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Benefits Alert

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Updated—End of COVID-19 National and Public Health Emergency — Employers' Next Steps

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We explore how group health plans will be impacted and what steps plan sponsors should take in advance of the Public Health Emergency and National Emergency.

What's the Impact?

- Plan sponsors will need to consider plan design options, work with third-party administrators to ensure compliance, and communicate changes to plan participants
- To ensure a smooth transition and compliance, consult experienced benefits counsel on questions related to design requirements, effective dates, and participant communications

May 5, 2023 Update:

The Treasury Department recently clarified through informal comments that the "Outbreak Period," which extended by up to one year several deadlines that affect group health plans and participants, will end on July 10. While the relevant regulatory agencies have not issued formal guidance regarding this issue since President Biden signed legislation that ended the COVID-19

National Emergency declaration as of April 10, the Treasury Department's comments are consistent with FAQs issued by the DOL, HHS, and Treasury in March. To the extent that group health plan sponsors have communicated an earlier end date for the Outbreak Period to participants, an update may be required. We will continue to monitor the situation and provide updates accordingly (including any official changes to the July 10th date).

April 17, 2023 Update:

Since the release of our February 7th alert describing the end of the COVID-19 emergency declarations' impact on group health plans, legislation has been enacted that ends the National Emergency earlier than May 11th and the relevant Departments (DOL, HHS, and Treasury) have issued a set of Frequently Asked Questions clarifying several items relating to testing and vaccine coverage, participant notifications, and "Outbreak Period" timeframes. A quick summary of these developments is provided below.

- Legislation signed by President Biden ends the COVID-19 National Emergency effective as of April 10th. This emergency period is tied to the Departments' "Outbreak Period" guidance that extended several ERISA-related deadlines for up to one year. Therefore, the Outbreak Period is now scheduled to end on June 9th (i.e., 60 days after the end of the National Emergency). Note that it is possible that the Departments will extend the 60-day period, but formal guidance to that effect has not been announced. We will issue updates as needed in the event such guidance is issued.
- The Departments note that some employees currently enrolled in Medicaid or CHIP coverage could lose that coverage when the Public Health Emergency (PHE) ends, and remind employers that there is a 60-day special enrollment right for those employees to enroll in employer plans.
- With respect to coverage of COVID tests, the Departments explain that it is possible that some tests will be collected before the end of the PHE but processed after the PHE ends. In those cases, the tests must be covered without cost sharing or other medical management techniques.
- Upon the end of the PHE, out-of-network coverage of COVID vaccines can be subject to cost-sharing and medical management. However, the Departments explain that, in the unlikely event, a plan does not have an in-network provider that can provide these services, out-of-network claims must be processed as if received in-network.
- The Departments also address participant notification requirements and explain the general rule that any change to a summary of benefits and coverage must be communicated at least 60 days prior to the change. Nevertheless, the Departments will deem sufficient any notice that is sent as soon as possible following the change to the summary of benefits and coverage. Further, if communications regarding the COVID coverage rules note that the changes are limited in duration (i.e., only during the PHE), then no additional notice is required. Employers should use caution, however, because if the notice explaining temporary

coverage changes was issued in a prior year, a new notice regarding the end of certain benefits and coverage limited to the PHE period must be issued.

COVID health emergencies formally ending in May — What health plan sponsors need to know

Over the past three years, group health plans have been subject to special rules intended to enhance coverage and provide administrative relief during the COVID-19 pandemic. These rules are generally either tied to the declaration of COVID-19 as a Public Health Emergency (first declared by the Department of Health and Human Services as of January 27, 2020, and extended every ninety (90) days thereafter) or National Emergency (first declared by the previous administration on March 13, 2020, and renewed annually thereafter). On January 30, 2023, the Biden White House announced its intent to end both the public health emergency and national emergency on May 11, 2023. Following a brief summary of the special plan rules, this alert explains how group health plans will be impacted when those rules end and what steps plan sponsors should take in advance of May 11.

Summary of COVID-19 special plan rules

The Families First Coronavirus Response Act of 2020 required group health plans to expand coverage for all COVID-19-related testing ordered by a participant's physician. This first-dollar coverage applies to both in-network and out-of-network testing services, and prior authorization or other medical management techniques are not permitted. The Coronavirus Aid, Relief, and Economic Security Act of 2020 expanded coverage for COVID-19-related testing even more and required rapid coverage (both in-network and out-of-network) of COVID-19 vaccines as preventive services. In January 2022, the Departments of Labor, Treasury, and Health and Human Services issued guidance requiring group health plan coverage of at-home COVID-19 tests purchased by participants. All of these coverage rules for COVID-19 testing and vaccines are tied to the Public Health Emergency and the requirements will end on May 11.

Effective as of March 1, 2020, the Department of Labor exercised its authority under Section 518 of the Employee Retirement Income Security Act (ERISA) and mandated that certain deadlines applicable to ERISA-covered plans are tolled until the earlier of (i) one year from the date of the applicable deadline (determined on an individual basis) or (ii) sixty (60) days after the announced end of the National Emergency. The period during which the deadline is delayed is referred to as the "Outbreak Period." During the Outbreak Period, the following deadlines are delayed: (i) special enrollment period under HIPAA (thirty (30) or sixty (60) days, as applicable); (ii) 60-day Consolidated Omnibus Budget Reconciliation Act (COBRA) election period; (iii) COBRA premium payment due date; (iv) deadline for qualified beneficiaries under COBRA to notify the plan administrator of a qualifying event; (v) deadline for a plan to provide COBRA election notices; (vi) claims and appeals filing deadlines; and (vii) deadlines related to external review of claims. These administrative rules will end on July 10, sixty (60) days after the end of the National Emergency.

Action items for plan sponsors

In connection with the end of the Public Health and National Emergencies, plan sponsors will need to consider plan design options, work with third-party administrators to ensure compliance, and communicate changes to plan participants.

Plan design: COVID-19 testing

During the Public Health Emergency, COVID-19 testing must be covered at first-dollar at both in-network and out-of-network levels of coverage. Once the Public Health Emergency ends, employers can cover COVID-19 in the same manner as any other diagnostic test. Sponsors should consider how coverage will be applied when a test is given during an office visit or when a physician sends the test to a lab. Consideration should also be given to how voluntary, or at-home testing will be treated under plans. Although over-the-counter diagnostic tests are eligible medical expenses (and reimbursable under health savings accounts (HSAs), health reimbursement arrangements (HRAs), and flexible spending accounts (FSAs)), most major medical group health plans do not cover over-the-counter products.

Plan design: Vaccines

COVID-19 vaccines are covered as preventive services under the Affordable Care Act (ACA). The standard requirement under the ACA is that preventive services must be covered at first-dollar only when obtained from an in-network provider or facility. During the Public Health Emergency, COVID-19 vaccines must be covered at first-dollar whether in-network or not. Plans should consider whether to modify the current rules to bring COVID-19 vaccine coverage back in-line with coverage of other preventive services.

Coordination with third-party administrators

Plan sponsors should contact their third-party plan administrators to ensure that procedures are in place to modify coverage requirements at the end of the public health and national emergencies. With respect to COVID-19 testing and vaccines, sponsors should ensure that coverage can be timely modified and whether the sponsor or administrator will communicate the changes to plan participants. Similarly, with respect to the Outbreak Period administrative rules, sponsors should confirm that administrators can reinstate the applicable deadlines by July 10 and communicate as needed to relevant participants.

Participant communications

Given that most of the coverage and administrative rules have been in place for almost three years, participant communication is key to mitigate potential disputes. To the extent that summary plan descriptions have been modified to reflect any of the COVID-19-related rules, a summary of material modifications should be sent to participants within sixty (60) days of the change. Even if the summary plan description does not describe the COVID-19 rules, it is still recommended, from an ERISA fiduciary perspective, that plans notify plan participants of the changes.

Special consideration should be given to the employee population that receives the communications. Certainly, active plan participants (including COBRA enrollees) should be

informed. Also, former employees who might be eligible for COBRA during the Outbreak Period (generally, anyone who lost coverage with a COBRA election right within the prior twelve (12) months) should receive notice that the Outbreak Period is ending. Also, because HIPAA special enrollment deadlines are delayed during the Outbreak Period, employees who have not enrolled in the plan should receive the notice in case they had a special enrollment right within the past twelve (12) months. With these nuances, the best approach may be to send the notice to all active employees and any former employee who had COBRA election rights within the 12-month period ending on July 10, 2023.

Plan sponsors and administrators should also review existing COBRA notices in advance of July 10. Many administrators modified standard COBRA election forms to reflect the special extended timelines for COBRA notifications, elections, and premium payments. Now, plan sponsors and administrators should work with their third-party COBRA administrators to modify the election forms and remove references to the extended timeframes.

Outlook

For most plan sponsors, the end of the Public Health and National Emergencies is a welcome development from a health plan management perspective. First-dollar coverage of COVID-19 tests, particularly at-home tests, has been a significant cost driver under most plans. Additionally, the Outbreak Period administrative deadline delays have been difficult to navigate (especially with respect to COBRA premium payments). As plan sponsors prepare to return to the old normal, benefits counsel should be consulted on questions related to design requirements, effective dates, and participant communications.

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