On March 27, Congress passed the Coronavirus Aid, Relief and Economic Security Act (the CARES Act), which provides sweeping relief to employers and employees through tax credits, expanded retirement plan distribution options, and a variety of other mechanisms. The recent federal emergency and disaster declarations have resulted in the availability of additional relief. This legal alert summarizes the legislative and administrative relief related to self-insured group health plans in connection with COVID-19. Please refer to our separate legal alert for a discussion of the provisions of the CARES Act related to retirement plans.

CARES Act provisions

The CARES Act contains several provisions that are relevant to sponsors of group health plans. The law specifically addresses items relating to testing, vaccines, health savings account (HSA) issues, and HIPAA protected health information.

Testing

As discussed below, the Families First Coronavirus Response Act (FFCRA) provides for group health plan coverage with no cost-sharing for FDA-approved COVID-19 testing. The CARES Act would expand this provision and apply it to additional forms of approved testing during the public health emergency (such as certain state-approved tests). In addition, the CARES Act would require group health plans to reimburse out-of-network providers for the “cash price” of COVID-19 tests and other services, as published by a provider on a public website. This would mean that plans could not enforce any out-of-network reimbursement limits for such testing. Providers offering testing would be required to publish the cash price online or risk incurring a Department of Health and Human Services penalty of up to $300 per day.

Health savings accounts

The CARES Act also addresses a couple of HSA issues. First, the Act would...
expand the IRS’s earlier HSA guidance to telehealth (discussed below), providing that a high-deductible health plan (HDHP) will not fail to be an HDHP because it does not have a deductible for “telehealth and other remote care services.” This provision would apply to plan years beginning on or before December 31, 2021. Second, the Act would repeal the requirement that over-the-counter medical and health items must be prescribed by a physician to be reimbursable under a health plan. This provision applies to both health flexible spending accounts (FSAs) and HSAs. The new provision also allows HSAs and FSAs to reimburse for menstrual care products.

**COVID-19 vaccine and preventive care coverage**

Another provision in the proposed CARES Act would require group health plans to cover any “qualifying coronavirus preventive service.” Specifically, group health plans would need to cover the COVID-19 vaccine, and to do so within 15 business days of the date that the vaccine is “recommended” by the Centers for Disease Control and Prevention.

**Eversheds Sutherland Observation:** While the ACA requires that group health plans cover certain preventive care items without any cost-sharing, the CARES Act would require coverage on an accelerated timeline.

**Health Insurance Portability and Accountability Act (HIPAA)**

**Substance use disorder disclosures**

Patient records containing information about substance use are highly sensitive and are subject to the federal Confidentiality of Alcohol and Drug Abuse Patient Records regulations that are, in some cases, stricter than HIPAA. For example, once substance use disorder information is initially disclosed, re-disclosure is generally precluded without the patient’s express consent.

The CARES Act allows patients to provide a one-time, “blanket” written consent to allow covered entities—e.g., health plans—to disclose medical records related to substance use disorders for purposes of treatment, payment and health care
operations. Any information disclosed may then be re-disclosed for those purposes as permitted by the HIPAA regulations. The written consent survives until the patient revokes the consent in writing. The Act would also allow disclosure of substance use disorder records, whether or not written consent is obtained, to a public health authority so long as its contents were de-identified.

The measure would prohibit employment discrimination based on any “inadvertent or intentional” disclosure of substance use disorder records. And the substance use disorder information generally would not be allowed in any civil, criminal, administrative or legislative proceedings.

Guidance on the disclosure of protected health information (PHI) in public health emergencies

Finally, the CARES Act directs the Department of Health and Human Services to issue guidance on sharing PHI during a public health emergency within 180 days of passing the Act.

Other provisions

The final version of the CARES Act also includes provisions that would:

• allow the Department of Labor to delay employee benefit-related deadlines because of a public health emergency;

• allow employers to make tax-free payments covering employee student loans under an employee educational assistance program; and

• include “amounts paid or incurred by the eligible employer to provide and maintain a group health plan” in the definition of wages for purposes of determining new employee retention credit amounts.

Earlier versions of the CARES Act contained some additional provisions that may be of interest to group health plan sponsors, and although they were ultimately left out of the bill, they may appear in subsequent legislative efforts relating to COVID-19. These include:
• Provisions allowing direct primary care arrangements (including ‘concierge care’ type services) to be offered alongside an HSA, to the extent that the cost of the arrangement does not exceed certain dollar amounts (depending on the number of people covered and the type of arrangement)

• Amendments to IRC § 223 that would allow an HSA to reimburse for the cost of certain primary care arrangements

• Changes to the health plan reporting rules passed under the Affordable Care Act (ACA) that would require employers to report the value of primary care arrangements on an employee’s W-2

**High-deductible health plan and HSA legislation and guidance**

The CARES Act passed, the IRS and Congress issued guidance and legislation that would strike a balance between current HSA eligibility rules and ensuring that individuals impacted by COVID-19 receive the medical care and testing they need.

First, on March 11 the IRS issued Notice 2020-15, providing that health plans that otherwise qualify as high-deductible health plans (HDHPs) will not lose that status merely because the plan covers the cost of testing for or treatment of COVID-19 before plan deductibles have been met. The IRS also noted that, as in the past, any vaccination costs continue to count as preventive care and can be paid for by an HDHP. For further discussion on COVID-19, HSAs and HDHPs, see our prior legal alert.

Second, under the FFCRA, group health plans cannot impose any cost-sharing requirements for FDA-approved COVID-19 testing and related services furnished during the period in which a national emergency has been declared (and beginning on March 18). The FFCRA states that the cost-sharing restrictions include deductibles, copayments, and coinsurance. In addition, group health plans cannot require prior authorization requirements or other medical management requirements for the following:

1. Testing products for the detection of SARS-CoV-2 or the diagnosis of the virus that causes COVID-19; and

2. Items and services furnished to an individual during health care provider
office visits (in person or via telehealth), urgent care center visits, and emergency room visits that result in an order for the administration of the testing described above.

**Eversheds Sutherland Observation:** While the law is unclear on points such as whether the cost-sharing prohibition applies to out-of-network services and retiree-only plans, right now we recommend a broad interpretation of the law. We would suggest advising third party administrators to apply the law in both cases unless and until there is additional clarifying guidance.

**Eversheds Sutherland Observation:** Note that the FFCRA provision is temporary, but with no established end-date. Group health plans will not be required to amend their plan documents (or summary plan descriptions), but plans will need to provide clear communication materials to medical providers and plan participants.

Third, on March 24 the Department of the Treasury and IRS released FAQ guidance regarding Notice 2020-18, which announced certain income tax return and filing relief in response to the COVID-19 crisis. The March 24 FAQs clarify that taxpayers may make contributions to HSAs or Archer MSAs for 2019 at any time up to July 15, 2020, the new due date for filing Federal income tax returns.

If you have any questions about this legal alert, please feel free to contact any of the attorneys listed under Related People/Contributors or the Eversheds Sutherland attorney with whom you regularly work.