



# Coronavirus Top Issues for Employers, Health Plans & Retirement Plans

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GROOM LAW GROUP

# Speakers

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# Agenda

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- Health Insurance (Essential Health Benefits/ Preventive Care)
- HSAs & Self-Funded Health Plans
- HIPAA Privacy
- Implications for Retirement Plans
- Paid/Unpaid Leave
- Corporate Insurance Coverage / Use of Emergency Funds
- Federal & State Guidance - Issued and Anticipated

# Health Insurance

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- Essential Health Benefits
- Preventive Care

# Health Insurance

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- **Essential health benefits (“EHB”)** include: laboratory services; hospitalization; ambulatory patient services; emergency services; preventive services; and prescription drugs.
  - **Laboratory Services**
    - Yes, covered as an EHB. However, whether any specific diagnostic or laboratory service is covered by a plan varies, and is based on the state benchmark plan and terms of the plan. Cost sharing may apply.
  - **Hospitalization, Ambulatory Patient Services, and Emergency Services**
    - Yes, covered as an EHB. However, whether any specific service is covered by a plan varies, and is based on the state benchmark plan and terms of the plan. Cost sharing may apply.

# Health Insurance

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- **Preventive services**

- Yes, preventive services are a category of EHB.
- Currently, COVID-19 testing and vaccine are *not* required preventive services.
- If a vaccine is developed for COVID-19, further guidance may be issued regarding whether it would be required to be covered as a preventive service with no cost sharing.

- **Prescription drugs**

- Yes, covered as an EHB. However, whether any specific drug is covered by a plan varies, and is based on the state benchmark plan and terms of the plan.
- Prior authorization for prescription drugs, including future treatment for COVID-19, may apply.

# HSAs & Self-Funded Health Plans

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# HSA & Self-funded Health Plans

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- **Several top-line questions:**
  - Paying for testing on a pre-deductible basis
  - Paying for telemedicine pre-deductible on a pre-deductible basis
  - Paying for all related costs on a pre-deductible basis
- **What does existing guidance provide?**
  - Is COVID-19 testing “preventive”
  - Is COVID-19 treatment “preventive”
    - What about telemedicine?
- **IRS/Treasury issued Notice 2020-15 (March 11, 2020) allowing health plans to provide COVID-19 testing and treatment before the deductible is satisfied without impacting HSA eligibility.**



# HIPAA Privacy

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# HIPAA Privacy

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- HIPAA only applies to covered entities (health plans, healthcare providers, health care clearinghouses)
  - Includes medical, dental, vision, prescription drug, health FSA, EAP benefits
  - Does not include disability, life, or pension plans
  - Does not apply directly to employer
  - Does not apply to workers' compensation

# HIPAA Privacy

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- **HIPAA applies to protected health information (PHI)**
  - **Health-related information about a person**
  - **Created or received by a Covered Entity, such as a health plan**
  - **Could be used to identify the person**
  - **Includes demographic information (such as address and birth date)**

# HIPAA Privacy

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- **Disclosure for Treatment**

- PHI may be disclosed for the treatment of the patient or to treat a different patient. Disclosure for treatment may only be made by (or to) health care providers.
- Allows reporting of patients that have been exposed to, suspected or confirmed to have the coronavirus to the CDC or another public health authority.

# HIPAA Privacy

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- **Disclosure for Public Health Activity**
  - To a public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury or disability.
  - At the direction of a public health authority, to a foreign government.
  - To persons at risk of contracting or spreading a disease or condition if other law, such as state law, authorizes the covered entity to notify such persons as necessary to prevent or control the spread of the disease or otherwise to carry out public health interventions or investigations.

# HIPAA Privacy

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- **Disclosures to Prevent a Serious and Imminent Threat**
  - Health care providers can share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public – consistent with applicable law and the provider’s standards of ethical conduct.
  - Allows providers to disclose information on a patient’s health to anyone who is in a position to prevent or lessen the serious and imminent threat.

# HIPAA Privacy

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Can I access my health plan for information on employees that tested positive for the coronavirus so I can monitor them or mandate quarantine?

- No. HIPAA would not permit a health plan to disclose information to an employer about an individual's health condition for a non-Plan purpose, which would include monitoring employees.

# HIPAA Privacy

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If I require my employees to be screened for a temperature in order to come on the work site will the screening results be subject to HIPAA?

- No. If the testing is performed on the job by a vendor that the employer hired to perform the testing, the results are not likely subject to HIPAA because the testing was not conducted or paid for by a health plan or health care provider. Note that other federal laws, such as the Americans with Disabilities Act, and state law should be consulted.



# Implications for Retirement Plans

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# Implications for Retirement Plans

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- **Plan Operations**
  - **Regulatory Requirements For Plan Fiduciaries**
    - Potential for DOL Relief
    - IRS Disaster Relief Authority
      - Code Sections 7508 / 7508A
      - Revenue Procedure 2018-58, Section 8
- **Available Plan Features**
  - **Hardship and Other In-Service Withdrawals**
  - **Potential Congressional Action**
    - Parallels to Hurricane and Wildfire Relief

# Implications for Retirement Plans

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- **Fiduciary Governance**
  - **Administrative Activities**
    - Committees – Quorum and Delegation Concerns
    - Directions and Signature Authority
      - Systems, Access and Methodologies
  - **Investments**
    - Investment Fluctuations
    - Company Stock
      - SEC Relief for Companies
  - **Service Provider Monitoring**

# Paid/Unpaid Leave

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# Paid/Unpaid Leave

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- **Questions to consider:**
  - What do existing sick leave policies cover?
  - What do existing STD and LTD policies cover?
  - May employers place a ban on work-related travel?
  - May employers place a ban on personal travel?
  - May employers quarantine employees?
  - For what time out of the office must employees be paid?
  - Is FMLA implicated?
  - State laws
  - Non-discrimination laws

# Corporate Insurance Coverage / Use of Emergency Funds

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- **Review of Insurance Coverage**
  - **Business Interruption Insurance and Impact on Plans**
    - Policy Terms
    - Reporting Obligations
- **Emergency Funds**
  - Employer Leave Banks
  - Emergency Fund Programs
  - Loans and Other Solutions

# Federal & State Agency Guidance: Issued & Anticipated

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# Federal & State Agency Guidance- Issued & Anticipated

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- CMS issued guidance on the coronavirus. Available at: <https://www.cms.gov/About-CMS/Agency-Information/Emergency/EPRO/Current-Emergencies/Current-Emergencies-page>
- HHS/OCR issued guidance in February 2020 on the coronavirus. Available at: <https://www.hhs.gov/sites/default/files/february-2020-hipaa-and-novel-coronavirus.pdf>
- DOL/OSHA issued guidance on the coronavirus and the workplace. Available at: <https://www.osha.gov/SLTC/covid-19/>
- EEOC issued guidance on coronavirus and the workplace. Available at: [https://www.eeoc.gov/eeoc/newsroom/wysk/wysk\\_ada\\_rehabilitaion\\_act\\_coronavirus.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm) and [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)
- Treasury –Notice 2020-15 (March 11, 2020) allowing health plans to provide COVID-19 testing and treatment before the deductible is satisfied without impacting HSA eligibility.

# Federal & State Agency Guidance- Issued & Anticipated

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- State Actions

- Budget -

- Several states have either enacted or introduced legislation to appropriate additional funding for coronavirus related activities, including Hawaii, Massachusetts, Maryland, Minnesota, New York and Washington.

- Coverage Mandates -

- **Washington** - Insurance Commissioner issued emergency order requiring state health insurers to: waive co-pays and deductibles for coronavirus testing; allow a one-time early refill for prescription drugs; and suspend any prior authorization requirement for the treatment or testing of COVID-19.
    - **California** - Governor directed commercial and Medi-Cal health plans to waive cost-sharing for all medically necessary screening and testing related to the novel coronavirus

# Federal & State Agency Guidance- Issued & Anticipated

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- State Actions

- Insurance Coverage -

- **Nevada** – Emergency regulation covering health insurance policies regulated by the Division of Insurance: requires issuers to cover medical services and prescriptions related to the novel coronavirus at normal costs; prohibits health insurers from imposing an OOP cost for a provider, urgent care center or emergency room visit when it relates to testing for COVID-19; prohibits insurers from charging for the COVID-19 test or a vaccine as it becomes available.
    - **New York** – Governor issued a directive requiring health insurers to waive cost-sharing associated with novel coronavirus testing, including emergency room, urgent care and office visits.

## **FOR MORE INFORMATION, PLEASE CONTACT**

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