, so there will be significant regulatory action early in the Biden administration beyond the regulatory priorities we have discussed previously.

Similarly, air ambulance services are prohibited from balance billing individuals covered by a group health plan or individual/group health insurance.

Required Plan or Issuer Coverage (aka "Preventing Surprise Medical Bills"). If the plan or issuer covers emergency services in an emergency department, the plan or issuer must cover out-of-network emergency services without prior authorization requirements with in-network cost sharing, similar to the current emergency services rule. With respect to non-emergency services provided by non-network providers at a network facility, and out-of-network air ambulance services, plans or issuers must impose in-network cost-sharing. The Act also adds new audit provisions to ensure plans and issuers are paying appropriately.

Prompt Payment. The emergency services, non-network providers at a provider facility and air ambulance provisions also require a plan or issuer to make an initial payment or notice of denial within 30 days after the bill is transmitted.

Arbitration. Certain out-of-network claims, including certain claims by non-network providers at network hospitals and air ambulance services, may be submitted to binding arbitration initiated by the plan/issuer or the provider.

External Review. Following an adverse benefit determination, the current external review process will be available to determine whether the surprise billing and surprise air ambulance provisions apply.

Advanced EOBs. Group health plans and health insurance issuers must provide an advance explanation of benefits ("EOBs") for scheduled services.

ID Card Information. Group health plans and health insurance issuers must include, in clear writing, the deductible, out-of-pocket limits, and consumer assistance information on ID cards (physical or electronic).

Continuity of Care. For individuals undergoing treatment for a serious and complex condition, who are pregnant, receiving inpatient care, scheduled for non-elective surgery or terminally ill, a group health plan or health insurance issuer must provide 90 days of continued, in-network care if a provider leaves the network.

Cost-Sharing Tool. Group health plans and health insurance issuers must maintain a "price comparison tool" available via phone or the web that allows enrolled individuals and participating providers to compare cost sharing for items and services.

Provider Directories. Group health plans and health insurance issuers must verify and update provider directories at least every 90 days and establish a system to respond to individuals within one business day regarding the network status of a provider. Provider directories must be available electronically and publicly.

Patient-Provider Dispute Resolution. Health care providers must provide good faith estimates of expected charges. For uninsured individuals, the Department of Health and Human Services ("HHS") will establish a dispute resolution process for instances where the actual charges substantially exceed the estimated charges.

Reporting. Air ambulance services must report cost data to the Departments of HHS, Labor ("DOL"), and the Treasury (the "Departments"), and group health plans and health insurance issuers must report air ambulance claims data. The Departments must form a committee to report on ground ambulance charges and issue a report of recommendations.

All Payer Claims Databases ("APCD"). Grants will be available to states to establish or improve state APCDs.

Provider Non-Discrimination. The Departments are required to issue a proposed rule, subject to notice and comment, on the ACA's provider non-discrimination provision.

Health Transparency

The Act includes additional reforms aimed at transparency and plan and issuer compliance. They include:

Removing Gag Clauses on Price and Quality Information. The Act prohibits plans and issuers from entering into provider contracts that bar, directly or indirectly, the disclosure of provider-specific cost and quality information. The provision also prohibits contractual arrangements that prevent plans from accessing de-identified claims information.

Disclosure of Broker/Consultant Compensation. The Act requires that brokers and consultants to group health plans disclose at the time of contracting any direct or indirect compensation that they will receive as a result of the services they provide to the plan. Issuers are required to disclose to individuals any direct or indirect broker compensation paid with respect to individual market coverage at the time of enrollment, and to report such information to the Secretary of HHS on an annual basis.

Strengthening Mental Health Parity Compliance. The Act requires that group health plans and health insurance issuers be able to provide to the Secretary of HHS, Secretary of DOL, or state insurance regulator, as applicable, within 45 days of enactment a detailed analysis regarding compliance with the Mental Health Parity and Addiction Equity Act's ("MHPAEA's") nonquantitative treatment limitation ("NQTL") rule. The Act further requires the Departments to develop a reporting process whereby this data is submitted to the Secretaries for evaluation of compliance.

Reporting on Pharmacy Benefits and Drug Costs. The Act requires group health plans and health insurance issuers to annually report to the Secretaries of HHS, DOL and the Treasury, detailed information regarding plan spending, the cost of plan pharmacy benefits, enrollee premiums, and any manufacturer rebates received by the plan or issuer, including any impact on premiums.

Other Health and Welfare Provisions

COVID-19 Vaccine and Testing. The Act provides over $30 billion for vaccine procurement and distribution, as well as more than $22 billion to the states, for testing, tracing and COVID-19 mitigation programs.

FSA Provisions. The Act permits the following flexible spending arrangement ("FSA") provisions to be added to a cafeteria plan, but employers are not required to do so. If an employer chooses to add the FSA provisions, the Act permits it to amend its cafeteria plan retroactively, so long as (1) the amendment is adopted not later than the last day of first calendar year beginning after the end of the plan year in which the amendment is effective, and (2) the plan is operated consistent with the terms of such amendment during the period beginning on the date of the amendment and ending on the date the amendment is adopted.

- **FSA Rollovers.** The Act allows health and dependent care FSA participants to carry over unused balances from a plan year ending in 2020 to a plan year ending in 2021 and from a plan year ending in 2021 to plan year ending in 2022. There does not appear to be any maximum carryover amount.
- **FSA Grace Period Extension.** The Act allows a health and dependent care FSA grace period for a plan year ending in 2020 or 2021 to be extended 12 months after the end of such plan year.
- **Health FSA Reimbursements.** The Act permits a health FSA to allow an employee who ceases participation in the plan during 2020 or 2021 (for example, due to termination of employment) to continue to receive reimbursements from unused balances through the end of the plan year in which such participation ceased (including any grace period).

- **Dependent Care FSA Participation.** The Act permits dependent care FSA participants whose qualifying child turned age 13 during the pandemic to continue to receive reimbursements for such child's dependent care expenses for (1) the remainder of the plan year and, (2) to the extent a balance remains at the end of the plan year, the following plan year until the child turns age 14 (but only with respect to the unused amount). The plan year described in (1) must have had a regular enrollment period that was on or before January 31, 2020.
- **FSA Election Changes.** The Act permits health and dependent care FSA election changes for plan years ending in 2021, regardless of whether the employee has a permitted election change event. This extends the election change relief for FSAs provided in IRS Notice 2020-29 by one year.

Student Loan Relief. The Act extends the CARES Act provision that allows an employer to pay qualified student loan payments tax-free through its employer education assistance program (up to $5,250) to payments made before January 1, 2026, instead of January 1, 2021.

Medical Expense Deduction. The Act makes permanent the medical expense itemized deduction at an adjusted gross income ("AGI") floor of 7.5%.

Retirement Provisions

Partial Plan Termination Relief. The Act provides relief from the 100% vesting requirement under Code section 411(d)(3) for turnover due to COVID-19. Specifically, a plan will not incur a partial plan termination for any plan year that includes the period beginning March 13, 2020 and ending March 31, 2021, provided that the number of active participants covered by the plan on March 31, 2021 is at least 80 percent of the active participants on March 13, 2020.

Traditional Disaster Relief. The Act provides special disaster related distribution and loan rules (similar to the CARES Act and other natural disasters – such as $100,000 distribution right, 10% penalty tax relief, increase in loan limits, loan suspensions, repayment options, return of withdrawals for home purchases) for FEMA declared disasters (other than COVID-19) from January 1, 2020 through 60 days after enactment of the Act. This applies to distributions made through 180 days after enactment.

Coronavirus-Related Distributions ("CRDs"). The Act extends the COVID-19 in-service distribution relief under the CARES Act to money purchase pension plans. (This trumps Notice 2020-50, but plan sponsors have a limited window (through December 31, 2020) to offer this relief.)

Section 420 Transfers. Among other changes, the Act permits an employer that had made a "qualified future transfer" to transfer excess defined benefit plan assets to cover future retiree health/life insurance costs to elect, by December 31, 2021, to terminate such transfer and restore the unused funds to the plan, subject to certain conditions. This election results in a taxable reversion if not restored to the health/life account within 5 years following the original transfer period.

Distributions During Working Retirement. The Act lowers the in-service distribution age under Code section 401(a)(36) for pension plans from age 59-1/2 to age 55 for certain employees in the building and

construction industry where the historic plan provisions provided this right. This is targeted relief and does not generally apply to plan sponsors.

Electronic Delivery Report. Report language to the Act requests that the DOL issue a report assessing the impact of the final DOL electronic delivery regulations, including the impact on individuals residing in rural and remote areas, seniors, and other populations lacking access to internet communications or who may only have access through public means. Although report language is not binding, DOL and other agencies typically try to comply with such requests.

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

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