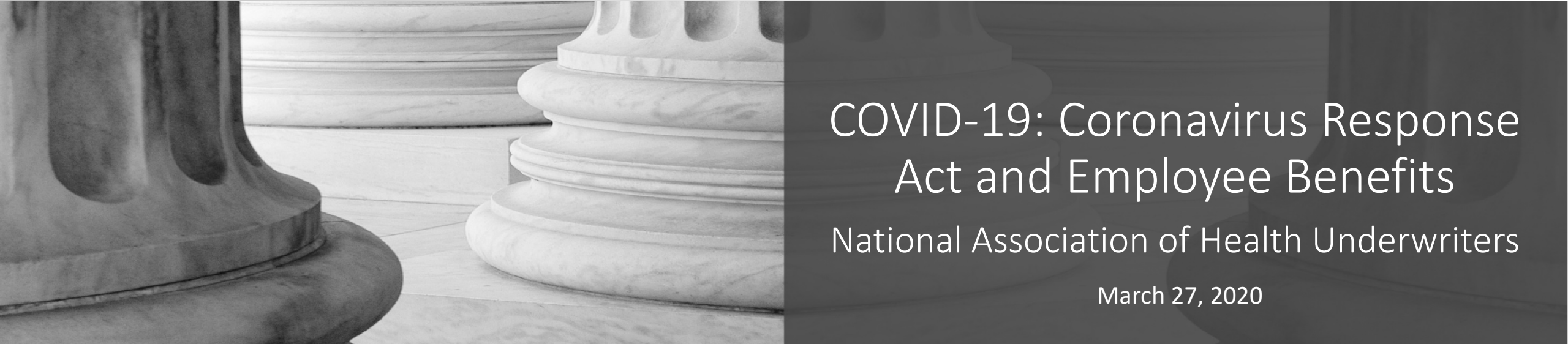




MARATHAS BARROW  
WEATHERHEAD LENT LLP

A black and white photograph of classical columns, likely from a government building, with a dark grey overlay on the right side containing text.

# COVID-19: Coronavirus Response Act and Employee Benefits

National Association of Health Underwriters

March 27, 2020

Stacy Barrow

[sbarrow@marbarlaw.com](mailto:sbarrow@marbarlaw.com)

(617) 830-5457

# Agenda

---



- COVID-19 Background
- Employer Responses
- Federal Government Responses
  - IRS re: HDHPs and HSAs, Tax Filing Relief
  - CMS re: Essential Health Benefits
  - EEOC re: Americans with Disabilities Act
  - DOL re: Family and Medical Leave Act
- Families First Coronavirus Response Act
- COVID-19 and Employee Benefits Issues
- COVID-19 and Employment Law Issues

# COVID-19 Background

---



- Virus is “SARS-CoV-2”
- Disease it causes is “coronavirus disease 2019” or “COVID-19”
- Timeline:
  - Jan. 30: World Health Organization (WHO) declared the outbreak a “public health emergency of international concern”
  - Jan. 31, U.S. Health and Human Services declared a public health emergency to aid the nation’s healthcare community in responding to COVID-19
  - Mar. 11, WHO publicly characterized COVID-19 as a pandemic (a global outbreak of disease)
  - Mar. 13, President Trump declared the COVID-19 outbreak a national emergency
  - Mar. 14, CDC has reported more than 2,000 cases from 49 states and Washington, DC

# COVID-19 Background

---



- Reported illnesses have ranged from very mild (including some with no reported symptoms) to severe, including illness resulting in death
  - Symptoms including fever, cough and shortness of breath may appear 2-14 days after exposure
- While information so far suggests that most COVID-19 illness is mild, serious illness occurs in a substantial number of cases
  - Older people and people with severe chronic medical conditions — like heart disease, lung disease and diabetes — are at higher risk of developing serious COVID-19 illness
  - Nearly 40% of patients sick enough to be hospitalized were aged 20-54
  - The virus that causes COVID-19 spreads easily from person-to-person via coughs and sneezes; can stick to hard and soft surfaces for days

# COVID-19 Background

---



- Vaccine for COVID-19 not expected until 2021 at the earliest
- Preventive measures: Social distancing to reduce contact of infected persons with large groups
  - School and workplace closures, large gatherings cancelled
  - Self-quarantining to reduce the chances of infection in locations with an outbreak
  - Washing hands often, and avoid touching the face with unwashed hands
- According to the WHO, the use of masks is only recommended if a person is coughing or sneezing or when one is taking care of someone with a suspected infection

# Employer Responses

---



- Educate employees on COVID-19, prevention & techniques to reduce spread
- Enforce stay-at-home policies if employees are sick or symptomatic
- Many employers are having employees work from home until further notice
  - Make sure employees have proper technology and that it's secured
  - Some employees may feel isolated; it's up to management to keep things lively – consider videoconferences to keep people engaged as a team

# Employer Responses (Cont.)

---



- Some businesses have been screening all visitors, asking them if:
  - They have returned from any of the countries listed on [www.cdc.gov](http://www.cdc.gov) within the last 14 days
  - They have been in close contact with anyone who has traveled within the last 14 days to one of the countries listed on [www.cdc.gov](http://www.cdc.gov)
  - They have had close contact with or cared for someone diagnosed with COVID-19 within the last 14 days
  - They have experienced any COVID-19 symptoms in the last 14 days (to include fever, cough, difficulty breathing)
- If any answer is yes, entry is denied

# Federal Government Responses

---



- Federal government has issued (or re-issued) guidance for employers
- Agency guidance includes the following:
  - IRS: [High Deductible Health Plans and Expenses Related to COVID-19](#)
  - IRS: [Relief for Taxpayers Affected by Ongoing COVID-19 Pandemic](#)
  - CMS: [FAQs on Essential Health Benefit Coverage and the Coronavirus](#)
  - EEOC: [Pandemic Preparedness in the Workplace and the ADA](#)
  - DOL: [COVID-19 or Other Public Health Emergencies and the FMLA](#)
  - DOL: [COVID-19 and the American Workplace](#) (**new posters, Q&As**)
- Other government resources:
  - <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
  - <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>



# IRS Response re: High Deductible Health Plans

---



- Notice 2020-15: An HDHP will not fail to be HSA-qualified merely because the plan provides benefits for testing and treatment of COVID-19 without regard to whether the minimum deductible has been satisfied
  - Applies to all medical care and items for testing and treatment of COVID-19
- All other HSA eligibility requirements are maintained at this time
  - Employers sponsoring HDHPs or other health plans should determine how their insurance carrier or TPA will provide benefits for treatment of COVID-19, including whether any cost sharing will apply
- Next round of relief likely to contain additional guidance on telehealth

# IRS Response – Tax Relief

---



- Notice 2020-18: Anyone with a federal income tax payment or federal income tax return due April 15, 2020, is affected by the COVID-19 emergency
- Therefore, the IRS is extending the April 15, 2020 tax filing deadline for all taxpayers to July 15, 2020
  - Federal income tax payment deadline also extended to July 15
  - States also starting to extend deadline

# IRS Response – Tax Relief

---



- Relief is available solely with respect to federal income tax returns and payments
- No extension is provided for the payment of any other federal tax, or for the filing of any federal information return
  - Employers filing 1095-C's electronically must do so by March 31, 2020
  - An automatic 30-day extension is available by completing Form 8809
  - Under certain hardship conditions an additional 30-day extension may apply; however, requests for additional extensions of time to file information returns are not automatically granted

# CMS Response re: Essential Health Benefits

---



- The “EHB package” that is required to be offered as part of all non-grandfathered plans for sale in the individual or small group market includes coverage for the diagnosis and *treatment* of COVID-19
  - Exact coverage details and cost-sharing amounts for individual services may vary by plan
  - All plans must provide free *testing* for COVID-19 under the Coronavirus Response Act
  - Many states are encouraging carriers to cover a variety of COVID-19 related services, including treatment, without cost-sharing

# CMS Response re: Essential Health Benefits

---



- Quarantine outside of a hospital setting, such as a home, is not a medical benefit; however, other medical benefits that occur in the home, such as home health care, may be covered (pursuant to prior authorization and/or cost-sharing or other limitations)
- While a COVID-19 vaccine does not currently exist, current rules require specific vaccines to be covered as EHB without cost-sharing, when recommended by the federal government
  - Under the ACA, plans are not required to cover a recommended vaccine until the first plan year beginning 12 months after the recommendation is issued, although plans may voluntarily choose to cover a vaccine for COVID-19, with or without cost-sharing, prior to that date

# EEOC Response re: Americans With Disabilities Act

---



- Now that COVID-19 is a pandemic as reported by the WHO and the CDC, employers may take certain actions without violating the ADA
  - ADA applies to employers with 15 or more employees and prohibits medical exams or disability-related inquiries unless job-related
  - However, when a pandemic becomes more severe according to the assessment of public health officials, employers may have sufficient objective information to reasonably conclude that employees will face a direct threat if they contract the virus
  - In these circumstances, employers *may* make disability-related inquiries or require medical examinations of asymptomatic employees

# EEOC Response re: Americans With Disabilities Act

---



- Employers may send employees home if they display flu-like symptoms (e.g., fever, cough, shortness of breath) during a pandemic
- Employers may ask employees who report feeling ill at work or who call in sick if they are experiencing flu-like symptoms
  - Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA
- When the CDC recommends that people who visit specified locations remain at home for several days until it is clear they do not have symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal

# EEOC Response re: Americans With Disabilities Act

---



- Employers may require employees to:
  - adopt infection-control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal; and
  - wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of infection
- When employees return after a pandemic, employers may require a doctor's note certifying fitness to return to work; however, the CDC recommends against requiring a doctor's note



# DOL Response re: Family and Medical Leave Act

---



- DOL released an FAQ to assist employers who are subject to FMLA
  - FMLA applies to an employer with at least 50 employees within 75 miles
  - Employees are eligible to take FMLA leave if they have worked for their employer for at least 12 months and have at least 1,250 hours of service over the previous 12 months (and work at an FMLA-covered location)
- Under the FMLA, covered employers must provide employees job-protected, unpaid leave for specified family and medical reasons
  - Employees on FMLA leave are entitled to continue group health plan benefits
- Employees may take leave to care for themselves or a family member
  - Leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under FMLA *or the new expanded FMLA*

# Families First Coronavirus Response Act

---



- On March 14, the House of Representatives passed the Families First Coronavirus Response Act (with adjustments on March 16) which includes emergency paid sick leave and paid family and medical leave
- The Act passed the Senate and was enacted on March 18
- Act includes Emergency FMLA and Emergency Paid Sick Leave provisions, free testing for coronavirus, increased funding for unemployment assistance, food aid, and Medicaid

# Families First Coronavirus Response Act

---



- Coronavirus Testing: All group health plans and health insurance issuers in the individual and group markets (including grandfathered plans) must provide COVID-19 testing with no cost-sharing or prior authorization requirements
  - Effective now through end of public health emergency as declared by HHS
  - Includes services for urgent care, emergency room, or provider visits that result in an order for or administration of a covered diagnostic test

# COVID-19 Testing

---



- There is a national shortage of COVID-19 laboratory testing materials
- Access to testing may be limited to those who meet certain criteria established by state Departments of Health
- Public health officials are urging those who have symptoms to stay home and contact their doctors by phone, rather than showing up at a medical facility asking to be tested

# Families First Coronavirus Response Act

---



- Provisions include **Emergency Paid Sick Leave** and **Emergency FMLA**
  - These provisions apply to employers with fewer than 500 employees and public employers of any size
  - Effective for leave taken between 4/1/20 and 12/31/20, unless extended
- Assistance for employers available via a refundable payroll tax credit
  - Good news for non-profits, as they wouldn't benefit from an income tax credit
  - Tax credit available for health insurance premiums allocable to qualified sick leave payments (as described in regulations to be published by the IRS)

# Emergency Paid Sick Leave

---



- Provides paid sick time to an employee who is unable to work (or telework) because the employee:
  1. is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
  2. has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  3. has COVID-19 symptoms and is seeking medical diagnosis;
  4. is caring for an individual who is subject to a quarantine or isolation order;
  5. is caring for a child if the school or day care center has been closed, or the child care provider is unavailable, due to COVID-19 precautions; or
  6. is experiencing any other similar condition specified by the federal agencies

# Emergency Paid Sick Leave

---



- Employees may be entitled to 80 hours of paid sick time (pro-rated for part-time employees)
  - All employees are immediately eligible for this leave
- Leave is paid at the employee's regular rate, up to \$511 per day (\$5,110 in the aggregate) when leave is taken due to an employee's own illness or quarantine, and paid at two-thirds of the regular rate, up to \$200 per day (\$2,000 in the aggregate) when leave is taken to care for others (or #6)
- FFCRA includes anti-retaliation provisions; failure to pay required sick leave is a failure to pay wages in violation of the FLSA

# Emergency Family and Medical Leave Act

---



- Amends FMLA to provides up to 12 weeks of job-protected leave for “a qualifying need related to a public health emergency” to employees who have been employed for at least 30 days
- A “qualifying need” is when an employee is unable to work (or telework) due to a need to care for a minor child if the child’s school or place of care has been closed or is unavailable due to a public health emergency
- After a 10-day elimination period, the rest of FMLA leave is paid at two-thirds of the employee’s regular rate based on normally scheduled hours, capped at \$200 per day and \$10,000 in total
  - Basically, a 10-week continuation of #5 under Emergency Paid Sick Leave
  - Employees may, but cannot be required to, use paid leave during elimination period



# Emergency FMLA and Emergency Paid Sick Leave

---



- Exceptions may apply for small employers (under 50 EEs) if the required leave would jeopardize the viability of their business
  - DOL will issue further guidance on the exception
- An exception to the reinstatement requirement under FMLA is available to employers with fewer than 25 employees, if the employee's position no longer exists after the pandemic ends
- Employers may exclude employees who are health care providers or emergency responders from E-FMLA and EPSL

# COVID-19 and Employee Benefits Issues

---



- Info provided to an employer by an employee is not subject to HIPAA
  - For example, employee is self-quarantining because of exposure to the virus
  - If the employer uses health plan information to determine if an employee has the virus, that information would be subject to HIPAA
  - Even if not subject to HIPAA, treat as sensitive personal information
- Employees may seek to stop dependent care FSA elections due to school closures; such changes are permissible based on the change in provider cost (the cost is \$0 when day care is closed)

# COVID-19 and Common Benefits Questions

---



- If employees are furloughed, review plan documents to determine if COBRA applies or if an extension of coverage is available
- Furloughs and layoffs: What are they?
  - Furlough is short of a layoff; benefits usually continue
  - Layoff is a job termination; any accrued leave is paid out
- When must COBRA be offered?
  - When benefits are lost due to a termination or reduction in hours
- When do employees lose eligibility for benefits?
  - Does it matter if they're expected to be rehired?
- How should employee contributions be handled during leave?

# COVID-19 and Employment Issues

---



- Are we required to pay employees out on leave?
- Can we tell employees if a coworker has COVID-19 or suspects they've been exposed?
- What should we do if an employee informs us that they've been exposed or tested positive for COVID-19?
  - Shut down office/area and clean/sanitize
  - Identify coworkers who may have been exposed
  - Inform affected coworkers—without identifying the employee—and recommend they speak to a health care provider and self-quarantine for at least 14 days
  - Encourage employees to contact HR with questions and advise the further communication will be forthcoming



## Questions?

Stacy H. Barrow

[sbarrow@marbarlaw.com](mailto:sbarrow@marbarlaw.com)

(617) 830-5457

The information provided in this slide presentation is not, is not intended to be, and shall not be construed to be, either the provision of legal advice or an offer to provide legal services, nor does it necessarily reflect the opinions of the firm, our lawyers or our clients. No client-lawyer relationship between you and the firm is or may be created by your access to or use of this presentation or any information contained on them. Rather, the content is intended as a general overview of the subject matter covered. Marathas Barrow Weatherhead Lent LLP is not obligated to provide updates on the information presented herein. Those viewing this presentation are encouraged to seek direct counsel on legal questions. © Marathas Barrow Weatherhead Lent LLP. All Rights Reserved.