

COVID-19: EMPLOYEE BENEFITS CONSIDERATIONS

As COVID-19 continues to spread, more areas of business and personal life may be interrupted. Preparation may minimize employee distress, business workflow and ease of handling new situations that arise from COVID-19. Below are some considerations and insights from an employee benefits and employer perspective.

PHARMACEUTICALS INTERRUPTIONS

With China being a major producer of raw materials for prescription drugs, the supply chain for many drugs may be substantially disrupted in the coming months. As of March 2020, the FDA has identified a shortage on at least one drug for humans – no shortages have been identified yet for drugs for animals. Coronavirus-related disruptions likely will affect generic drugs more than brand-name pharmaceuticals, which more often choose domestically produced ingredients. The FDA is in contact with Chinese manufacturers and reminding them to report any disruptions.

Health agencies recommend people take steps to secure a supply of needed medications and basic over-the-counter medication like Tylenol and Motrin. At this time, suggestions for securing prescribed medications include getting prescriptions filled early or obtaining a larger supply of medications, but this may be limited due to “too-soon-to-fill” restrictions. As pressure continues to be put on supply lines, it is unknown what changes will be made to refill restrictions.

COVERED TOPICS

- Pharmaceuticals Interruptions
- International Considerations
- Workers' Compensation
- HIPAA Privacy
- Employer Obligations for HIPAA Privacy
- Employer Obligations for HIPAA
- Non-Discrimination
- Caregiver Leave, Medical Leave & Quarantine
- Impact Projections on Insurers & Reinsurers
- Company Responses to COVID-19
- Workplace Preparedness
- Proactive Employee Communications



INTERNATIONAL CONSIDERATIONS

Domestic employers with a workforce in affected countries may consider offering short-term or long-term relocation or assist with requests to leave that country. If transferring or relocating, assess an employee's assignment documentation for early termination and relocation expenses. If an expat does not comply with a company's requests or directions, employers may need to revisit employment or have these individuals sign waivers acknowledging they refused company support.

If collecting personal data of employees, ensure the request complies with the country's data-privacy laws. Employers may request that employees update their existing information, such as an emergency contact person.

If a company is considering layoffs, thoroughly review that country's laws around termination and employee protections. Laws vary by country for furlough pay, termination requirements and union involvement. Employees may be open to required vacation time usage, especially if their long-term job is more secure.

International employees who normally commute to a location may fall under different tax, employment law or payroll implications if they begin working remotely in another country.

Personal accommodations may also need to be made for long-term school closings, limited or restricted travel or inaccessibility to appropriate working conditions.



WORKERS' COMPENSATION

Bodily injury to employees, specifically injury by disease, as a result of the COVID-19, has the potential to significantly impact a company's domestic workers' compensation and employers' liability insurance policies.

It is important to understand how it applies relative to the policy coverage and to the state jurisdiction. Most jurisdictions also require that an illness or disease arise out of or be caused by conditions particular to the work to be compensable.

For a claim to be compensable, however, it would have to be proven that the virus was, in fact, contracted at work, and exposure to the employee was not due to an alternative source. If an illness can be contracted at work and in the wider world, it will generally not be found compensable. Bodily injury by disease must be caused or aggravated by the conditions of the employment. Additionally, the employee's last day of last exposure to the conditions causing or aggravating such bodily injury must occur during the policy period.

U.S. workers' compensation will only respond to suits, and any related legal actions for damages for bodily injury by accident or disease must be brought in the United States, its territories or possessions, or Canada. Coverage should include voluntary workers as insureds (if applicable) and coverage for executives traveling abroad (or a separate foreign voluntary workers' compensation policy in place for foreign travel).

HIPAA PRIVACY

Employers that sponsor a self-insured medical plan or an insured medical plan for which they receive protected health information (PHI) from the plan will have HIPAA Privacy compliance obligations. Normally, there is no reason for an employer to receive individually identifiable health information from its group health plans. Generally, the group health plan (or more practically, the insurance carrier or third-party claims administrator) is prohibited from disclosing PHI to the employer unless there is specific language in the health plan contract or document that allows for such disclosure, and then only if necessary, for specific health plan operation activities.

Under HIPAA the group health plan and the claims payor may disclose PHI:

- For treatment (e.g., an individual's PHI can be provided to a hospital that is treating the individual), payment (PHI may be disclosed to the claims payor) or health plan operations (plan administration functions)
- To public health officials authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury or disability
- 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

EMPLOYER OBLIGATIONS FOR HIPAA PRIVACY

The question is, what happens if PHI that includes information on an individual's status contains information identifying diagnosis of COVID-19 and that information is shared with the employer/plan sponsor? This could come from the medical plan or even a health FSA report if it contains actual claims information.

A human resources or benefits employee may receive the information from the group health plan. Any additional disclosure is strictly regulated under HIPAA. The received information is subject to HIPAA, even if employees of the employer are authorized to receive PHI for health plan operations. The information can only be disclosed for health plan operations and then, only to those individuals authorized under the terms of the plan to receive it.

If there is no operational need for this PHI, do not ask for or accept the information. Additionally, the employer may not take any employment or retaliatory action based upon PHI. These requirements apply to the use and disclosure of any PHI.

The employer will most likely find out if an employee has had potential contact with the coronavirus or is infected with the coronavirus directly from the employee rather than through the group health plan.

What if the employee is requesting time off for treatment? Although not directly subject to HIPAA because it is coming from the employee and not the covered entity (health plan), this is still confidential information and may even be considered a request for leave, including protected leave under the Family Medical Leave Act (FMLA) or other applicable leave laws.





EMPLOYER OBLIGATIONS FOR HIPAA NON-DISCRIMINATION

Additionally, an employer-sponsored group medical plan may not establish a rule for eligibility based on whether an individual is actively at work unless absence from work due to any health factor (such as being absent from work on sick leave) is treated, for purposes of the plan, as being actively at work.

This means under the HIPAA non-discrimination rules actively-at-work-clause, if an employee has begun employment, but is in a waiting period, and is now not actively at work due to a health-related condition, the employee must be enrolled in the group medical plan as of the first day the employee would have been eligible, but for the health-related absence.

The question is whether an employee that is not ill, but is in quarantine (for example, due to recent potential exposure) should be enrolled in the medical plan upon the first day he or she would become eligible for enrollment. A self-insured medical plan will have more leeway to design plan eligibility than the typical fully-insured plan, but either plan will need to comply with these HIPAA non-discrimination requirements. The conservative approach would be to treat an individual in quarantine as not actively at work due to a health-related condition. How carriers in the fully-insured market will approach actively at work clauses remains to be seen.

These specific requirements will not apply to separate dental or vision plans.

CAREGIVER LEAVE, MEDICAL LEAVE & QUARANTINE

If the Family and Medical Leave Act (FMLA) applies to the employer, employees can apply for coverage if they or an immediate family member contracts coronavirus as it is considered a “serious health condition.” The employee is entitled to a job reinstatement and any additional leave benefits available by individual state law.

The Americans with Disabilities Act of 1990 (ADA) may also apply to quarantined individuals. An ADA disability requires a person to have an impairment that substantially limits one or more major life activities, including walking, sitting, reading, breathing and talking. A history of these impairments falls under ADA protections.

If the symptoms are severe, COVID-19 may qualify as an ADA-recognized disability, meaning an employer cannot fire the employee for being in isolation or quarantine. Employers may need to provide reasonable accommodations for an employee, even if symptoms are not severe enough to qualify as an ADA disability. Laws vary by state and should be consulted if there is concern about ADA, employee termination or quarantine or isolation laws.

Paying quarantined employees also depends on any contract, collective bargaining agreement and exempt status. Hourly employees are not necessarily guaranteed wages or hours and thus pay. Employees within a contract or collective bargaining agreement may require payment for a work-required leave. Exempt employees do not have to be paid if they are sent home for an entire workweek, but they must be paid for an entire week if they work a partial workweek.

IMPACT PROJECTIONS ON INSURERS & REINSURERS

According to Standard & Poor's Global Ratings Inc., the overall impact of the coronavirus is expected to be "manageable." While contingent business interruption claims are expected to be widespread, the ratings agency expects damages to be well within insurer and reinsurer capital tolerances.

The majority of national health plan insurers and reinsurers confirmed they are not anticipating any material rate impact due to the coronavirus. There may be more hospitalizations, which would elevate overall health claims, but insurers believe the coronavirus could have a greater impact on Group Life claims. From a true risk perspective, it is still important for employers to review their benefit plan documents to ensure that the policies do not have exclusions pertaining to global pandemic disease.

Aviation, travel insurance, credit insurance and contingency or event cancellation coverage lines are likely to be triggered by claims, according to the report.

COMPANY RESPONSES TO COVID-19

With growing cases, companies are taking different approaches to protecting employees and businesses.

Companies with a workforce that can work remotely are encouraging or requiring employees to work from home, host video-conferences instead of in-person meetings and canceling or changing company events. If remote work is not possible, employees who use public transportation may be allowed to come in earlier or later to avoid rush hour, be offered paid or unpaid leave or are refreshed on all personal hygiene recommendations.

Employers are taking precautions in who is allowed into the workplace. Some companies are barring visitors who recently traveled through higher-risk infection areas, such as China, Iran, Italy and Japan, from entering the building. Many are canceling domestic and international travel to avoid potentially exposing employees to the virus.

WORKPLACE PREPAREDNESS

While COVID-19 growth is unknown, it is advantageous to develop or revisit contingency and business continuity plans. Plans may need to accommodate for vastly reduced workforce size or inability to receive deliveries or enough supplies. As a part of this plan, consider how and when you will communicate closings, remote work requirements or important business communications.

Ask all employees to proactively cross-train and create workflow documentation in the case of long-term absences. From personal health to caring for family members, a workforce may lose key players for a time.

Another consideration is if, how and when you allow employees to work remotely. See if there is a need to create, revisit or re-distribute a work-from-home policy. If there is an expected increase in remote employees, verify there is the technology, support and IT infrastructure to handle the uptick.

Finally, develop a plan if someone becomes ill with symptoms of COVID-19. Find an area where an employee can be isolated. Work to identify at-risk individuals without inviting stigma or discrimination. Know who to contact in the local public health system to report a suspected case.



PROACTIVE EMPLOYEE COMMUNICATIONS

With the vast media coverage, staying proactive in employee communication may help alleviate employee concern and equip them in the case of COVID-19 spreading through the community.

Telehealth

If your company offers telehealth, highlight what is covered, how to access it and who to contact with questions. Telehealth is generally cheaper, quicker to access and avoids additional exposure to other illnesses.

Insurance Coverage

Remind employees of any tools to compare prices of a visit, how to find a doctor or clinic and any other health insurance restrictions or considerations.

Sick Leave Policy

Re-distribute your sick leave policy, including when an employee can take it, when they can return to work and what happens if an employee exhausts sick time.

Encourage Staying Home

Encourage employees to stay home or take sick leave if they show even mild symptoms or are taking simple medications (e.g., paracetamol, ibuprofen), which may mask symptoms.

Communicate Appropriately

Avoid providing medical opinions or misinformation about the virus. Use resources from the Centers for Disease Control (CDC), World Health Organization (WHO) or additional government guidelines to share with employees.

Basic Hygiene Reminders

The best prevention includes standard precautions like excellent handwashing with soap and water for 20 seconds, avoid touching your face (especially your eyes, nose and mouth), cover your cough and sneezes with your sleeve and staying home if you feel sick with a cold or flu symptoms.

Keep Workspaces Clean

Provide employees with additional ways to keep themselves, their workstations and common areas clean. Simple resources include hand sanitizer, plentiful soap and paper towels in restrooms and cleaning wipes.

Keep up with COVID-19 with the following sites:

<https://www.cdc.gov/Coronavirus/2019-ncov/specific-groups/guidance-business-response.html>

<https://www.businessgrouphealth.org/topics/blog/the-evolving-situation-of-coronavirus-what-we-know-and-what-we-dont>

<https://www.who.int/health-topics/Coronavirus>

Sources:

<https://www.latimes.com/business/story/2020-02-28/column-coronavirus-china-drugs>

<https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/coronavirus-information-and-FAQs.aspx?>

<https://www.forbes.com/sites/tomspiggle/2020/02/26/the-coronavirus-keeping-your-job-if-you-get-quarantined/#6f63cc2f4f41>

<https://www.businessinsurance.com/article/20200224/NEWS06/912333206/Coronavirus-impact-manageable-for-insurers-reinsurers-Standard-&-Poors-China-sup>

<https://www.natlawreview.com/article/japan-s-covid-19-response-could-indicate-global-shift-daily-workplace-disease>

<https://www.nytimes.com/2020/02/26/business/coronavirus-businesses.html>

<https://www.shrm.org/hr-today/news/hr-news/Pages/Coronavirus-Prompts-Companies-to-Telework.aspx>

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