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MEMORANDUM

TO: Group Health Plan Clients

FROM: Slevin & Hart, P.C.

DATE: March 20, 2020

RE: Families First Coronavirus Response Act

On March 18, 2020, the President signed into law the Families First Coronavirus Response Act ("Act"). As summarized below, the Act requires group health plans to provide coverage for coronavirus testing to participants and beneficiaries without cost-sharing or prior authorization requirements. The Act also requires private-sector employers with fewer than 500 employees to provide paid sick leave in connection with the coronavirus for up to 12 weeks. The Act also expands the Family and Medical Leave Act ("FMLA") requirements to cover leave related to the coronavirus for private sector employers with fewer than 500 employees.

Section 1 below summarizes the coronavirus testing benefit that applies to all group health plans (including self-insured and insured funds) and is effective March 18, 2020. Funds should work with their claims administrators immediately to confirm these benefit changes can be implemented as soon as possible. We expect that additional guidance will be issued on this matter and will provide the guidance as it becomes available.

Sections 2 and 3 below summarize the obligation of private sector employers with fewer than 500 employees to provide emergency FMLA paid leave and paid sick leave consistent with the Act. Although the paid FMLA and sick leave requirements are employer obligations and do not have to be provided by a health fund, the Act does contemplate that a multiemployer fund could be the vehicle that provides these benefits to affected employees, assuming that the bargaining parties negotiate to provide such a benefit through the Fund. We will provide further guidance to address the practical considerations for a multiemployer fund in evaluating whether to agree to such an arrangement.

Finally, the Act also contain provisions allowing employers to take a refundable payroll tax credit equal to the paid leave being provided under the Act. We have not summarized these provisions here but will do so once additional guidance is issued.

Changes Applicable to Group Health Plans

1. Coverage for COVID-19 Testing

a. ***Which Plans are Affected***? The Act provides that any group health plan, as defined under the Employee Retirement Income Security Act of 1974 (ERISA) and any health insurance issuer offering group or individual health insurance coverage must provide certain coverage related to coronavirus testing. A "group health plan" means an employee welfare benefit plan to the extent it provides medical care to employees and their dependents directly or through insurance, reimbursement, or otherwise for various benefits, which may include medical, surgical, or hospital care or benefits. Consequently, most welfare plans are subject to these new coverages, including grandfathered plans under the Affordable Care Act (ACA).

b. ***What New Benefits are Required***? The Act prohibits a group health plan from imposing any cost-sharing, prior authorization or medical management requirements on the following items: (1) in vitro diagnosis products for the detection of SARS-CoV-2 or the diagnosis of COVID-19 that are approved by the FDA and the administration of such diagnostic products; and (2) items and services furnished to an individual during health care provider office visits (including in-person visits and telehealth visits), urgent care visits, and emergency room visits that result in an order for or administration of an in vitro diagnosis product, but only to the extent that the item or service relates to the furnishing or administration of the diagnostic test or the evaluation of whether an individual needs a diagnostic test. In vitro diagnostic products are "reagents, instruments, and systems intended for use in the diagnosis of disease or other conditions."

The Act leaves open a number of questions. First, the Act is not clear whether the testing has to be covered if performed by an out-of-network provider. Following that approach, the Act is silent about the plan's reimbursement rate to out-of-network providers. It is also unclear on whether plans that do not provide telehealth services will now have to provide them and whether plans that are entirely exempt from the Affordable Care Act, such as limited-scope dental and vision benefit programs and retiree-only plans, are required to provide this coverage. Finally, the exact scope of the Act's coverage for items and services furnished to an individual during health care provider office visits that result in an order for a COVID-19 diagnostic test is unclear. Each of these points will need further guidance.

c. ***When are the New Benefits Effective***? The Act provides that group health plans must provide this coverage "beginning on or after the date of the enactment" of the bill, March 18, 2020. However, it is not clear whether it covers services provided on and after that date or claims processed on or after that date for earlier testing.

Changes Applicable to Employers

2. Emergency Family and Medical Leave Expansion Act

a. ***What New Benefits are Required***? The Act provides that covered employers must provide up to 12 weeks of paid leave for a "qualifying need related to a public health emergency" for employees. This "qualifying need" is limited to periods of leave for an employee

who is unable to work or telework due to: (1) the need to care for the employee's son or daughter under 18 years old if the child's school or place of care has been closed; or (2) the childcare provider is unable to care for the child, due to a public health emergency. A "public health emergency" is defined as an emergency with respect to COVID-19 that is declared by federal, state, or local authority.

The first 10 days of the emergency FMLA leave can be unpaid but the employer must allow an employee to substitute any accrued vacation, personal, or sick leave for the 10 days of unpaid leave. The remainder of the emergency FMLA leave must be paid at an amount that is not less than two-thirds of an employee's regular rate of pay and must be based on the number of hours the employee would otherwise be scheduled to work. If an employer is unable to determine the number of hours the employee would have worked because the employee's schedule varies from week to week, the maximum number of hours for which the employee will be entitled to paid leave is based on the average number of hours that the employee was scheduled per day over the 6-month period ending on the date the employee took the leave. The amount required to be paid for this emergency FMLA leave cannot exceed $200 per day for any employee and $10,000 in the aggregate for any employee over the 12-week period.

Generally, under FMLA, the employer is required to restore employees to their prior positions or an equivalent position upon the expiration of the FMLA leave. However, the Act provides an exception to this rule for employers that have fewer than 25 employees if the employee's position no longer exists due to operational changes resulting from a public health emergency related to COVID-19. However, the employer still must make reasonable efforts to restore the employee to an equivalent position. The rules under FMLA governing the maintenance of health benefits during any FMLA leave have not been impacted by the Act.

b. ***Which Employers are Affected***? Employers that have fewer than 500 employees are subject to these new FMLA provisions. This means that employers with fewer than 50 employees who were previously not subject to FMLA requirements are now subject with respect to FMLA leave in these limited circumstances. However, the Secretary of Labor is permitted to exempt employers with fewer than 50 employees if the required leave would jeopardize the viability of the business. In addition, employers with fewer than 50 employees will not held liable for damages in civil actions brought by employees for a violation of this emergency FMLA leave provision.

c. ***Which Employees are Affected?*** These expanded FMLA leave rules apply to all employees who have worked at least 30 days for an employer. Generally, FMLA leave only applies to employees after they have worked for 12 months for an employer and worked a certain number of hours during that 12-month period. Therefore, the Act expands the universe of employees who will be entitled to FMLA leave and its protections.

d. ***When Are the New Benefits Effective***? These provisions of the Act are effective no later than April 2, 2020 (15 days after the date of its enactment) and expires on December 31, 2020. However, it is not clear whether it covers periods of leave that began prior to the effective date or only leave that begins after that date.

3. Emergency Paid Sick Leave Act

a. ***When Is Leave Required and What is the Benefit***? The Act provides that covered employers must provide paid sick leave to a full-time or part-time employee who is unable to work or telework because the employee is: (1) subject to a federal, state, or local quarantine or isolation order that is related to COVID-19; (2) advised by a health care provider to self-quarantine due to COVID-19; (3) experiencing symptoms of COVID-19 and is seeking medical attention; (4) caring for an individual subject to a quarantine order or has been advised to self-quarantine by a health care provider; (5) caring for a son or daughter and the child's school or place of care is closed or the child care provider is unavailable due to COVID-19; or (6) experiencing other similar conditions specified by the Secretary of Health and Human Services.

A full-time employee is limited to 80 hours of paid sick leave under the Act. The maximum hours of paid sick leave for a part-time employee is the average hours the employee works, over a 2-week period. If an employer is unable to determine with certainty the number of hours the employee would have worked because his or her schedule varies from week to week, the maximum hours for such an employee would be the average number of hours that the employee was scheduled per day over the 6-month period ending on the date the employee takes the paid sick leave. Further, unlike the new FMLA leave provisions described above, all employees are immediately eligible for emergency paid sick leave, regardless of their length of employment with the employer. The employer may not require an employee to use other paid leave before paid sick leave is used. However, the Act does not define what constitutes full-time or part-time and will require additional guidance.

If the leave is taken for reasons (1) through (3) above, the required paid leave must be paid at the employee's regular rate of pay and is limited to $511 per day to any employee and $5,110 in total payments for any employee. If the leave is pursuant to reasons (4) through (6), the required paid leave must be paid at two-thirds of the employee's regular rate of pay and is limited to $200 per day to any employee and $2,000 in total payments to any employee. The Act requires for the Secretary of Labor to issue guidance on calculating the amount of paid sick time within 15 days of the Act's enactment. The Act also calls for a model notice on paid sick leave provisions for employers to post. The model is to be provided no later than 7 days after March 18, 2020.

b. ***Which Employers are Affected***? Like the FMLA changes, these requirements apply to employers with fewer than 500 employees. And as with the emergency FMLA leave, the Secretary of Labor has the power to exempt businesses with fewer than 50 employees if the viability of a business would be jeopardized.

c. ***When Are the New Benefits Effective***? Like the FMLA changes, these provisions of the Act are effective no later than April 2, 2020 (15 days after the date of its enactment) and expires on December 31, 2020. It is not clear whether it covers days of sick leave taken prior to the effective date.

We anticipate that the relevant government agencies will issue guidance on many aspects of the above provisions in the near future and we will communicate that guidance to you when it is issued. In the interim, we look forward to speaking with you to address any questions you may have.

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