COVID-19 Legislation & Benefits FAQs

March 27, 2020

In response to questions we have received related to the benefit plans we administer, Chard Snyder has compiled these FAQs to provide guidance for our associates, advisors and clients. Answers include the most recent information shared by the U.S. government and its agencies regarding the impact of the coronavirus (COVID-19) pandemic on these services.

PLEASE NOTE - *Employers should check their Summary Plan Document (SPD), as that may supersede direction given here. Chard Snyder strongly advises employers to seek legal counsel regarding any benefits program changes they may be considering related to the COVID-19 virus.*

Recent Legislation

Families First Coronavirus Response Act

President Trump signed into law on March 18 the Families First Coronavirus Response Act, implementing requirements for health plans to pay various expenses associated with testing and treatment of COVID-19 without cost-sharing, and also enhancing FMLA provisions for employees who must take leave resulting from COVID-19 illness.

HSA Contribution Deadline Extension

The IRS has updated their Filing & Payment Deadline FAQs, confirming that HSA (as well as IRA and certain retirement plan) contributions otherwise due by April 15, 2020, can be made as late as July 15, 2020. This aligns with the three-month tax return filing deadline extension the IRS announced in Notice 2020-18, issued on March 20, 2020.

HDHPs, HSAs & COVID-19 Testing & Treatment

Last week the Internal Revenue Service (IRS) issued Notice 2020-15, stating that high deductible health plans (HDHPs) can pay for COVID-19-related testing and treatment—prior to the satisfaction of a deductible—without jeopardizing the plan participants' ability to contribute to a health savings account (HSA).

Additional information on recent legislation can be found on the Chard Snyder website at https://www.chard-snyder.com/covid-19-response

NOTE: No specific COVID-19-related legislative guidance has been issued related to qualified transportation plans, dependent care assistance (DCA) program, flexible spending accounts (FSA), health reimbursement arrangements (HRAs), or COBRA.

Definition of Terms

For purposes of these FAQs, these terms could be defined in a plan document or used interchangeably at the discretion of the employer to indicate a period of eligibility for the participant. The employer has two obligations: to adjust the plan document to define the terms of eligibility for the participant due to actions taken during the COVID-19 pandemic AND to notify the participant of any change in status as it relates to their eligibility for COBRA.

Furlough is a temporary leave situation that employers implement for reasons such as budget issues, a slow-down in business, or other non-discipline related issues. Typically, employees will be placed on this temporary, unpaid leave for a specified amount of time.

Layoff is when an employer dismisses an employee and they are let go (laid off) from their job. If a person who is laid off were to return to their original job, they would have to be rehired. Historically, the term layoff means a temporary dismissal, like a furlough, but today we generally use the word layoff when an employer lets go of an employee because they can no longer afford to pay them, their business is down or other for economic reasons.

Sick leave is "leave from duty, work, or the like, granted because of illness," meaning "permission to be absent." Leave is also referred to as a leave of absence. Leave generally implies a person is away from work for an extended period of time.

Benefits FAQs

Dependent Care Assistance (DCA)

Q1 - Can a mid-year election change be made for a dependent care FSA (DCA) if the employee no longer needs daycare or needs additional daycare due to COVID-19?

A1 - Participants may experience changes to their daycare situation because of the COVID-19 virus response. Mid-year DCA election changes are allowed **only if the terms of the plan document permit and only for certain specified reasons** including significant cost change, change in hours or change in worksite. IRS guidance says that employees may change their elections based on a reduction in the hours of childcare needed (e.g., employee is working from home and not using daycare or has experienced a temporary daycare closure). Reductions in childcare hours needed and lower cost of childcare would permit an election change. Others who are considered essential employees may want to increase contributions because they have to take children to daycare more frequently. This increase in the hours of childcare needed and increase in expense would also permit an election change. Employees who must work at home due to COVID-19 response would equate to a change in worksite and serve as a qualifying event. *Because guidance from the regulation is not entirely specific, Chard Snyder suggests clients seek legal counsel if seeking definitive guidance.*

Flexible Spending Accounts (FSA)

Q2 - Is COVID-19 testing a qualified expense for purposes of an FSA benefit?

A2 - Recent legislation states that group health plans shall provide coverage, and shall not impose any cost-sharing requirements (including deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements for expenses related to the diagnosis of COVID–19. This also pertains to other costs associated to the diagnosis, such as healthcare provider office visits, urgent care visits, or emergency room visits that result in an order for or administration of diagnostic testing for COVID-19. Health FSAs are group health plans and are therefore required to comply.

Q3 - Can a plan provide an extension of the FSA grace period?

A3 – No. The IRS has not issued guidance with respect to this matter. Employers should administer their plans in accordance with their plan documents and current regulations until new guidance is provided by the IRS.

Q4 - Can a plan extend the FSA or DCA runout period?

A4 – Yes. Runout period is at the discretion of the employer and can be extended. If an employer decides to extend the runout period, direction may need to be given to participants to re-file claims. Changes to plan documents are addressed in Q15 or contact your Client Relationship Manager for direction.

Q5 - Can an employer suspend its employee FSA contributions during a furlough?

A5 - Employers should review the provisions in their plan document concerning employee leaves of absence, as leave could be FMLA leave (both paid and unpaid) and non-FMLA leave. Each type of leave may be addressed differently. The plan may contain requirements to continue coverage during the leave and allow contributions to be deferred until employees return to employment. Any payroll deductions through an FSA are stopped for furloughed employees, or participants may revoke coverage while on leave. However, if their enrollment is not disrupted participants will not be able to get reimbursed for claims until they return to "pay status" and allocations restart. Any missed deductions from paychecks would be made-up or recalculated over remaining pay periods to match a yearly FSA contribution.

COBRA & FSA/DCA

Q6 - Does a participant have to elect COBRA to access unused FSA or DCA funds?

A6 - An employee who loses health FSA coverage due to a COBRA qualifying event must elect COBRA to continue coverage under the plan. But for expenses already incurred prior to losing coverage, the employee would have until the end of the plan-specified runout period to submit expenses and would not have to elect COBRA to take advantage of the runout period.

COBRA does not apply to dependent care assistance (DCA) plans because they are not group health plans. The participant would have until the end of the plan-specified runout period to use any remaining DCA funds.

Health Savings Accounts (HSA)

Q7 - Does the recent deadline change provide more time to contribute money to a Health Savings Account (HSA) or Archer Medical Savings Account (MSA) for 2019?

A7 - Yes. Contributions may be made to an HSA or Archer MSA, for a particular year, at any time during the year or by the due date for filing a return for that year. Because the due date for filing Federal income tax returns is now July 15, 2020, under this relief contributions can be made to a HSA or Archer MSA for 2019 at any time up to July 15, 2020.

Transit & Parking

Q8 - Are transit expenses reimbursable under various work-from-home arrangements?

A8 - Transportation expenses are reimbursable only when they are incurred because of commuting between a residence and a place of employment.

The IRS has indicated that an employer's qualified transportation fringe benefit plan may not permit employees to receive a refund of the amount that they deferred that exceeds the actual amount of expenses incurred.

If a transit pass that is no longer needed was purchased using a pre-tax benefit card, the service provider will not issue the refund directly to the participant. However, a refund from the provider to the participant's account may be an option that can be coordinated between the provider and the participant's employer.

If the plan document allows, amounts that are not used during a month because the employee is working from home as a result of their employer's response to COVID-19 may be carried forward for future use.

Family Medical Leave Act (FMLA)

Q9 - Can an employee who is furloughed for partial business shut-down and cannot perform work remotely take FMLA leave?

A9 - Recent legislation temporarily added a new qualifying need to benefit from FMLA leave. Specifically, eligible employees of employers covered by FMLA (as defined in the recent legislation) are entitled to the FMLA leave if they are unable to work (or tele-work) due to a need for leave to care for children under 18 years of age if the school or place of care has been closed, or the children's care provider is unavailable, due to a public health emergency. This qualifying reason is effective until December 31, 2020.

Based on this, being furloughed for partial business shut-down and not being able to perform work remotely does not, alone, qualify an employee for the emergency FMLA leave provided under the recent legislation.

Q10 - What type of documentation is required for the new FMLA event relating to school or childcare closings?

A10 - Chard Snyder will rely on employers for whom we administer FMLA to only send through FMLA requests they know are impacted by school or childcare closures. We will share more as we receive further guidance.

Q11 - Can a previous illness that was not deemed a "serious medical condition" under FMLA now be deemed as a "serious medical condition" for FMLA purposes due to the elevated risk?

Example 1: I am pregnant, not due for a few months, but my doctor has ordered me to not go to work to limit exposure and risk. Does FMLA work for me on this?

Example 2: I have a chronic disease and have a doctor's note excusing me from work due to potentially being in a high risk group for COVID-19.

A11 - The employer should first determine that the employee cannot work remotely from home. Neither of these examples are qualifying events currently, as they are not defined as a serious medical condition for FMLA purposes. There is a risk of a condition, but not a condition. These issues may qualify under the Emergency Paid Sick Leave, which is also addressed in the Families First Coronavirus Response Act.

Q12 - Some doctors are currently refusing to complete FMLA Medical Certifications and instead are providing a doctor's note. In some cases this contains enough information to create an FMLA case, in some cases not. Should the rules for acceptable FMLA documentation be relaxed during this crisis?

A12 - FMLA documentation requirements regarding "serious medical conditions" have not been changed within COVID-19-related regulation updates. Employers could revise their company HR policy to temporarily allow documentation exceptions, but no official guidance regarding this issue has been provided.

Protected Health Information (PHI)

Q13 - Can an employer disclose employee COVID-19 test results or other information to keep the rest of its workforce safe without violating HIPAA?

A13 - The privacy and security rules issued by the Department of Health and Human Services substantially remain in full force. In general, these rules allow a covered entity to disclose protected health information (PHI) in limited circumstances, which include disclosures:

- to a public health authority that is authorized by law to collect or receive such information.

- to a person subject to the jurisdiction of the Food and Drug Administration (FDA), with respect to an FDA-regulated product or activity for which that person has responsibility related to the quality, safety, or effectiveness of the product or activity.
- to a person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading a disease or condition, if authorized by law to notify such person as necessary in the conduct of a public health intervention or investigation.

Guidance does not extend to other situations, including disclosures for internal use for purposes of ensuring workforce safety. Employers should seek legal counsel before disclosing protected health information to ensure compliance with privacy and security rules.

Terminated & Rehired Employees

Q14 - Can an employer terminate and then re-activate savings and spending plan enrollment for a participant if the employer terminates and later rehires that participant?

A14 – Based on current regulations, how plans treat rehired individuals depends both on the length of time that elapsed between termination and rehire, and also the terms of the plan document.

Many plan documents contain terms that reinstate employees with the same benefit elections if they are rehired within 30 days of termination, but require new elections for employees who were rehired more than 30 days after termination. Employers should consult their plan documents to determine the particular provisions that apply.

The IRS has informally commented that it generally views FSA coverage as continuing if the leave is less than 30 days. Under this approach, the maximum annual contribution would not decrease and the employer could 'catch up' the employee's salary reductions when the employee returns; however, expenses incurred during the period of leave would not be eligible for reimbursement from the plan.

Plan Documents

Q15 - Do plan documents need to be revised to accommodate changes related to COVID-19?

A15 -Plan document changes could be anything in writing, but may not necessarily be in a formal amendment or summary of material modifications. Memos or letters from the plan sponsor outlining rules for eligibility and changes to deadlines could be saved with existing plan documents and meet the expectations of the IRS rules.