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Benefits Planning During Turbulent Times
Election Year, Coronavirus, and More

New Orleans
Benefits Expo

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Today's Topics

General guidance

Recent legislative responses to COVID-19:

- FFCRA
- CARES Act
- Emergency Paid Sick Leave Act
- Emergency FMLA Expansion Act

Today's Topics

Recent regulatory responses to COVID-19:

- Cafeteria plans
- HDHPs
- Telehealth
- COBRA
- HIPAA

Recent litigation

Looking ahead!

General Guidance for Employers

- Encourage sick Employees (“EEs”) to stay home
- Send EEs home who become sick during the day
- Emphasize respiratory etiquette and hand hygiene
- Perform routine cleaning
- Encourage EE self reporting of sick family members
- Maintain confidentiality
- Do not make any risk determinations based on protected class

Employer Response

- Consider special leave policies
- Implement COVID-19 policies to notify EEs about absences, benefits and workplace hygiene
- Implement unlimited sick time so EEs will not be docked for absences or have absences count against PTO
- Add additional time to PTO banks or “borrowing” future PTO time
- Expand telecommuting

Education & Health Plan Design

Be ready to address claims related to COVID-19

- Consider changes to company policies to ensure flexibility
 - Increase sick days, cancel non-essential travel for work, cancel in-person meetings, encourage working remotely
- Reduce financial implications of a pandemic
 - Consider reducing copays, coinsurance and deductibles for preventions, detection and treatment

Education & Health Plan Design

Educate workforce

- Protection, detection, treatment of COVID-19 through wellness program
- Company-wide communication with updated policy and health plan changes

Families First Coronavirus Response Act (FFCRA)

Helps combat the workplace effects of COVID-19

- Reimburses American private Employers (“ERs”) that have fewer than 500 EEs with tax credits for the cost of providing EEs with paid leave taken for reasons related to COVID-19
- Enables ERs to keep their workers on payrolls, while ensuring that workers are not forced to choose between their paychecks and public health measures

FFCRA

Determine EE head count

- Must be calculated each time an EEs leave is taken
- Needs to include EEs on leave, temporary EEs and day laborers supplied by a temporary agency
- Workers who are independent contractors under the Fair Labor Standards Act are not considered EEs for the 500 EE threshold

FFCRA – Fair Labor Standards Act (FLSA)

Joint ERs

- Where a corporation has an ownership interest in another corporation, the two are separate ERs unless they are joint ERs under FLSA
- If joint ERs under FLSA, all of the common EEs must be counted in determining whether paid sick leave must be provided provided under the two acts in FFCRA

FFCRA – FMLA Integrated ER Test

- Generally, two or more entities are separate ERs unless they meet the integrated ER test under FMLA
- Factors under FMLA include common management, interrelation between operations, centralized control of labor relations, and degree of common ownership/control
- If two entities are integrated, then EEs of all entities will be counted in determining ER coverage for purposes of expanded FMLA

FFCRA

Includes temporary protections and relief offered by:

- Emergency Paid Sick Leave Act
- Emergency Family and Medical Leave Expansion Act

Temporary Rules are effective from
April 1, 2020 – December 31, 2020

IRS Guidance on the Act

ER subject to the Act will receive:

- Immediate dollar-for-dollar tax offset against payroll taxes
- Where a refund is owed, the IRS will send the refund as quickly as possible

IRS Guidance on the Act

“Health Care Providers”

- Under FMLA regulations, ERs of individuals who are deemed “health care providers” and ERs of individuals who are emergency responders are not required to provide emergency paid leave
- Those ERs may elect to do so and receive a tax credit

IRS Guidance on the Act

Small business protection

- ERs with fewer than 50 EEs are eligible for an exemption from the requirements to provide leave to care for a child whose school is closed or where child care is unavailable in cases where the viability of the business is threatened

IRS Guidance on the Act

Self-employed individuals

- The same credits available to ERs with 500 or less EEs are available to self-employed individuals under similar circumstances
- Credits will be claimed on their income tax return and will reduce estimated tax payments

IRS Guidance on the Act

Easing compliance

- Businesses can retain and access funds that they would otherwise pay to the IRS in payroll taxes
- If amounts are not sufficient to cover the cost of paid leave, ERs can seek an expedited advance from the IRS

IRS Guidance on the Act

Non-enforcement period

- DOL will not bring an enforcement action against any ER for violations of the Act so long as the ER has acted reasonably and in good faith to comply with the Act

Emergency Paid Sick Leave Act

DOL guidance

- 10 days paid sick leave
 - Full-time EEs—up to 80 hours of paid sick time
 - Part-time EEs—up to the number of hours equal to the average hours they work in a two week period

Emergency Paid Sick Leave Act

EEs qualify when they miss work because of COVID-19:

- Subject to federal, state or local quarantine or isolation order
- Advised by healthcare provider to self-quarantine
- Experiencing symptoms of COVID-19 and seeking medical diagnosis
- Caring for individual under the above conditions
- Caring for son or daughter whose school or day care has been closed due to COVID-19

20

Emergency Paid Sick Leave Act

Amount of paid leave:

- Must be paid at EEs regular rate of pay if used because EE is quarantined, received diagnosis of COVID-19 or needs preventative care
 - Shall not exceed \$511/day or \$5110 in the aggregate
- ERs must pay two-thirds of the EEs regular rate of pay if EE is on leave to care for a family member who has COVID-19
 - Shall not exceed \$200/day or \$2000 in the aggregate

21

Emergency Paid Sick Leave Act

- ER must allow the EE to first use sick leave provided under this sick leave law then the EE can decide to use any remaining accrued paid leave under an ERs policy

The ER may not require the EE to use accrued leave under an ER policy first

- ERs who fail to comply will be treated as having committed a minimum wage violation under the Fair Labor Standards act

Emergency Family and Medical Leave Expansion Act

DOL guidance

- Reasons for leave now include “qualifying need related to a public health emergency”
 - Limited to circumstances where an EE is unable to work (or telework) to care for a minor child if the child’s school or day care has been closed due to the public health emergency

Emergency Family and Medical Leave Expansion Act

- First ten days are unpaid
- EE can substitute with accrued paid leave, including emergency paid sick leave
- Remaining ten weeks are paid at two-thirds of the EEs regular rate
 - Shall not exceed \$200/day or \$10,000 in aggregate per EE
- EE must be restored to the same job on return to work

24

FMLA - DOL Guidance

Q: Must an ER grant leave to an EE who is sick or who is caring for a family member who is sick?

A: Workers who are ill with COVID-19 or have a family member with COVID-19 are urged to stay home to minimize the spread of the pandemic.

- ERs are encouraged to support community mitigation strategies and should consider flexible leave policies for their EEs.

FMLA - DOL Guidance

Q: Can an EE stay home under FMLA leave to avoid getting pandemic influenza?

A: Leave taken by an EE for the purpose of avoiding exposure to the flu would not be protected under the FMLA.

FMLA - DOL Guidance

Q: What legal responsibility do ERs have to allow parents or care givers time off from work to care for the sick or children who have been dismissed from school?

FMLA - DOL Guidance

- A:** There is currently no federal law covering non-government EEs who take off from work to care for healthy children.
- ERs are not required by federal law to provide leave to EEs caring for dependents who have been dismissed from school or child care.
 - ERs should review their leave policies to consider providing increased flexibility to their EEs and their families.

FMLA - DOL Guidance

Q: May an ER require an EE who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?

FMLA - DOL Guidance

- A:** Yes. However, ERs should consider that during a pandemic, healthcare resources may be overwhelmed and it may be difficult for EEs to get appointments with doctors or other health care providers to verify they are well or no longer contagious.
- ER may require doctor's note where the medical condition would impair his ability to perform essential job functions without reasonable accommodation or pose a direct threat to safety in the workplace

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

- Enacted March 27, 2020
- Amended section 6001 of the FFCRA to include a broader range of diagnostic items and services that health plans and issuers must cover

CARES Act – DOL Guidance

Q: What types of group health plans are subject to FFCRA section 6001 as amended by section 3201 of CARES Act?

A: Group health plans and health insurance issuers offering group or individual health insurance coverage (including grandfathered health plans)

CARES Act – DOL Guidance

Q: Can a plan or issuer impose any cost-sharing, prior authorization, or medical management requirements for benefits that must be covered under FFCRA and CARES?

CARES Act – DOL Guidance

A: No. Section 6001(a) of the FFCRA provides that items and services must be covered without cost-sharing (i.e., deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements when medically appropriate for the individual as determined by his/her attending healthcare provider.

CARES Act – DOL Guidance

Q: Are plans and issuers required to cover items and services furnished by out of network providers?

CARES Act – DOL Guidance

A: Yes. Section 3202(a) of the CARES Act provides that a plan or issuer providing coverage for items and services as described in Section 6001(a) of the FFCRA, shall reimburse the provider in an amount that equals the cash price for such service as listed by the provider if the plan or issuer does not have a negotiated rate with such provider.

CARES Act – DOL Guidance

Q: How can plans and issuers utilize remote care services to mitigate the impact of COVID-19?

CARES Act – DOL Guidance

- A:** The availability and use of telehealth and other remote care services are vital to combat COVID-19.
- The Departments strongly encourage all plans and issuers to promote the use of such services, including mental health and substance use disorder services.
 - Section 3701 of the CARES Act amends the laws applicable to high deductible health plans and health savings accounts to provide flexibility with respect to telehealth and remote care services.

ERISA Disaster Relief Notice

Released by EBSA on April 28, 2020

- Provides relief for EE benefit plans from certain disclosure and reporting deadlines imposed under ERISA

ERISA Disaster Relief Notice

Required Disclosure Relief

- Failure to timely furnish certain ERISA required notices, disclosures or documents during this pandemic will not be considered a violation as long as the plan and plan fiduciary act in good faith to furnish the required documents as soon as reasonably practicable

ERISA Disaster Relief Notice

Covered Documents include (but not limited to):

- Summary plan description
- Summary of material modification
- Blackout notice
- Response to requests for plan document

ERISA Disaster Relief Notice

Good faith efforts include:

- Use of electronic means of distribution
- Communication with participants and beneficiaries
- As long as the plan sponsor had reason to believe the participant could access the notice electronically

ERISA Disaster Relief Notice

Form 5500 and Form M-1 Filing Deadline Relief

- Filings otherwise due on or after April 1, 2020 and before July 15, 2020 are now due July 15, 2020
- Extension beyond July 15, 2020 is still available using Form 5558 but the 2 ½ month extension period will be measured from the regular due date, not July 15
- Form M-1 filings are provided the same relief

**Relief does not extend the deadline for
2019 calendar year plans.**

High Deductible Health Plans

Notice 2020-15

- HDHP is permitted to cover all medical services received and items purchased in association with testing and treatment of COVID-19
- Allows HDHP's to be flexible without concern of deductible, cost sharing, or losing HSA eligibility
- Eliminates administrative and financial barriers for testing and treatment of COVID-19

Cafeteria Plans

Notice 2020-29 issued May 12, 2020

- Election change relief
- Health FSA and DCAP claims
- Relief for HDHPs
- Telehealth service exemption

Cafeteria Plans

Cafeteria plans may be amended to permit prospective election changes:

- New elections for ER sponsored health plan
- Election to enroll in different ER plan
- Revocation of existing election for ER plan, with an attestation that EE will enroll in other comprehensive coverage
- FSA or DCAP election changes

Cafeteria Plans

- Each EE who is eligible to make salary reduction contributions under the plan can make an election change (including an initial election) during the 2020 calendar year
- Revocation of an existing election for ER-sponsored health coverage
 - ER must receive from the EE an attestation in writing that the EE is or will immediately enroll in other comprehensive health coverage not sponsored by the ER

47

Cafeteria Plans

- ER utilizing this relief is not required to provide unlimited election changes but may determine the extent to which such election changes are permitted and applied
- Permitted election changes must be applied on a prospective basis only

Changes to the plan's election requirements cannot result in failure to comply with the nondiscrimination rules applicable to § 125 plans

Cafeteria Plans

FSA & DCAP claims

- ERs can amend its cafeteria plans to permit EEs to apply unused amounts remaining in a health FSA or DCAP to pay or reimburse expenses incurred for the same qualified benefit through December 31, 2020
- Be careful about extending FSA funds and making EE not eligible for HSA

Cafeteria Plans

Plan amendments

- Any ER that decides to amend its cafeteria plan in accordance with Notice 2020-29 must adopt a plan amendment
- Amendment for the 2020 plan year must be adopted on or before December 31, 2021 and may be effective retroactively to January 1, 2020

ER must inform all EEs eligible to participate in the cafeteria plan of the changes to the plan

50

Cafeteria Plans

Notice 2020-33 issued May 12, 2020

- FSA carryover amounts
- Deadline for plan amendments
- Expenses for insurance premiums

Cafeteria Plans

FSA carryover amounts

- Maximum unused amount from a plan year starting in 2020 allowed to be carried over to the immediately following plan year beginning in 2021 is \$550
 - 20% of \$2,750
 - Indexed 2020 limit under § 125(i)

Cafeteria Plans

Timing for expenses for insurance premiums

- Cafeteria plans now permitted to treat an expense for a premium for health insurance coverage as incurred:
 - The first day of each month of coverage on a pro rata basis
 - The first day of the period of coverage or
 - The date the premium is paid

Cafeteria Plans

Example:

- An individual coverage HRA with a calendar year plan year may immediately reimburse a substantiated premium for health insurance coverage that begins on January 1 of that plan year, even if the covered individual paid the premium for the coverage prior to the first day of the plan year

CARES Act

Coronavirus Aid, Relief, and Economic Security Act (CARES Act) expands benefits for:

- Over the counter (OTC) and menstrual care products; and
- Telehealth and other remote services

CARES Act

For amounts paid after December 31, 2019:

- HSAs* may treat expenses for OTC products as paid for medical care even if they aren't paid under a prescription
- Likewise, HSAs* may treat amounts paid for menstrual care products as paid for medical care

* And Archer MSAs if you can find one

These provisions have no expiration date

CARES Act

For reimbursements after December 31, 2019:

- Same rules apply to FSAs and HRAs

These provisions have no expiration date

CARES Act

For plan years beginning before 2021, HDHPs may pay expenses for telehealth and other remote services without regard to the deductible amount for the plan

This provision expires December 31, 2021

Other Medical Arrangements

Proposed Regs (June 10, 2020) regarding treatment under Section 213 for amounts paid for:

- Direct primary care arrangements;
- Health care sharing ministries; and
- Other medical care arrangements, such as an HMO or government sponsored health care programs (Medicare).

COBRA

Released on April 28, 2020 by EBSA, DOL & IRS

- Provides group health plan participants an extension to make special enrollment changes, elect COBRA and pay COBRA premiums

Group health plans must disregard the period from March 1, 2020 until sixty (60) days after the announced end of the COVID-19 National Emergency (“outbreak period”)

COBRA

Provides relief to plan participants, beneficiaries, qualified beneficiaries or claimants during the outbreak period including:

- 30 day period to request HIPAA special enrollment
- 30 or 60 day deadline for ERs or individuals to notify the plan of a qualifying event
- 60 day deadline for individuals to notify the plan of a determination of disability

COBRA

- 60 day deadline for participants to elect COBRA
- 14 day deadline for plan administrators to furnish COBRA election notices
- 45 day deadline in which to make a first premium payment and 30 day deadline for subsequent premium payments

COBRA

- Date individuals may file a benefit claim under a plan's claims procedure
- Date claimants may file an appeal of an adverse benefit determination
- Date claimants may file a request for an external review after receipt of an adverse benefit determination
- Date claimant may file information to perfect a request for external review

COBRA

Neither the DOL nor the IRS has advised that participants must be notified in their COBRA election notices regarding these extended time periods. Nevertheless, it would seem prudent that any COBRA election forms should be modified to describe this extended election and payment periods (and the consequences of utilizing those extended periods). Presumably, COBRA service providers will include some form of supplementary notice.

Special Enrollment for ACA Marketplaces

White House considered adding a limited special enrollment period (SEP), but on March 31 announced it rejected the new SEP

Some states that operate their own marketplaces do allow an SEP, currently including:

- California, Connecticut, Maryland, Massachusetts, Minnesota, Nevada New York, Rhode Island, Vermont and Washington

Affordable Care Act (ACA) Case

2017 Tax Cuts & Job Reform Act

- Individual mandate penalty tax reduced to zero, but structure remains
- Effective January 1, 2019

Affordable Care Act (ACA) Case

Texas v. Azar

- States challenged constitutionality of the mandate
- Argued mandate without penalty not sustainable under *Sebelius* decision by SCOTUS
- Dec. 14, 2018 Judge rules entire ACA invalid
- Dec. 30, 2018 Judge issues stay of ruling
- Parties appeal to U.S. Court of Appeals
- 2-1 decision ACA individual mandate unconstitutional but remanded for review of severability

Affordable Care Act (ACA) Case

What happens next?

- Case goes back to lower court for further review
- En banc hearing?
- ACA eventually will go before Supreme Court again
- Defendants will argue nothing has changed – tax structure remains but amount is zero
- Case will likely be heard after election

Affordable Care Act (ACA) Case

Currently case does not impact:

- ER mandate or annual reporting
- IRS continues active enforcement of both

Compliance with ACA must continue

Association Health Plans

Pathway 1 AHPs

- Bona fide AHPs are treated as a single ER under ERISA and can avoid certain plan restrictions that apply to small ER groups
- High bar for bona fide AHP status – must be formed for a purpose other than insurance, members must control the plan, and members must be in the same line of business and same geographical locale
- Other type of plan is entrepreneurial plan

Association Health Plans

Pathway 2 AHPs

- Final AHP rule issued June 21, 2018 changed key rules:
 - May be formed for purpose of insurance
 - Allow working owners
 - Commonality of interest or geographic locale, which can even span across state lines if in the same metropolitan area
 - Control standards

Association Health Plans

State AHP Activity

- States that have enacted legislation authorizing pathway 2 AHPs
- Other states ratcheted up enforcement to prevent pathway 2 AHPs

Association Health Plans

State of New York v. United States Department of Labor

- March 2019 – Federal district court struck down several aspects of the 2018 rule finding that it unreasonably expanded ERISA’s definition of “ER”
- Decision sets aside the revised rule, including the commonality of interest based on location, pending appeal
- Administration appealed, choosing not to revise to meet terms of court order

Association Health Plans

State of New York v. United States Department of Labor

- U.S. Department of Justice filed an appeal on April 26, 2019
- D.C. Circuit heard oral arguments on Nov. 14, 2019

Association Health Plans

Types of AHPs allowed & prohibited after court ruling

PROHIBITED AHPs	ALLOWED AHPs
AHPs whose member ERs share only the same geographic location (such as a state or metropolitan area)	Bona fide AHPs whose member ERs have a common interest and genuine organizational purpose unrelated to providing benefits Facts and circumstances determine commonality, which can't rely solely on geography
AHPs with working owners (members with no EEs)	AHPs that don't allow working owners (all members have EEs)
AHPs sponsored by associations that have the primary purpose of purchasing health coverage, but also have a substantial business purpose	AHPs sponsored by associations that have a genuine business/organizational purpose and function unrelated to providing benefits

Association Health Plans

DOL Nonenforcement Policy

- DOL and HHS won't pursue enforcement action against Pathway 2 AHPs formed between publication of the final rule and the court's decision as long as the AHPs relied in good faith on the final rule and continue to pay health benefit claims as promised

Association Health Plans

Renewing Pathway 2 AHPs

- Issuers may renew pathway 2 AHPs only if the converge complies with the relevant ACA market requirements for that ER's size
- Unless an appeals court reinstates the 2018 rule, groups cannot establish new Pathway 2 AHPs going forward

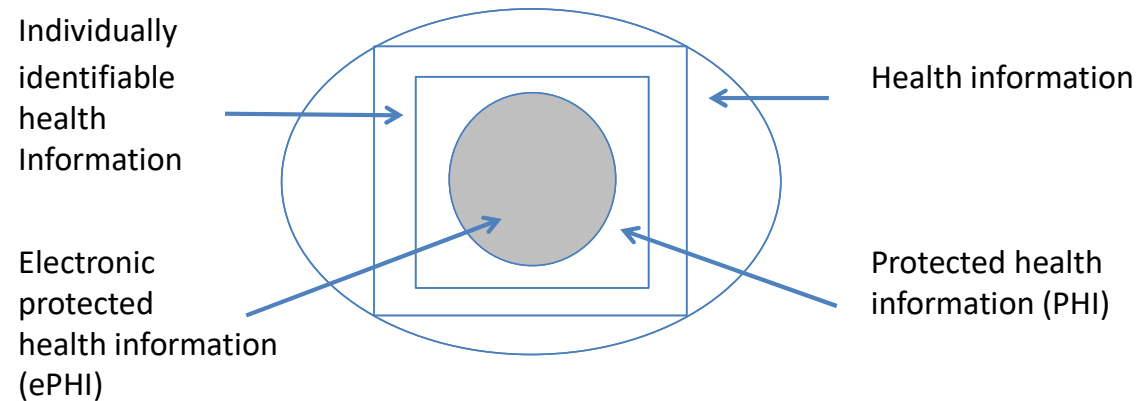
Association Health Plans

Next Steps

- States that have adopted legislation that would allow Pathway 2 AHPs raise issues about ERISA compliance as long as the 2018 rule remains invalidated
- AHP members should continue to monitor federal litigation over the 2018 rule

HIPAA: PHI and ePHI

- Privacy: Protected health information (PHI)
- Security: Electronic PHI (ePHI)



What is not PHI?

Health information ER receives from a source other than its GHP

- EE submits request for FMLA leave or ADA accommodation
- EE calls in sick
- *EE reports positive COVID-19 test*
- Workers' compensation or disability plans
- Drug testing or work physicals

Caution: Other laws or company policies likely protect confidentiality of this information

30

What is not PHI?

“De-identified” health information

- Safe harbor: Remove 18 identifiers; or
- Professional statistical analysis, documenting methods and results that show “very small risk” of identification

Identifiers include information such as:

- ☐ Name
- ☐ Phone number
- ☐ Address
- ☐ SSN

HIPAA Privacy Rule

Use and Disclosure Rules

- Use: Sharing, employing, applying, examining, or analyzing PHI within the entity holding the PHI
- Disclosure: Transferring, giving access to, or disclosing PHI outside of the entity holding the PHI

Use & Disclosure Rules

Disclosures are also permitted under certain (narrow) public policy-related exceptions—

- Where required by law
- To law enforcement
- Workers' compensation
- Judicial proceedings (e.g., subpoena)

Use & Disclosure Rules

- Serious and imminent threat to health or safety of a person or the public
 - Disclosure made only to someone reasonably able to prevent or reduce the threat, including the target of the threat
 - Fact-specific
 - Case-by-case basis; not as a blanket disclosure rule

COVID-19 & HIPAA

Balancing Act

- HIPAA protects the privacy of PHI
- Ensure necessary uses and disclosures are made in order to protect public health

COVID-19 & HIPAA

HIPAA Privacy rule applies to telehealth remote communications during public health emergency

- HHS will waive potential penalties for HIPAA violations against health care provider
- Has to be used in good faith for telehealth treatment or diagnostic purposes

COVID-19 & HIPAA

HHS Bulletin reminds CEs and those subject to HIPAA that it still applies—even in pandemic emergency

- HIPAA allows PHI to be disclosed without an individual's authorization when disclosed to public health authorities

COVID-19 & HIPAA

Even in an emergency situation--

- CEs must make reasonable efforts to limit the information disclosed to the minimum necessary to accomplish the purpose
- CEs must continue to use reasonable safeguards to protect patient information against impermissible uses and disclosures

COVID-19 & HIPAA

Other federal laws to be considered when handling EE PHI as it applies to COVID-19 in the workplace are:

- Genetic Information Nondiscrimination Act; and
- Americans with Disabilities Act.

COVID-19 & HIPAA Q&A

Q: May ERs ask an EE if they have been exposed to COVID-19?

COVID-19 & HIPAA Q&A

A: Generally, no.

Title II of GINA prohibits ERs from requesting genetic information from EEs.

ERs cannot ask an EE about the manifestation of a disease or disorder in a family member of the EE, including an EEs spouse.

COVID-19 & HIPAA Q&A

Q: If an EE reports that they have been exposed to a person who may be infected or who is known to be infected with COVID-19, what is our responsibility to others that have been in contact with that person?

COVID-19 & HIPAA Q&A

A: Send the EE home immediately and advise remote work/stay home.

Advising such workers to go home is not a disability-related action and would be permitted under the ADA since COVID-19 poses a direct threat to the public.

COVID-19 & HIPAA Q&A

Q: When the ER becomes aware of a person as described above, may it require the EE to provide evidence that they have sought the advice of a healthcare professional?

COVID-19 & HIPAA Q&A

A: Generally, no.

In the alternative, one suggestion may be to require the EE leave work immediately and telework for the minimum two-week self-quarantine period set by the CDC.

continued on following slide

95

COVID-19 & HIPAA Q&A

Upon return to work, an ADA-covered ER may require EEs who have been away from the workplace during the pandemic to provide a doctor's note certifying fitness to return to work.

Such inquiries are permitted under the ADA either because they would not be disability-related or, COVID-19 is truly severe, they would be justified under the ADA standards for disability-related inquiries of EEs.

COVID-19 & HIPAA Q&A

Q: If an EE is known to be infected with COVID-19, what is the ERs responsibility to others that have been in contact with that person?

COVID-19 & HIPAA Q&A

A: Since COVID-19 poses a direct threat to those who come in close contact (within about 6 feet) with an infected individual, disclosure to those EEs who may have come in contact with the infected person would be permissible.

Such disclosures should be limited to the minimum necessary information in order to accomplish the purpose of notifying EEs of possible exposure.

HIPAA Security Rule

Most COVID-19 issues relate to privacy, but security enforcement continues at high level

Security standards

- Applies to all CEs and BAs
 - Under HITECH Act, BAs may be penalized for violations
- Only applies to ePHI

HIPAA Security Rule

- GHPs must comply with 22 standards in 5 categories
 - Administrative safeguards
 - Physical safeguards
 - Technical safeguards
 - Organizational safeguards
 - Policies, procedures, and documentation requirements

HIPAA Security Rule

- Entity-specific approach (differs from HIPAA privacy rule)
 - Each entity determines reasonable and appropriate measures for implementing HIPAA security standards

HIPAA Security Rule

- Begins with mandatory written risk analysis that considers—
 - Entity's size, complexity, and capabilities;
 - Entity's technical infrastructure, hardware, and software security capabilities;
 - Costs of security measures; and
 - Probability and criticality of potential risks to ePHI

HIPAA Security Rule

Key point:

HIPAA security is an *ongoing* process,
not a one-time project!

Risk Analysis

Current OCR focus: risk analysis!

- Required (and crucial; everything flows from this step!)
- Thoroughly assess potential risks and vulnerabilities to the confidentiality, integrity, and availability of ePHI throughout entire enterprise—and document in writing
 - Inventory all information systems (including hardware, software, and fixed and portable devices) and identify all ePHI

104

Risk Analysis

Identify threats to ePHI
(natural, environmental, and human)

Examples: Earthquakes, tornadoes, landslides, electrical storms; electrical outages, pollution, chemicals, liquid leakage; inadvertent data entry by workforce members, network-based attacks, malicious software uploads.

Risk Analysis

Identify vulnerabilities

Examples: Failure to disable passwords for terminated EEs, poor or nonexistent firewalls, ineffective barriers to viruses and other malicious software, failure to install operating system patches, fire-control measures that may damage hardware or software.

Risk Analysis

- Determine likelihood and impact of each threat
- Identify measures to reduce threats to reasonable and appropriate levels

Other Requirements: NOPP

Notice of Privacy Practices

- Specific content requirements
- Written in plain language
- Distribution of notice
 - To new enrollees at time of enrollment
 - Within 60 days after a material revision of notice
 - At any time on request
 - At least once every 3 years

108

LGBT Protections under Title VII

Bostock v. Clayton County, Georgia

- Three cases reviewed, out of the Eleventh, Second & Sixth Circuit Courts
- Cases all stemmed from situations where an ER allegedly fired a long-time EE for being gay or transgendered

LGBT Protections under Title VII

Bostock v. Clayton County, Georgia

- Under Title VII, Congress adopted broad language making it illegal for an ER to rely on an EE's sex when deciding to fire that EE
- On June 15, 2020 SCOTUS issued a 6-3 ruling, written by Justice Gorsuch
- An ER who fires an individual merely for being gay or transgendered defies the law under Title VII

LGBT Protections under Title VII

Impact on health plans

- Same sex spouses should be included in the definition of “spouse” for group health and welfare plans to avoid potential litigation
- Decision effectively (though not directly) overrules Administration action on June 12, 2020

Planning for the Year Ahead

Turbulent times likely to continue

- Pandemic likely to subside and surge again . . .
- More testing and vaccines expected

Election campaigning and result will have a great impact on issues discussed today

Either way—expect many changes ahead

Stay tuned for more updates!

Good to meet you (virtually)!
See you again!

Andrew Ky Haynes, Esq.



Andy Haynes is the President of Haynes Benefits PC, an EE benefits law firm in Kansas City.

Andy is the current author of two books published by the EE Benefits Institute of America: (1) HIPAA Portability, Privacy and Security and (2) Group Health Plans: Federal Mandates Other Than COBRA & HIPAA.

Andy is a lecturer with EBIA and other prominent EE benefits organizations, and has led over 200 seminars, webinars and media events regarding Health Care Reform. He has been quoted in the Wall Street Journal and other national publications.

Known as the "Singing Benefits Lawyer", Andy's seminars combine his passion for benefits law and music in a unique manner creating informative and entertaining seminars.

Andy received his undergraduate degree from the University of Missouri-Columbia and his law degree from Emory University School of Law, where he was Research Editor of the Emory Law Journal. Andy is a Fellow of the American College of EE Benefits Counsel.

An active member of the community, Andy and his family reside in Blue Springs, Missouri. He is an active musician in his church band and the occasional gig. He is active with local PBS and NPR stations, where he serves as an on-air personality.

114

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