May 04, 2020

The Honorable Mitch McConnell
United States Senate
Washington, DC 20510

The Honorable Nancy Pelosi
U.S. House of Representatives
Washington, DC 20515

The Honorable Charles Schumer
United States Senate
Washington, DC 20510

The Honorable Kevin McCarthy
U.S. House of Representatives
Washington, DC 20515

Dear Senate Majority Leader McConnell, House Speaker Pelosi, Senate Minority Leader Schumer and House Minority Leader McCarthy:

On behalf of the nation’s large employers, Business Group on Health thanks all members of Congress for their leadership in response to the COVID-19 pandemic. The Business Group represents 443 primarily large employers, including 73 of the Fortune 100, who voluntarily provide health, disability, leave, and other benefits to over 55 million American employees, retirees, and their families. As employers and employees respond to the unprecedented public health and economic conditions of COVID-19, ensuring access to affordable, high-quality employer-sponsored health and welfare benefits will be critical to the nation’s recovery. Therefore, we urge Congress to continue its support for working families by:

- Increasing employers’ flexibility to limit COVID-19 related out-of-pocket costs for individuals enrolled in high-deductible health plans (HDHPs) paired with health savings accounts (HSAs);
- Increasing flexibility in cafeteria plan rules for emergency situations;
- Protecting patients from surprise billing;
- Supporting employer-sponsored paid leave benefits;
- Ensuring access to medications; and
- Easing employees’ health coverage transitions.

We detail our recommendations below.
I. **Support for Employees in HSA/HDHP Arrangements**

Based on our most recent survey data, nearly 90% of large employers offer HDHPs paired with HSAs—either as a coverage option or the only available coverage for employees. These arrangements offer substantial cost and tax savings benefits for employees. However, COVID-19 presents unique, unanticipated cost and coverage challenges for HSA/HDHP enrollees, particularly if they have not yet satisfied their deductibles for the plan year. Therefore, to support employees and dependents enrolled in HSA/HDHP arrangements, we recommend the following:

- Amending the Internal Revenue Code to allow pre-deductible coverage of mental and behavioral health medications and services.

- Amending the Internal Revenue Code to permanently allow pre-deductible coverage of telehealth services.

These amendments would ensure that employers have flexibility to lower or eliminate out-of-pocket costs that might otherwise limit employees’ access to critical health services during the COVID-19 pandemic and future emergency situations. These amendments also would increase access to mental and behavioral health services as demand increases due to the stresses of the COVID-19 emergency.

II. **Flexibility in Cafeteria Plan Rules for Emergency Situations**

Nearly all employer-sponsored health coverage is governed, in part, by the cafeteria plan rules of section 125 of the Internal Revenue Code. These rules allow employers to offer a range of benefits—including medical, health flexible spending accounts (health FSAs), and dependent care assistance programs (DCAPs)—on a tax-advantaged basis. However, COVID-19 has highlighted certain cafeteria plan rules that limit employers’ and employees’ ability to make enrollment changes and maximize savings in response to emergency situations. Therefore, to support employees and dependents, we recommend amending the Internal Revenue Code to:

- Establish a safe harbor for employers to allow plan enrollment changes in response to emergency situations. For example, we recommend that employers be permitted to allow changes to health coverage enrollments consistent with emergency situations such as COVID-19. We also recommend that employers have discretion to allow changes in employees’ health FSA and DCAP contributions consistent with changes to health care and childcare availability in light of COVID-19 “stay at home” and other emergency conditions.

- Restore plan sponsors’ ability to set health FSA contribution limits, which will allow employers flexibility to tailor limits to employees’ savings needs.

- Eliminate the health FSA rollover limit (currently $500), which will encourage additional savings for future health expenses.
III. COVID-19 Testing, Treatment, and Surprise Billing

The Business Group supports the Families First Act’s provisions ensuring individuals’ access to COVID-19 testing without cost sharing. As the pandemic continues and coverage costs for COVID-19 related conditions rise, employers’ task of balancing comprehensive coverage with affordability will be all the more difficult. Employer-sponsored group health plans have a legal duty to consider plan design effects on their entire covered populations, including effects on future premiums and cost sharing. Cost sharing structures are based on extensive actuarial analysis of quality, utilization, covered populations, and cost. Therefore, we support the Families First Act’s approach to cost sharing for COVID-19 treatment, which acknowledges employer-sponsored plans’ obligation to balance access, quality, affordability, and benefit design flexibility—for COVID-19 and all other treatments—for their employees.

However, our members are concerned that their efforts to maintain affordable health coverage will not adequately protect employees from the unprecedented costs COVID-19 presents without additional support from Congress. Therefore, we recommend the following:

- Ban on surprise billing. COVID-19 likely will increase the need for emergency, hospital, and other care. To protect working families from unanticipated costs, we recommend a ban on balance billing—for all covered treatments, medications, and related items/services—at least for the duration of the COVID-19 public health emergency. We also recommend that payment rates for these items/services be based on negotiated in-network or Medicare rates and considered payment in full. These measures would protect employees and group health plans in a manner similar to HHS’s conditioning CARES Act Provider Relief Fund dollars on providers abstaining from balance billing, which we support.

- Requiring that providers’ published cash prices for COVID-19 testing and treatment be based on the lowest negotiated rates.

- Providing direct financial assistance specifically for the purpose of maintaining or providing employer-sponsored health coverage. Because the pandemic affects all sectors of the economy, we recommend that this funding be made available to employers of all sizes.

IV. Supporting Paid Leave Benefits

Business Group members offer a wide range of leave and income replacement benefits to support employees who need time off from work, including paid sick leave, paid parental leave, paid time off, unpaid leave, and short- and long-term disability benefits. Because each of our members tailors leave benefits to the unique needs of its employee population, we support the Families First Act’s approach to leave benefits, which gives large employers flexibility to offer different combinations of leave and income replacement benefits, as appropriate for their
specific industry conditions and employee populations. To ensure that employers are able to continue offering robust leave benefits, we recommend the following:

- Establishing a safe harbor whereby employers currently offering leave benefits are deemed in compliance with state and local leave requirements.
- In the alternative, establishing a uniform, nationwide administrative, reporting, and compliance standard for all state, local, and emergency leave requirements.
- Providing direct financial assistance or tax credits to maintain and encourage employer-sponsored leave benefits for employees.

These measures would bolster and minimize administrative burdens of much-needed leave benefits during the COVID-19 and future health emergencies.

V. Ensuring Access to Medications

Though employers, carriers, and pharmacy benefit managers (PBMs) have already partnered to relax rules related to fill limits, prior authorizations, and similar restrictions, we recommend easing legislative and regulatory barriers to ensure that patients can access needed medications without risking COVID-19 exposure. Specifically, the Business Group supports a holistic public health approach between state governments, Congress, and regulatory authorities to provide flexibility in access to prescription drugs. For example, it may be appropriate to:

- Temporarily suspend dispensing limits for certain drugs classified as controlled substances;
- Work with states to evaluate the utility of relaxing delivery, quantity, and refill limits for certain controlled substances temporarily;
- Allow waivers of federal rules to ensure access to opioid use disorder medications such as naloxone to minimize the need for human contact to receive medication assisted treatment; and
- Urge states that impose quantity limits to relax or suspend those rules to allow patients to obtain medications while the COVID-19 pandemic is ongoing.

The COVID-19 outbreak also has created an unprecedented surge in demand for particular products, which could limit the ability of manufacturers and the drug supply chain to fully satisfy orders in the short-term. Foreign control of raw active ingredients needed for numerous antibiotics, as well as other drugs used to treat blood pressure and diabetes, further challenges manufacturing at a time when both imports and exports have been limited.
To sustain patient access to care and prevent drug shortages, the Business Group supports:

- Requiring that public disclosure of manufacturer drug shortages reported by the Food and Drug Administration (FDA) attributable to COVID-19 include the name of the drug, its therapeutic category, and the reason for the shortage—to allow appropriate public/private strategies to address shortages in an expedited manner.

- Improving critical infrastructure through improved data sharing and requiring more accurate supply chain information. Empowering the FDA to require information to assess critical infrastructure, as well as manufacturing quality and capacity, would facilitate more accurate and timely supply chain monitoring and improve our ability to recognize shortage signals, particularly during the COVID-19 outbreak.

VI. Supporting Employees through Health Coverage Transitions

Business Group members are committed to providing affordable, comprehensive health coverage and other benefits to their employees. However, the unprecedented public health and economic conditions of COVID-19 require employers to look toward all types of health coverage—public and private—as critical potential supports for the working population. Robust health coverage options, whether offered through employers, the individual market, or governmental entities, will ensure that working families and employers recover from the COVID-19 pandemic as quickly as possible. To that end, we recommend the following:

- Financial support and regulatory flexibility to ensure a stable individual health insurance market and expand enrollment options.

- Financial support and regulatory flexibility to bolster state Medicaid programs and expand enrollment options, including consistent eligibility criteria and simplified enrollment processes.

- Amending the Internal Revenue Code to increase employers’ options when offering health reimbursement arrangement (HRA) funds to purchase individual market coverage. We recommend that employers have latitude to provide funds and assist employees with individual market enrollment without risk of liability under ERISA or the employer shared responsibility provisions of the Affordable Care Act.

Thank you for considering our recommendations. We would be happy to provide additional details and look forward to working with Congress to support employers and employees through the COVID-19 crisis. Please feel free to contact me to discuss (kelsay@businessgrouphealth.org).

Sincerely,

Ellen Kelsay
President & CEO