

The Phia Group, LLC

Re: Impact of COVID-19 on Self-Funded Group Health Plans

Date: March 13, 2020

Issue:

Examine the impact of COVID-19 on self-funded group health plans and provide The Phia Group's consultative guidance on the most relevant benefit plan and employer-based considerations moving forward.

As this is a fluid and constantly evolving situation, we have based our consultative opinion on the guidance currently available on the date listed above. As the landscape surrounding COVID-19 continues to develop, federal, state, and local guidance may change as well. As such, it is important to note that guidance issued after March 13, 2020 may impact the relevant considerations outlined below.

Discussion:

I. Self-Funded Group Health Plan Considerations

i. Testing for and Treatment of COVID-19

Plans are likely to experience an influx of claims related to COVID-19. Initially, plans will likely see an increase in the need for diagnostic testing to determine whether a participant has contracted the condition. This will likely be followed by additional claims related to the treatment of the condition for those have been infected.

Plans must review their current plan design to determine whether these services would be covered by the existing plan and if so, whether any cost-sharing requirements would apply. As discussed below, plans may consider covering those benefits at 100% (without cost-sharing), even under a High Deductible Health Plan/Health Savings Account structure.

To mirror early trends regarding coverage for services related to the diagnosis and treatment of COVID-19, particularly in the fully insured space, plans may want to consider waiving any potential cost-sharing requirements if the benefits are covered. Currently, self-funded plans subject to The Employee Retirement Income Security Act (ERISA) are not required to waive cost-sharing for the testing and treatment of COVID-19 but may consider doing so to prevent the spread of the condition.

Major insurance carriers, along with Medicare and Medicaid, have agreed to waive all copays on the testing of COVID-19.¹ Furthermore, some states, including New York, California, and Washington (with more expected to follow), have directed insurers to waive cost-sharing for these services.² These state directives are not applicable to self-funded plans governed by ERISA. Therefore, ERISA plans organized in those states continue to have the option to waive any applicable cost-sharing, but are not required to do so.

¹ [White House Briefing March 10, 2020](#)

² [New York Directive](#), [California Directive](#), [Washington Directive](#)

For self-funded non-ERISA plans, such as non-federal governmental plans, the plan would be subject to any state directive issued and must act in accordance with those mandates applicable to them or potentially face penalties.

Plans should also consider whether making these benefit changes will impact their grandfathered status under the Affordable Care Act (ACA). Group health plans that were in existence on March 23, 2010 were given “grandfathered status” and thus not required to follow certain health care reform requirements put into place by the Affordable Care Act. The plans maintain this status until such time as certain changes are made to the plan terms. When one of these changes is made, the plan loses its grandfathered status on the date the prohibited change takes effect. Once it is lost, the grandfathered status can never be recaptured and therefore it is extremely important for plan sponsors to understand the limitations within which they can alter the terms of the group health plans.

One of the changes that may cause a plan to lose its grandfathered status is the “elimination of all or substantially all benefits to diagnose or treat a particular condition.”³ Note that this event relates to the reduction or elimination of a benefit – not simply any change to a benefit. For plans that add benefits to their plans to address COVID-19, the addition of those benefits would not result in a loss of grandfathered status, as adding more robust benefits to the plan will not cause such a change. Having said that, plans should be cautious if/when the plan considers removing that benefit in the future, as it could then cause a loss of grandfathered status. While these are unprecedented circumstances, plans must be mindful of the impact a change in benefits may have on the plan both in the short-term and the long-term. It is possible that the federal government may issue guidance on this issue, but as of right now, the effect this type of change may have is unclear. This is a very fluid situation and could change radically and significantly in the future. Phia will certainly assist plans to continue to navigate this situation as guidance develops. In summary, GF plans can certainly add benefits without losing grandfathered status, but removal of such new benefits in the future could jeopardize grandfathered status.

ii. High Deductible Health Plan Considerations

A High Deductible Health Plan (HDHP) is a health plan that will typically have a higher deductible and lower monthly premiums than a traditional health plan. HDHPs are commonly offered by employers in conjunction with a Health Savings Account (HSA) as a low cost benefit option. In order to utilize an HSA, an individual must be enrolled in an HDHP, and *only* an HDHP. An HSA is a tax-advantaged account that allows eligible individuals to contribute funds to their HSA on a pre-tax basis.⁴ An individual is only eligible to contribute to an HSA if they are enrolled in a valid HDHP and otherwise meet the eligibility requirements provided by the Internal Revenue Service (IRS).

An HDHP must comply with IRC § 223(c)(2).⁵ This section of the code provides the minimum deductible and the maximum out-of-pocket expenses required for a plan to be considered an HDHP. Further, a plan considered an HDHP cannot contribute to the costs of non-preventive services until an individual’s deductible is met.⁶ Typically, diagnostic testing and/or treatment for a particular, existing condition, such as COVID-19, would not be considered “preventive care” and therefore, an HDHP could only contribute to the cost of coverage after an individual has met their deductible.

In response to COVID-19, the Internal Revenue Service (IRS) has issued guidance clarifying that HDHPs may waive deductibles entirely or apply a lower deductible for the testing and treatment of COVID-19

³ [26 CFR § 54.9815-1251](#)

⁴ Internal Revenue Code § 213(d).

⁵ IRC § 223

⁶ [IRS HDHP Rules](#)

without jeopardizing a participant's eligibility to contribute to an HSA. The purpose of this exception is to "remove barriers" and to "avoid administrative delays or financial disincentives that might otherwise impede testing for and treatment of COVID-19."⁷

Employers offering an HDHP are now able to waive the deductible and cost-sharing for certain services related to COVID-19 to combat this public health emergency without worrying about the potential impact this may have on a participant's eligibility to contribute to an HSA.

It is important to note that at this time, self-funded HDHPs are not required to waive the deductible for this service, but may consider doing so to help combat the spread of COVID-19 and to reduce the potential impact of the condition on plan participants.

iii. Plan Design Considerations

Self-funded plan administrators have important duties to administer the plan in accordance with its terms. As such, it's important for plan administrators to formally make any necessary changes to their plan documents in the event the plan waives cost-sharing requirements that would otherwise be applicable, rather than simply choosing not to enforce existing plan provisions. In order to do so effectively, we recommend amending the plan to account for the potential modifications needed to address COVID-19. Changes that may be needed, depending on the current design of the plan, could include the following:

1. Add language regarding the testing for and treatment of COVID-19 to the benefit grid and outline the applicable cost-sharing requirements.

It will be important to include language to clarify that expenses related to the testing of and treatment for COVID-19 will still be subject to the plan's other requirements and limitations even if cost-sharing is waived. For example, the plan should still apply the applicable medically necessary limitation or exclusion when considering whether claims are payable under the plan.

2. Allow participants to seek treatment through the use of telemedicine.

As person-to-person contact is the primary method by which the virus is spread, we recommend allowing, and encouraging, participants to seek treatment through the use of telemedicine or by other virtual means. This will also help to alleviate the strain on brick and mortar health facilities, which is projected to be a major problem in the coming weeks and months. The plan administrator should ensure that participants have telemedicine options available when considering this change. Even if telemedicine options are not currently available, some providers may develop virtual methods of treating patients. As such, this option should be communicated, along with the importance of reducing person-to-person contact, to plan participants.⁸

3. Allow continuation of health coverage for individuals who are not able to work and may require a leave of absence as a result.

Employees who have contracted COVID-19, employees who must care for family members who have contracted the virus, or employees who are quarantined (whether self-quarantined, travel-related, or medically quarantined) are likely to miss significant time at work. Plans should review both their plan document and their employment policies to ensure that there is sufficient flexibility to account for these

⁷ [IRS Guidance on COVID-19](#)

⁸ [CDC COVID-19 Spreading](#)

extended absences. The plan should clearly communicate whether coverage will be continued during a leave of absence, including existing leaves such as FMLA. Employers have discretion when determining whether to allow employees to take a leave of absence. As such, employment policies should clearly communicate the circumstances that could give rise to a permitted leave of absence and actively communicate those policies to their employees, and even more importantly from a plan perspective, communicate whether coverage is continued while on such leaves of absence. It is also important that any new or existing extensions of coverage are provided for in any applicable stop-loss policies.

4. Ensure the definition of “Actively at work” properly encompasses situations such as individuals who must work from home as opposed to in the office.

As the need for workplace accommodations to help prevent the spread of COVID-19 will be prevalent, the plan may consider reviewing their definition of the term “Actively at work” to ensure that employment policies instituted in response to COVID-19 do not conflict with the plan’s definition of actively at work and inadvertently render participants ineligible for coverage.

5. Ensure that the plan does not exclude coverage as a result of a State of Emergency or other applicable exclusion which would deny coverage in the given situation.

Plans often contain limitations and exclusions that may limit expenses that are incurred as a result of a “State of Emergency” or a similar situation. In this case, as more states declare emergencies, it would be prudent to ensure that the plan’s limitations do not conflict with the employer’s intended response to the condition.

iv. Stop-Loss Coverage

It is also critically important to communicate any plan changes to the stop-loss carrier. Most stop-loss policies require notice plan changes before the change will be considered when determining whether the claim is reimbursable. We recommend reviewing the stop-loss policy to determine whether notice of the change is required and engaging with the stop-loss carrier to confirm that the carrier accepts the changes in an effort to mitigate any potential reimbursement issues.

II. Employer Considerations

i. Preparing for COVID-19 and Preventing its Spread

Employers should consider taking precautionary actions to prevent the spread of COVID-19. The Department of Labor (DOL) has issued guidance to employers on suggested practices for preparing for and responding to COVID-19.⁹ The DOL recommends that employers implement basic prevention measures such as encouraging employees to wash their hands, using appropriate respiratory illness etiquette (coughing or sneezing into the arm rather than the hand), encouraging employees to stay home if they are sick, establishing work from home policies (when feasible), and maintaining diligent cleaning and disinfecting practices in the workplace.

Furthermore, the Center for Disease Control (CDC) has also issued recommended strategies for employers to combat the spread of COVID-19.¹⁰ Those recommendations include the following:

⁹ [DOL Guidance on COVID-19](#)

¹⁰ [CDC Guidance](#)

- Encourage employees who are experiencing symptoms, or are in close contact with family members who are experiencing symptoms, to stay home rather than come to the work place.
- Ensure that sick leave policies are flexible and consistent with the current public health guidance.
- Do not request or require validation from healthcare providers when employees are experiencing symptoms and unable to come into work.
- Advise employees of the potential risks associated with traveling both domestically and internationally.

Both the DOL and the CDC strongly recommend creating an Infectious Disease Outbreak Response Plan. Establishing such a plan may help employers protect their employees from COVID-19 while ensuring continuity of business operations. The plan should be flexible to ensure that it meets the unanticipated needs of impacted employees, while also ensuring business continuity. The plan should be proactively communicated and thoroughly explained to employees in an effort to maximize the plan's effectiveness. The CDC also recommends that the plan should be tested, to the degree feasible, to ensure any issues or gaps in the plan are identified prior to its implementation.

In regards to some of the items a response plan may include, the following should be considered:

- Workplace safety precautions.
- Employee travel restrictions.
- Provisions for stranded travelers unable to return home.
- Mandatory medical check-ups, vaccinations or medication.
- Mandatory reporting of exposure, such as employees reporting to employers and employers reporting to public health authorities.
- Employee quarantine or isolation.
- Facility shutdowns.

In regards to business travel, some employers have chosen a more cautious approach and have temporarily halted, or at least limited, all nonessential business travel to areas that pose a significant risk of infection to protect their employees. Decisions regarding the restriction on travel are likely unique to the employer's business purposes and will need to be considered with that in mind.

ii. Disaster Recovery and Business Continuity

As discussed above, employers should be prepared to address a situation where an outbreak may impact employees. Employers must consider how to not only prepare and prevent the spread to its employees, but also must determine how it will respond in the event an employee contracts COVID-19. The employer must determine, based on the facts and circumstances at hand, whether to close physical offices and resort to telecommuting or continue their normal operations while taking extra precautions. Employers must consider their own unique needs to ensure that the workforce is protected and that business can continue effectively. These issues should be addressed and prepared for, in advance of any issues that may result as a result of COVID-19.

iii. Leave of Absence

Employers should consider reviewing their leave of absence policies and determine whether the policies adequately address the need for extended leaves of absences as a result of COVID-19. The employer must consider whether it will offer leaves to only those employees who have contracted COVID-19, or if those policies may also apply to employees who been quarantined, or who voluntarily chose to self-quarantine, as a result of close contact with individuals who have contracted the virus. Federal, state, and local laws may

also require the employer to provide leave in certain circumstances. Employers should review the relevant state and local guidance on this issue to determine whether any state-mandated leaves may apply.

The Family and Medical Leave Act (FMLA) may require covered employers to allow unpaid leave for eligible employees under certain circumstances. An employer is covered by FMLA if it employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.¹¹ An employee may be eligible for FMLA if they have worked for the employer for at least 12 months, have at least 1,250 hours of service over the previous 12 months, and work at a location where at least 50 employees are employed by the employer within 75 miles.

An employee who meets the above criteria could be eligible for FMLA if the leave is the result of either the employee or an immediate family member contracting COVID-19. Employers are encouraged to support employees who seek leave under these circumstances.¹²

On the other hand, according to the DOL, an employee would not be eligible for FMLA if they are seeking the leave for the purpose of avoiding exposure to COVID-19. As such, self-quarantine measures would not be covered under FMLA.

Finally, while some states require paid leave under broader circumstances, federal law does not generally require that employer provide paid sick leave to employees who are absent from work as a result of an illness, such as COVID-19, at this time (for example, FMLA is job-protected leave but need not be paid). However, employers should consider providing paid sick leave to employees who have or are in close contact with individuals who may have contracted the virus, when feasible. By offering paid leave, the employer may reduce the risk of person-to-person contact between employees who may be affected by largely eliminating its employees' incentive to come to work sick. At a minimum, employers should consider providing unpaid leave, regardless of federal, state, and local laws.

iv. American's with Disabilities Act (ADA)

The Americans with Disabilities Act (ADA) generally prohibits employers from discriminating against individuals with disabilities in the workplace. Further, the ADA requires that employers make reasonable accommodations for individuals with disabilities (absent an undue hardship) during a pandemic.

The Equal Employment Opportunity Commission (EEOC) has previously issued guidance to help employers understand what actions would be permissible by an employer in the event of a pandemic as it relates to the ADA.¹³ We recommend reviewing this document to ensure compliance with the ADA.

Employers may consider communicating with their employees to determine whether they have contracted or may contract COVID-19. Employers must generally be cautious to keep any employee communications confidential in accordance with the ADA. The guidance issued from the EEOC identifies several permitted actions during a pandemic. Some of the identified permitted actions include the ability to:

- Ask employees if they are experiences influenza-like symptoms;
- send employees home if they display influenza-like symptoms;
- measure an employee's temperature;
- encourage telework;

¹¹ [29 CFR § 825.104 - Covered employer.](#)

¹² [DOL Guidance on FMLA and COVID-19](#)

¹³ [EEOC Guidance on Pandemic Response](#)

- require infection control practices (handwashing, coughing and sneezing etiquette, etc.);
- ask why an employee failed to report to work.

Employers should work with Human Resources and their legal counsel to align their policies when it comes to how much information the employer may request to ensure compliance with the ADA and applicable privacy rules.

v. Work from Home Policies

As mentioned above, the primary method by which COVID-19 spreads is through person-to-person contact. As such, employers may consider implementing work from home policies to reduce the need for in-person communication and unnecessary contact. This employment policy should be established with both the interest of the workforce and continuity of the business in mind. There are of course certain businesses where work from home policies would not be feasible due to the nature of the business and the required duties for a given profession. Additionally, for certain employees, work from home may not be feasible due to a lack of the necessary equipment or connectivity. If this is the case, employers should consider what accommodations can be made to address this situation. If no accommodations are feasible, the employer must consider how to address the situation from a business continuity standpoint. With all this in mind, employers must consider whether a work from home policy would be feasible for their business.

When establishing a work from home policy, employers should outline and communicate what is expected from their employees while working from home. This communication will be important to ensure that the business continues to operate during this period.

Disclaimer: This opinion is based on the facts as presented and re-stated above, and our research, which includes the sources utilized as of the date this opinion has been drafted. This is a consulting opinion only, and does not purport to offer legal advice or fiduciary guidance as to the denial or acceptance of claims or appeals. This opinion is based upon our interpretation of the relevant materials and may not conform to official interpretations of statutes, regulations, contracts, or other materials. Subsequent changes in applicable law may change the result of this opinion. Ultimately the Employer/Plan Sponsor is responsible for making all business decisions related to their benefit offerings (including drafting and ratifying its plan documents) and, as the Plan Administrator, has the discretionary authority to interpret the terms of the Plan Document and make benefit determinations.

Other Useful Links:

Center for Disease Control:

1. <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>
2. <https://www.cdc.gov/coronavirus/2019-ncov/communication/factsheets.html>

Centers for Medicare and Medicaid:

1. <https://www.cms.gov/newsroom/press-releases/cms-publishes-first-set-covid-19-frequently-asked-questions-faqs-state-medicare-and-childrens-health>
2. <https://www.cms.gov/newsroom/press-releases/cms-develops-additional-code-coronavirus-lab-tests>
3. <https://www.medicare.gov/medicare-coronavirus>
4. <https://www.cms.gov/files/document/03052020-medicare-covid-19-fact-sheet.pdf>
5. <https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/EHB-Benchmark-Coverage-of-COVID-19.pdf>

Department of Health and Human Services:

1. <https://www.hhs.gov/about/news/coronavirus/index.html>

Department of Labor:

1. <https://www.osha.gov/SLTC/covid-19/>
2. <https://www.dol.gov/agencies/whd/fmla/pandemic>

Internal Revenue Service:

1. <https://www.irs.gov/coronavirus>
2. <https://www.irs.gov/pub/irs-drop/n-20-15.pdf>

U.S. Equal Employment Opportunity Commission (EEOC):

1. https://www.eeoc.gov/facts/pandemic_flu.html (issued 2009, re-issued 2020)