Gallagher

COMPLIANCE

Priorities and Perspectives

Recordkeeping in a Pandemic

Maintaining your organizational wellbeing during the unprecedented COVID-19 pandemic requires a broad view of the factors that impact your ability to achieve your business objectives while supporting the personal wellbeing of your employees. COVID-19 has not only increased the number of records human resources and employee benefits departments must retain, but also added the challenge of trying to do so while working remotely. As your organization strives to meet existing and new recordkeeping requirements, it will be helpful to have a systemic process in place. Check out the action steps below to help you identify new or updated recordkeeping requirements as a result of COVID-19.

1. Receive. Document. Maintain. The Families First Coronavirus Response Act (FFCRA), which took effect on April 1, 2020, created two types of paid emergency leave for impacted employees – Emergency Paid Sick Leave and Public Health Emergency Leave. Both the Department of Labor (DOL) and the Internal Revenue Service (IRS) issued FAQs setting forth documentation requirements for an employer with an employee who requests leave under FFCRA. The DOL FAQs indicate that an employer should document specific information when an employee requests leave under the FFCRA. The DOL permits the employee to provide the required information to the employer, either orally or in writing. Further, if an employer intends to make a claim for refundable tax credits under FFCRA, the employer will need to comply with all IRS requirements. Based on the IRS FAQs, employers seeking to make a claim for the refundable tax credits will need a written statement from the employee regarding the request for leave to support the employer's claim for reimbursement of the costs of leave. Employers should be prepared to maintain FFCRA-related leave documents for four years, regardless of whether the leave was granted or denied. Employers that deny a request based on the small business exemption must document their authorized officer's determination that the exemption criteria were met. ***What steps has your organization taken not only to document leave requests but also to document the basis for reimbursement under the FFCRA for leave?***

2. Question. Record. Safeguard. Many employers now seek to return employees to the workplace after a period of absence due to shelter-in-place or stay-at-home orders. As part of that process, employers are taking steps aimed at creating a safe work environment by asking employees if they are experiencing symptoms of COVID-19, such as fever, chills, cough, shortness of breath, or sore throat. Such questions are permissible medical inquiries under the Americans with Disabilities Act (ADA) because COVID-19 is considered to be a pandemic. Employers subject to the ADA must safeguard all information about employee illness as a confidential medical record in compliance with the ADA. ***What actions does your organization take to safeguard the confidentiality of employee medical information connected to COVID-19 symptoms?***

3. Check. Log. Protect. In addition to asking questions about possible symptoms for employees returning to the workplace, many employers are taking employees' temperatures – often at the beginning and end of the workday. Under the Equal Employment Opportunity Commission's (EEOC) guidance under the ADA, measuring an employee's body temperature is generally considered to be a medical examination. Such a medical examination is permissible according to the EEOC because the Center for Disease Control (CDC) and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions. Many employers are keeping logs of employee temperatures, which then creates confidential medical records under the ADA, and thus for

employers subject to the ADA, should be handled accordingly. ***Are there any additional actions your organization should take to protect the confidentiality of temperature checks in response to COVID-19?***

4. Calculate. Continue. Minimize. Because of a concern about the possibility of individuals losing benefits as a result of a failure to comply with certain deadlines due to COVID-19, the DOL's Employee Benefits Security Administration (EBSA) and the IRS relaxed certain employee benefit timeframes, including three significant deadlines related to COBRA continuation coverage. The Department of Health and Human Services (HHS) encourages nonfederal governmental plans to also adopt the relief. Those three deadlines include the following: (1) the 60-day election period for COBRA continuation coverage; (2) the date for making COBRA premium payments; and (3) the date for individuals to notify the plan of a qualifying event or determination of disability for purposes of COBRA. Under the regulations, group health plans must disregard a period called the Outbreak Period when calculating certain time periods. The Outbreak Period is the period from March 1, 2020 until 60 days after the announced end of the National Emergency (or such other date announced by the Agencies). (As of July 15, the end of the Outbreak Period has not been announced.) Under CORBA, Plan administrators need to maintain recordkeeping procedures that establish and prove when election periods begin and end and when elections are sent by qualified beneficiaries. The Outbreak Period will make this recordkeeping particularly challenging because of the change to the calculation of specific dates, and employers should be aware of lingering COBRA responsibilities that may be triggered by the Outbreak Period relief. Careful recordkeeping related to the three COBRA periods impacted by the Outbreak Period relief will help employers minimize the risk of mistakenly denying or terminating COBRA coverage. ***What steps has your organization taken to minimize the risk of mistakenly denying or terminating COBRA continuation coverage by overlooking relief granted during the Outbreak Period?***

5. Evaluate. Account. Respond. In addition to the relief granted during the Outbreak Period for certain deadlines associated with COBRA continuation, the EBSA and the IRS have also granted relief during the Outbreak Period for time periods related to HIPAA special enrollment rights. (HHS has also encouraged nonfederal governmental plans to comply voluntarily.) For example, if an employee who previously declined employer-sponsored coverage has a child during the Outbreak Period, that employee's timeline to request a special enrollment does not start until after the Outbreak Period ends. Employers thus must take special care when receiving requests for special enrollment either during or after the end of the Outbreak Period to take into account the relief for that period of time. ***How can your organization ensure that it correctly evaluates the timeliness of requests for special enrollment impacted by the Outbreak Period relief?***

6. Verify. Process. Administer. Along with the relief extending certain COBRA timeframes and HIPAA special enrollment periods, relief granted by the EBSA and the IRS also applies to certain timeframes related to claims and appeals impacted by the Outbreak Period. More specifically, the relief applies to: the date within which individuals may file a benefit claim under the plan's claims procedure; the date within which claimants may file an appeal of an adverse benefit determination under the plan's claims procedure; the date within which claimants may file a request for an external review after receipt of an adverse benefit determination or final internal adverse benefit determination; and the date within which a claimant may file information to perfect a request for external review upon a finding that the request was not complete. HHS urges nonfederal governmental plans also to adopt relief for claims and appeals deadlines. Employers should note that this relief will impact not only their major medical plans, but also other group health plans, disability benefits, and other employee welfare benefit plans subject to ERISA or the Internal Revenue

Code, such as health flexible spending accounts (health FSAs) and health reimbursement arrangements (HRAs). Employers should work with their third-party administrators and carriers to ensure that processes are in place to correctly administer claims and appeals in light of the Outbreak Period relief. ***What conversations does your organization need to have with your third-party vendors to verify that Outbreak Period relief is administered correctly for impacted benefits?***

7. Amend. Add. Extend. Due to the possibility of unanticipated changes in the availability of medical care and dependent care during the COVID-19 pandemic, employees may be more likely to have unused health FSA or dependent care flexible spending account (DCAP) amounts as of the end of the plan year, or the end of a grace period, ending in 2020. These employees may wish to have more time to use the amounts to pay or reimburse medical care or dependent care expenses. To address this, IRS Notice 2020-29 relaxes the general cafeteria plan rules to permit an employer to amend its cafeteria plan to add (or extend) a grace period to allow reimbursement of expenses incurred through December 31, 2020. The extension is available for any plan year or grace period that ends in 2020. Note that this grace period extension is different from, and in addition to, the extension of time for filing claims already incurred, which is discussed above. Thus, grace periods may make recordkeeping even more complex for flexible spending accounts. ***If adopting extended grace periods for your organization's health FSA or DCAP, what processes have been adopted to keep track of claims applicable to expenses incurred during the plan year or grace period ending in 2020?***

8. Request. Retain. Prove. As more employers move to online platforms for annual enrollment, it will be important for those employers to capture needed records. In addition to obtaining a salary reduction agreement, for example, it will also be important for employers to obtain waivers of coverage for employees who decline coverage. Waivers play an important role not only in potential future HIPAA special enrollment periods, but also for establishing that an offer of coverage was made for purposes of the Patient Protection and Affordable Care Act (ACA). For instance, applicable large employers (employers with 50 or more full-time and full-time equivalent employees) are required to offer coverage that provides minimum value and is affordable to full-time employees to avoid ACA employer shared responsibility penalties. As long as an employer makes the offer, no penalty applies. A signed waiver from an employee provides proof that coverage was offered to that employee. Similarly, if employees are required to contribute to the cost of coverage or may purchase coverage such as supplemental life insurance, a signed waiver is the employer's proof that coverage was offered and waived should a question arise at a later date. ***What steps are you taking to ensure that you obtain signed waivers from employees, particularly if you've moved your annual enrollment to an online platform?***

9. Notify. Consent. Distribute. In addition to maintaining records of employee elections, employers also must retain records to establish that certain employee notices were distributed. However, there is an additional recordkeeping requirement for employers who wish to distribute those notices electronically. Specifically, employers who provide benefit information and conduct annual enrollment electronically rather than on paper, must obtain consent to use electronic distribution for employees without worksite access to their electronic information systems. Employers are required to follow certain rules – including the provision of pre-consent notification – to obtain consent before distributing materials such as Summaries of Benefits and Coverage (SBCs) and summary plan descriptions (SPDs) electronically. Forms W-2 and 1095 may also be distributed electronically, but employee consent is required in all

cases, not just for employees without worksite access. In addition, employers who wish to distribute their HIPAA Notices of Privacy Practices through email should be aware that pre-consent must be obtained, and record of that pre-consent must be retained. ***How will your organization gain and document the necessary consent to distribute materials electronically?***

10. Assess. Protect. Monitor. As a result of the COVID-19 pandemic, many human resources and benefits personnel have moved to remote work and are thus accessing sensitive employee records from outside of their normal network environments. Remote access to organizational information systems, such as email and network drives, can open organizations up to increased cybersecurity risks. For this reason, human resources and benefits personnel should be careful to adhere to safeguards implemented by their organizations, such as only using a virtual private network (VPN) to access email and network drives. Other precautions include avoiding sending emails or attachments to personal email addresses or computers, using multifactor authentication whenever possible, and not using personal devices to access or store sensitive information, such as Social Security numbers, census data, and protected health information. ***What steps is your organization taking to protect and monitor records containing sensitive information obtained and transmitted by human resources and benefits personnel who are working remotely?***

Compliance is a series of actions, not a final destination. As a trusted advisor, Gallagher has developed this *Priorities and Perspectives* series to help you pursue a path through employee benefits compliance issues as part of an overall continuing compliance plan. Employers should carefully evaluate their health and welfare plans to determine if they are in compliance with both federal and state law. If you have any questions about one or more of the compliance requirements listed above, or would like additional information on how Gallagher constantly monitors laws and regulations impacting employee benefits in order to support employers in their compliance efforts, please contact your Gallagher representative.
