The Coronavirus Aid, Relief, and Economic Security Act FFCRA Amendments and Benefits Provisions

In response to the spread of the 2019 Novel Coronavirus (COVID-19), President Trump signed the **Coronavirus Aid, Relief, and Economic Security Act** (CARES Act) into law on March 27, 2020. The CARES Act is the third phase in Congress' response to COVID-19 following the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 and the Families First Coronavirus Response Act (FFCRA).

The roughly $2 trillion CARES Act provides emergency relief aimed to assist business, individuals, and hospitals during the period of public health emergency due to COVID-19. The CARES Act provides various benefits to individuals such as cash payments and increased unemployment benefits, as well as funding for various state and federal programs.

This Advisor focuses on the CARES Act's material amendments to the FFCRA and the CARES Act's benefits provisions.

CARES Act Amendments to the FFCRA

Emergency and Family Medical Leave Act (EFMLA)

The CARES Act amends the EFMLA leave portion of the FFCRA to include a limitation on the amount that employers are required to pay to employees during emergency leave taken due to the employee's need to care for their minor child on account of **1)** closure of their child's school or child care center, or **2)** their child care provider's unavailability, in either case due to an emergency declaration by federal, state, or local authorities related to COVID-19. The CARES Act clarifies that an employer will not be required to pay more than $200 per day and $10,000 in the aggregate for each employee taking paid EFMLA leave. After 10 days, the emergency leave becomes paid leave. The total leave can extend for up to 12 weeks. Employees are required to be paid at a rate equal to at least two-thirds of their regular rate of pay as determined under the Fair Labor Standards Act (FLSA), after the first 10 days of EFMLA leave.

The CARES Act also clarifies that an employee will be treated as employed for 30 days, and therefore eligible for leave under the FFCRA's emergency leave provisions, under the following circumstances:

1. The employee was laid off by the employer no earlier than March 1, 2020.
2. The employee had worked for the employer for not less than 30 of the last 60 calendar days prior to the layoff.
3. The employee was rehired by the employer.

Emergency Paid Sick Leave Act (EPSLA)

The CARES Act also amended the EPSLA leave portion of the FFCRA, which entitles full-time and part- time employees to 80 hours of paid sick leave , in order to limit the amount that an employer is required to pay. The limitation is $511 per day and no more than $5,110 in the aggregate, when the EPSLA is for one of the following reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

The CARES Act amended the EPSLA to limit the amount that an employer is required to pay to an employee on leave for one of the following reasons to $200 per day and no more than $2,000 in the aggregate:

4. The employee is caring for an individual who is subject to an order as described in number 1 above or has been advised as described in number 2 above.
5. The employee is caring for his or her son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Employer Tax Credits for Compensation and Benefits

The CARES Act amends the FFCRA by providing that the tax credits for compensation paid and health benefits maintained by the employer during leave periods under the FFCRA may be advanced according to forms and instructions provided by the IRS. We intend to provide additional information regarding the employer tax credits in a subsequent Advisor.

DOL Temporary Non-Enforcement of FFCRA Violations

In the Department of Labor (DOL) Field Bulletin No. 2020-1, issued on March 24, 2020, the DOL stated that it will not bring enforcement actions against any public or private employer for violations of the FFCRA occurring within 30 days of the Act's enactment, which is March 18, 2020, through April 17, 2020.

For purposes of non-enforcement of violations, the employer must be acting "reasonably" and "in good faith" when the violations occurred, and the following facts must be present:

- The employer remedies any violations, including by making all employees whole as soon as possible.
- The violations are not willful (the employer either knew or showed reckless disregard for the matter of whether the employer's conduct was prohibited).
- The DOL receives a written commitment form the employer to comply with the FFCRA in the future.

In addition to the DOL's temporary non-enforcement policy for FFCRA violations, the agency has been empowered to delay certain reporting and disclosure deadlines under the Employee Retirement Income Security Act of 1974.

Health Plan Mandatory No-Cost COVID-19 Testing and Treatment

The CARES Act amends the FFCRA to provide that an individual health plan policy offered by an insurer or group health plans (including insured, self-insured, and grandfathered plans) must provide coverage and not impose any cost sharing (including deductibles, copayments, and coinsurance), prior authorization, or medical management requirements for the following services during the public health emergency due to COVID-19:

- An in vitro diagnostic product for the detection of SARS–CoV–2 or the diagnosis of the virus that causes COVID–19, and the administration of such an in vitro diagnostic product, that 1) has been approved, cleared, or authorized under the Federal Food, Drug, and Cosmetic Act (FDA); 2) is a clinical laboratory service performed in a laboratory certified to conduct high-complexity testing and the developer has requested, or intends to request, emergency use authorization under the FDA; 3) is developed in a state that has notified HHS of its intention to review tests intended to diagnose COVID-19; or 4) is another test that HHS determines to be appropriate.
- Items and services furnished to an individual during health care provider visits that result in an order for or administration of an in vitro diagnostic product described above, but only to the extent that those items and services relate to furnishing or administering the in vitro diagnostic products or to determine the need of the individual for such product.

A health plan or issuer covering the items and services listed above must reimburse the provider of the diagnostic testing at the negotiated rate for the service. If the health plan or issuer does not have a negotiated rate with the provider, the reimbursement rate will be the cash price for the service as listed by the provider on a public internet website, or a lower negotiated rate. During the public health emergency, the FFCRA requires each provider of a diagnostic test for COVID-19 to publish the cash price for the test on a public internet website of the provider. The following services are considered preventive care under health care reform (that is, must be covered without imposing any cost sharing such as deductibles, copays, coinsurance by non-grandfathered group health plans):

- An item, service, or immunization that is intended to prevent or mitigate the coronavirus disease and is an evidence-based item or service that has a rating of “A” or “B” in the current recommendations of the United States Preventive Services Task Force.
- An immunization that is intended to prevent or mitigate the coronavirus disease that has a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved.

These services must be covered as preventive care 15 business days after the date on which a recommendation is made relating to the service as noted above.

Account-Based Health Plans

Under the CARES Act, a plan will not fail to be a high deductible health plan if the plan does not require the minimum deductible to be met before covering telehealth and other remote care services for plans beginning on or before December 31, 2021. Telehealth and other remote care will not prevent an individual from being health savings account (HSA) eligible for plan years beginning on or before December 31, 2021. These provisions will be effective on March 27, 2020.

The CARES Act eliminates the requirement that over-the-counter medicines and drugs must be prescribed in order to be considered a qualified medical expense for HSAs, health flexible spending arrangements (FSAs), health reimbursement arrangements (HRAs),and Archer medical savings accounts (MSAs). The CARES Act also categorizes female sanitary products as qualified medical expenses for HSAs, health FSAs, HRAs, and Archer MSAs. These provisions will apply to expenses incurred and amounts paid after December 31, 2019.

The CARES Act does not provide an exception to the cafeteria plan rules to allow mid-year election changes outside of qualified life events.

Confidentiality of Medical Records Relating to Substance Use Disorder

The CARES Act amends the section of the Public Health Services Act (PHSA) addressing confidentiality of records relating to substance use disorder. The CARES Act provides that, once prior written authorization is obtained from the individual, the contents of records relating to the individual's substance use disorder may be used or disclosed by a covered entity, business associate, or program for purposes of treatment, payment, and health care operations as permitted under the Health Insurance

Portability and Accountability Act (HIPAA) regulations. Prior written consent may be given once for all future uses or disclosures for purposes of treatment, payment, and health care operations until the individual revokes the consent. The Health Information Technology and Clinical Health Act (HITECH Act) will apply to these uses and disclosures.

The CARES Act also adds a "public health authority" as an entity that may receive records relating to an individual's substance use disorder, without the individual's consent, provided the records have been de-identified under HIPAA. Entities maintaining records related to substance use disorder will be required to provide a notice of privacy practices under HIPAA. The above provisions regarding the confidentiality of records relating to substance use disorder will take effect March 27, 2021.

No later than 180 days after March 27, 2020, the Department of Health and Human Services (HHS) will issue guidance on sharing protected health information under HIPAA during the public health emergency due to COVID-19.

Retirement Plans

In addition to the new guidance related to health plans, the CARES Act relaxes several of the rules applicable to retirement plans.

10% Early Withdrawal Penalty Waived for COVID-19 Retirement Plan Distributions

Individuals may take an early distribution of up to $100,000 from their retirement plans and individual retirement accounts (IRAs) related to COVID-19 without being subject to the 10% early withdrawal penalty under Section 72(t) of the Internal Revenue Code that otherwise applies when the distribute is under the age of 59½. The distributed amount may be re-contributed to another eligible retirement plan within three years, without being subject to the IRS's annual limitations on contributions.

The distribution may be taken at any time in calendar year 2020 by an individual: (1) who is diagnosed with COVID-19 by a CDC-approved test, (2) whose spouse or dependent is diagnosed with COVID-19 by a CDC-approved test, (3) who "experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off, or having work hours reduced due to" COVID-19, (4) who is unable to work due to COVID-19 child care issues, (5) who has closed or reduced hours in a business owned or operated by the individual, due to COVID-19, or (6) who has experienced other factors as determined by the Secretary of the Treasury. The administrator of the plan may rely on the individual's certification that the individual qualifies for a coronavirus-related distribution.

Required Minimum Distributions Waived for Calendar Year 2020

For 2020, required minimum distributions have been suspended. Accordingly, minimum distributions otherwise required in 2020 from defined contribution plans need not be made. These are the amounts that the IRS requires be distributed from retirement arrangements beginning April 1 of the calendar year following the later of the calendar year in which the individual attains age 72 or retires. The waiver applies to:

1) defined contribution 401(a) qualified plans;
2) defined contribution 403(a) and 403(b) plans;
3) governmental defined contribution 457(b) plans;
4) IRAs. A plan sponsor may have discretion to determine whether this provision will be implemented. We await receipt of additional guidance in this regard.

Maximum Loans from Qualified Retirement Plans Increased

The $50,000 limit for loans is increased to $100,000 for "qualified individuals" made during the 180-day period beginning March 27, 2020. The cap of 50% of the present value of the vested benefit is increased to 100% of such present value for purposes determining loan availability. The due date for any repayment by a "qualified individual" of a participant loan that would occur from March 27, 2020, through December 31, 2020, is delayed for up to one year. Later repayments for such loan are also adjusted "appropriately" to reflect the prior delayed due date "and any interest accruing during such delay." The delay period is ignored in determining the five-year maximum period for such loan.

A "qualified individual" who could be eligible for these expanded loan limits and loan delays is one who could meet the same coronavirus-related tests as discussed above for coronavirus-related distributions.

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