March 27, 2020

Amber Rivers
Acting Director - Office of Health Plan Standards and Compliance Assistance Department of Labor
200 Constitution Ave NW
Suite N-5653
Washington, DC 20210

Jeffrey Wu
Deputy Director for Policy
Center for Consumer Information and Insurance Oversight
Centers for Medicare and Medicaid Services
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Carol Weiser
Benefits Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Victoria Judson
Associate Chief Counsel (EEE)
Internal Revenue Service
Office of Chief Counsel 1111
Constitution Avenue, NW
Washington, DC 20224

Re: Request for Guidance Regarding the Families First Act, the CARES Act and Telehealth

Dear Ms. Rivers, Mr. Wu, Ms. Weiser and Ms. Judson:

I write on behalf of the American Benefits Council ("the Council") to provide recommendations on important guidance needed from the U.S. Department of Labor, the U.S. Department of Health and Human Services, and the U.S. Department of the Treasury (collectively, the "tri-agencies") regarding implementation of the Families First Coronavirus Response Act ("Families First Act") and the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

I would like to thank you for your efforts to date to address the pandemic, and look forward to working with you as the tri-agencies implement these statutory provisions and provide sub-regulatory guidance to group health plans and health insurance issuers in responding to the novel coronavirus (COVID-19) pandemic. In particular, we

greatly appreciate the time you and your staff took earlier this week to discuss the issues covered in this letter.

The Council is a Washington, D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's largest corporations and collectively either directly sponsor or administer health and retirement benefits for virtually all Americans covered by employer-sponsored plans.

In that regard, our members play a vital role in both providing access to necessary testing for and treatment of COVID-19 and mitigating the economic consequences of the pandemic for millions of Americans. In general, we believe that the provisions of the Families First Act and the CARES Act will provide important coverage for the testing for COVID-19 and an eventual vaccine for COVID-19. We are also fully supportive of the provision in the CARES Act which allows high deductible health plans to cover telehealth services without cost-sharing, for the plan years affected by this public health emergency.

However, as discussed on our call on March 24, for some of these new provisions, plans and employers need guidance to ensure that they are in compliance. In addition, further guidance is needed to support employers' efforts to expand telehealth coverage, in the interest of employees and the public health. Below we provide detail on the more pressing implementation questions. Of course, with the immediate effective date of some of these coverage provisions, we request that guidance be issued as soon as possible.

COVID-19 TESTING COVERAGE

On March 18, the president signed into law the Families First Act, and on March 27, the president signed into law the CARES Act. Section 6001 of the Families First Act requires that, during the public health emergency, group health plans cover, without cost-sharing, testing for COVID-19 and the items and services furnished during a provider visit (office, telehealth, urgent care and emergency room) that result in the order for or administration of the testing product to the extent those items and services relate to the order for or administration of the testing product or the evaluation of the individual's need for the testing product. Even before this requirement in the Families First Act, many employer-sponsored plans covered COVID-19 screening without cost-sharing. Notwithstanding these previous forward-leaning efforts, of course employers want to ensure they understand the scope of the new Families First Act requirement. As part of that process, a number of questions and implementation issues have arisen.

Specifically, the Council requests clarification and guidance related to the following:

Basis for No Cost-Share

Section 6001(a)(2) of the Families First Act provides that plans must cover, without cost-sharing, items and services furnished during provider visits "that result in an order for or administration of" COVID-19 testing, to the extent the item or service relates to the furnishing or administration of the product or the evaluation of the individual to determine the need for the test. The question that has arisen is whether the requirement to cover the office visit related to screening for COVID-19 only applies when a COVID-19 test is "order[ed] or administ[ered]" or whether it also applies if other methods are used to evaluate the patient and/or if a test ultimately is not ordered or administered. We request that the tri-agencies provide guidance clarifying the requirement, specifically whether a test must be ordered or administered for the no cost-share requirement to apply.

Setting of Care Requirements

Section 6001(a)(2) of the Families First Act requires coverage without cost sharing for items and services related to the administration or order of a COVID-19 test, whether provided in an office visit, telehealth visit, urgent care visit, or emergency room visit. We believe that the most natural reading of the statute requires coverage with no cost-sharing *if* the plan in question covers the underlying type of visit, particularly with respect to telehealth services and doesn't separately require that group health plans cover telehealth. That said, we request that the tri-agencies clarify that the requirement to cover testing-related items and services with no cost-share applies only to the extent the underlying plan covers benefits in that setting of care. We note that many Council members have been at the forefront of providing significant telehealth coverage during this public health emergency but we ask for confirmation here to fully understand the new legal requirements.

Out-of-Network Providers

Section 6001 of the Families First Act is silent regarding whether the no-cost-sharing requirement applies to services provided only in-network; or whether it also applies to services provided out-of-network. The CARES Act includes a provision (section 3202) which would prescribe the amount plans must pay for COVID-19 testing, and possibly related items and services, to both in-network and out-of-network providers, although the language is not clear if the prescribed reimbursement applies only to the test, or also to related items and services. While suggestive that no cost-sharing can be imposed with respect to out-of-network services, the CARES Act language is not entirely clear in this regard. We request that the tri-agencies clarify whether plans must provide COVID-19 testing, and the related items and services, without cost-sharing, on an out-of-network basis.

Scope of Section 3202 of the CARES Act

Another urgent implementation question that has arisen is whether section 3202 of the CARES Act which establishes an out-of-network "cash price" reimbursement for COVID-19 testing (as described in the bullet immediately above) applies not only to the COVID-19 test, but also to other related items and services, such as the office visit and whatever other item or service may be related to the COVID-19 "evaluation" referenced in section 6001(a) of the Families First Act. We request that the tri-agencies clarify whether the "cash price" payment requirement applies solely to the cash price of the test, or whether it applies to other related items and services, including evaluation (and whether, in that case, providers would be required to publicly post the cash prices for those items and services).

Summary of Benefits and Coverage (SBC)

Many employers are making (or contemplating making) changes to the health coverage they provide in response to COVID-19, including to come into compliance with the Families First Act and the CARES Act and to expand access to or reduce costs for telehealth services. At the same time, the law and regulations regarding SBCs require that plans, which make a material modification to the plan terms that would affect the content of the SBC mid-year, provide notice of the modification to enrollees not later than 60 days *prior to* the date on which the modification will be effective and update the SBC.

Due to the urgency of the pandemic (and the immediate effective date of the Families First Act), plans are concerned that they will not be able to comply with the 60-day advance notice requirement if they are seeking to implement changes immediately (such as eliminating copayments on telehealth services). We request that the tri-agencies adopt a non-enforcement safe harbor from this SBC requirement (to notify 60-days in advance and to update the SBC), so long as the changes at issue are benefit enhancements related to COVID-19 and the plan provides notice to participants of the changes as soon as practical. We request that the safe harbor apply to the current plan year and any plan year that begins before the end of the COVID-19 related public health emergency.

Medical Management Techniques

Section 6001(a) of the Families First Act provides that plans may not impose "prior authorization or other medical management requirements" with regard to COVID-19 testing and the related items and services. Due to concerns about the scarcity of tests, questions have been raised over whether this means that participants can request a screening under the plan, without cost-sharing, without regard to whether they have symptoms or other risk factors. Our understanding is that the health care provider would have the ability to make medical necessity determinations, in the normal course

and in accordance with clinical guidelines and their professional expertise, but that the plan would not be permitted to separately apply medical management requirements. We request that the tri-agencies clarify the requirement relating to the prohibition on imposing medical management requirements.

Effective Dates

Section 6001(a) of the Families First Act provides that plans must cover, without cost-sharing, certain items and services furnished during the emergency period "beginning on or after the date of enactment of the Act." Other provisions of the Families First Act are effective "not later than 15 days after the date of enactment." In addition, sections 3201, 3202, 3203 of the CARES Act do not specify an effective date, which we have interpreted as being effective on the date of enactment. All of this has led to confusion about the effective dates of section 6001(a) of the Families First Act and sections 3201, 3202, and 3203 of the CARES Act. We request that the tri-agencies confirm the effective dates of these provisions.

TELEHEALTH SERVICES

Many employers are making efforts to expand telehealth coverage during the COVID-19 crisis in order to help employees and their families practice social distancing and to protect the public health. The Council believes that the provision allowing HSA-eligible high-deductible health plans to cover telehealth services without cost-sharing under the CARES Act is an important step.

However, an additional issue remains for tri-agency consideration. In response to the pandemic, many employers wish to provide telehealth services to their employees who are not benefits eligible and employees who opted out of the employer's group health plan. In some instances, these employees have other coverage (for example, though a spouse's coverage or through a union plan), while in other instances, the employee may not have other coverage. A number of employers provide these benefits on a limited basis consistent with the current excepted benefits regulations. During this public health emergency, other employers, however, wish to provide more substantial telehealth coverage than may otherwise currently be considered an excepted benefit.

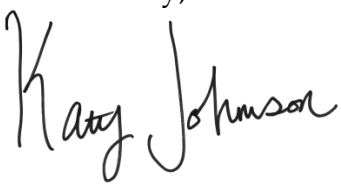
The Council requests that the tri-agencies take action to ensure that an employer's more robust offer of telehealth services does not result in a violation of the Affordable Care Act's market reforms to the extent the benefits provided give rise to an ongoing administrative scheme (*i.e.*, an ERISA plan) and provide significant benefits in the nature of medical care. The tri-agencies could accomplish this flexibility by adopting a non-enforcement policy that applies to the current plan year and any plan year that begins before the end of the COVID-19 related public health emergency, or by issuing additional excepted benefit guidance. Regardless of which approach the tri-agencies

adopt, the Council believes that expanding employers' flexibility to offer all employees more substantial telehealth benefits during the pandemic, regardless of whether the employee is enrolled in the employer's comprehensive medical plan, is essential to protect the employees' and the public health.

We commend you for your efforts to address the COVID-19 epidemic and understand the immense amount of work ahead. We greatly appreciate your attention to this request among the many other essential matters before you. We will continue to notify you of related areas where guidance is needed as we become aware.

As always, please contact us to let us know how we can best assist you in your important efforts. Thank you again.

Sincerely,



Katy Johnson
Senior Counsel, Health Policy