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EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

COVID-19 EMPLOYEE BENEFITS DEVELOPMENTS

The COVID-19 pandemic poses a number of challenges for employee benefit plans and their fiduciaries. The associated demand for medical care and financial strain on employees have led to the enactment of laws and the issuance of regulations and other guidance creating additional obligations for these plans, as well as making special plan features available to assist employers and employees in dealing with the crisis. This newsletter provides an overview of important employee benefits considerations and legal developments.

EMPLOYEE BENEFITS PROVISIONS OF THE AMERICAN RESCUE PLAN ACT OF 2021

On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021 ("ARPA"). Among other provisions, ARPA includes COBRA subsidies, assistance for multiemployer pension plans and pension funding relief for single-employer plans.

COBRA SUBSIDIES

ARPA includes a COBRA subsidy provision that applies April 1, 2021 and provides a 100% subsidy for the cost of COBRA coverage for up to six months for individuals (participants, spouses and dependents) who qualify for COBRA due to a reduction in hours or an involuntary termination of employment. Except for health care flexible spending accounts, all employer group health plans (including medical, dental and vision plans and employee assistance programs) appear to be covered by the subsidy. The employer offering the plan must pay COBRA premiums to the insurance carrier (or cover the cost of providing COBRA coverage under a self-insured plan), and can then take a payroll tax credit to recoup the cost of covering COBRA premiums or costs. An individual who becomes eligible for Medicare or most other group health coverage ceases to be eligible for the subsidy, and must notify the employer.

ARPA provides for an additional COBRA election opportunity for eligible individuals who either do not have a COBRA election in effect on April 1, 2021, or who had a COBRA election in effect previously, but discontinued COBRA before April 1, 2021. Employers were required to provide notices to eligible individuals and to provide notice between 45 days and 15 days before the premium assistance period ends for an assistance eligible individual (not including premium assistance that ends because the individual becomes eligible for other group health plan coverage or Medicare).

More information is available in our newsletters at https://www.hselaw.com/news-and-information/legalcurrents/2226-cobra-subsidy-provisions-in-the-american-rescue-plan-act-will-require-employer-action, https://www.hselaw.com/news-and-information/legalcurrents/2448-irs-issues-supplemental-guidance-on-american-rescue-plan-cobra-subsidy and https://www.hselaw.com/news-and-information/legalcurrents/2454-deadline-for-notice-of-expiration-of-premium-assistance-is-fast-approaching

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Multiemployer Pension Plans

ARPA's multiemployer plan provisions adjust a number of multiemployer plan funding requirements to give plans more time to absorb liabilities and improve funding status. ARPA also allows plans to "freeze" their status for a year with respect to designations of "green zone," "endangered," "critical" or "critical and declining" status for the first or second plan year beginning on or after March 1, 2020 (as elected by the plan) based on their status for the prior year, and adjusts certain requirements normally applicable as a result of critical or endangered status designations. In addition, the statute creates a special financial assistance program for troubled multiemployer plans.

Pension Funding Relief

Along with funding relief provisions specific to plans sponsored by community newspapers, ARPA includes funding changes for single-employer defined benefit plans generally. Those provisions extend the pension liability amortization period from seven to fifteen years (with this extension accompanied by a "fresh start" that disregards prior year shortfalls and recalculates the plan's funding status), and extend and enhance interest rate smoothing. Employers have flexibility about when to implement these changes. An employer can implement the amortization period and "fresh start" changes retroactively to the 2019 plan year or delay implementation to a later year through 2022. The interest rate changes take effect for the 2020 plan year but an employer can elect not to have the changes apply for years before 2022 (and can elect that delay for all purposes or only for purposes of benefit restrictions under Section 436 of the Internal Revenue Code).

CARES ACT IMPLICATIONS FOR EMPLOYEE BENEFIT PLANS

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), enacted on March 27, 2020, was the third piece of legislation passed in an attempt to address the economic impact of COVID-19. The CARES Act included a number of provisions affecting qualified retirement plans and IRAs, as well as group health plans. The provisions likely to be of the most interest to employers sponsoring qualified retirement plans and group health plans are outlined in this newsletter.

QUALIFIED RETIREMENT PLANS

In May 2020, the Internal Revenue Service ("IRS") released a set of frequently asked questions (available at the IRS website here) that provided additional clarity on a number of important CARES Act retirement plan provisions. The agency followed that informal guidance on June 19, 2020 with Notice 2020-50 (https://www.irs.gov/pub/irs-drop/n-20-50.pdf). The Notice expanded access to CARES Act distribution and plan loan relief and provided more details about other aspects of the CARES Act distribution and loan provisions. Subsequently, the IRS issued Notice 2020-51, providing instructions for administering the provisions allowing participants and beneficiaries in defined contribution plans to waive minimum distributions otherwise due. The IRS has also issued a new special tax notice (https://www.irs.gov/pub/irs-drop/n-20-62.pdf), which incorporates general updates related to distributions connected to emergencies and disasters.

"Coronavirus-Related Distributions"

Under the CARES Act, a "qualified individual" could withdraw up to $100,000 from that individual's 401(k) or another qualified plan or IRA in a "coronavirus-related distribution" ("CRD") that qualified for favorable tax and rollover treatment. In the case of 401(k), 403(b) and 457(b) plans, the CARES Act waived the usual statutory restrictions on in-service distributions, although any spousal consent rules relevant to a particular plan still applied. Distributions from defined benefit plans and money purchase pension plans could be made only if the usual spousal consent rules were satisfied (taking into account the IRS' modified notarization requirements) and in the case of defined benefit plans, only if otherwise legally permissible (e.g., to someone who had terminated employment or attained age 59½),[1] but could qualify for the special tax and rollover rules.[2] Plans were not required to allow CRDs,[3] but someone who took a distribution or withdrawal could claim the CRD tax benefits if the individual and the distribution met all the requirements, even if the plan making the payment had not offered any special distribution rights. For example, a terminated employee who was a "qualified individual" could take a distribution under a 401(k) plan's normal distribution rules, and claim the CRD benefits on his or her tax return. In addition, Notice 2020-50 stated that a qualified individual who had defaulted on a loan and had that defaulted loan amount offset from his or her account balance could claim that amount as a CRD, subject to the usual limits.[4]

The CRD rules applied to qualifying distributions made on or after January 1, 2020, and before December 31, 2020 (i.e., no later than December 30, 2020). Plan amendments were originally scheduled to be due at the end of the 2022 plan year (with governmental plans entitled to a later deadline), but the IRS has extended the deadline to December 31, 2025 (with governmental plans again entitled to extended deadlines).

"Qualified Individuals"

Under the CARES Act, a "qualified individual" was defined as:

- An individual who had been diagnosed with SARS-coV-2 or coronavirus disease 2019 (collectively, "COVID-19") by a test approved by the CDC (including a test authorized under the Federal Food, Drug, and Cosmetic Act);

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[1] The Consolidated Appropriations Act, 2021 retroactively allowed the authorization for special in-service withdrawals to apply to money purchase pension plans. The original statutory text had not included this rule.

[2] Sponsors of plans which are dual-qualified in Puerto Rico should bear in mind that the special distribution rules available in connection with the pandemic under Puerto Rico law overlap with but are not identical to U.S. law, and consult Puerto Rico counsel about permissible payment options and Puerto Rico tax implications.

[3] The IRS noted that plans allowing payment of benefits normally subject to the distribution restrictions of Section 401(k)(2)(B)(i), 403(b)(7)(A)(i), 403(b)(11) or 457(d)(1)(A) must treat similar payments similarly when it comes to deciding whether or not a payment is a CRD, and thus in counting (or not counting) payments towards the $100,000 limit.

[4] In contrast, the "deemed distribution" of a defaulted loan could NOT be treated as a CRD. Likewise, distributions or refunds of excess contributions, ESOP dividends paid in cash rather than being invested in the plan, automatic enrollment refunds under an EACA, the costs of current life insurance protection, prohibited allocations treated as deemed distributions under Section 409(p) of the Code and distributions for health and accident insurance premiums could not be treated as CRDs.

- An individual whose spouse or dependent had been diagnosed in such a manner with COVID-19; or
- An individual who experienced "adverse financial consequences" as a result of being quarantined, furloughed, laid off, having hours reduced, or being unable to work due to lack of child care due to COVID-19, or having to close or reduce the hours of a business the individual owns or operates due to COVID-19, or such other factors as determined by the Secretary of the Treasury or his delegate.

Notice 2020-50 expanded the definition of "qualified individual" to also include any individual who experienced adverse financial consequences as a result of:

- The individual having a reduction in pay (or self-employment income) due to COVID-19 or having a job offer rescinded or start date for a job delayed due to COVID-19;
- The individual's spouse or a member of the individual's household[5] being quarantined, being furloughed or laid off, or having work hours reduced due to COVID-19, being unable to work due to lack of childcare due to COVID-19, having a reduction in pay (or self-employment income) due to COVID-19, or having a job offer rescinded or start date for a job delayed due to COVID-19; or
- Closing or reducing hours of a business owned or operated by the individual's spouse or a member of the individual's household due to COVID-19.

Plan administrators could rely on the employee's certification that the employee met one of the above conditions in determining whether the employee was a qualified individual, in the absence of actual knowledge to the contrary. The IRS provided a model certification, which simply required the individual to certify that he or she met "at least one" of the listed qualifications. In keeping with this approach, we recommended that certifications be high-level and minimize any need to disclose medical information regarding the employee or the employee's spouse or dependent.

$100,000 Limit

The $100,000 cap on CRDs applied in the aggregate to all distributions to the qualified individual, but an employer was not required to enforce the limit with respect to any plans not maintained by the employer or a member of the employer's controlled group. For example, if an employer made a distribution of $100,000 from the employer's 401(k) plan, the employer had not violated any rules if the qualified individual also took payment from that individual's personal IRA or a plan sponsored by an unrelated employer. Alternatively, for example, if an employer made a distribution of $110,000 from the employer's 401(k) plan, then that plan would have a compliance failure. Of course, the individual can only claim the CRD tax benefits for up to $100,000, and may face additional adverse tax consequences if he/she obtained an otherwise-impermissible distribution in excess of the CRD limits.

Tax Treatment and Reporting

A CRD was exempt from the 10% early withdrawal penalty typically incurred for withdrawals before age 59½, and from the 25% penalty tax applicable to certain withdrawals from SIMPLE IRAs.[6] The IRS has said

[5] For purposes of the additional situations included in the definition of "qualified individual," a "member of the individual's household" is someone who shares the individual's principal residence.

[6] A CRD also will not be considered a change in a series of substantially equal periodic payments for purposes of the exemption from the 10% penalty tax available to someone receiving such a series of payments.

that plans should report CRDs on Form 1099-R, using either code 2 (early distribution, exception applies) or code 1 (early distribution, no known exception) in box 7.[7] However, regardless of how the payor reports the distribution, a qualified individual can claim the CRD tax benefits if the distribution meets the requirements.

Ordinary income tax does apply (subject, of course, to any special tax treatment available for after-tax contributions, Roth contributions and so forth), but the qualified individual can spread the taxes over three years if he or she so desires, paying 1/3 for 2020, 1/3 for 2021 and 1/3 for 2022. If the qualified individual dies during the three-year period, the remaining untaxed amount must be included in income in the year of the individual's death.

Qualified individuals who receive CRDs should report CRDs on their income tax returns for 2020 (and, if applicable, 2021 and 2022). They will also need to file Form 8915-E (8915-F, for 2021 or later years) with their returns (or on its own, if the individual is not otherwise filing a return) to claim the tax benefits and calculate the amount of the distribution includible in income for the year.

Recontribution

In addition, if the CRD otherwise qualifies as an "eligible rollover distribution,"[8] the qualified individual can, at any time during the three-year period beginning on the day after the date the CRD was received, make one or more contributions in an aggregate amount not to exceed the amount of the distribution to an eligible retirement plan (i.e., a qualified plan, 403(b) plan, governmental 457(b) plan or IRA). These contributions will be treated as rollover contributions (or direct trustee-to-trustee transfers, if an IRA is the recipient of the contribution)[9] for tax purposes. An individual who does this would then file Form 8915-E (8915-F for 2021 and later years) and amended tax returns as needed to report the repayment and claim any refunds necessary due to inclusion of the repaid distribution in prior years' taxable income. If an individual recontributes part but not all of the CRD and is using the three-year income-inclusion rule, the individual has flexibility as to the year(s) to which the recontribution will be applied.

This recontribution option is not available to beneficiaries (other than surviving spouses) of deceased participants and IRA owners.

Notice 2020-50 says that, "In general, it is anticipated that eligible retirement plans will accept recontributions of coronavirus-related distributions, which are to be treated as rollover contributions. However, eligible retirement plans generally are not required to accept rollover contributions. For example, if a plan does not accept any rollover contributions, the plan is not required to change its terms or procedures to accept repayments." Since the IRS remarked on plans that do not accept any rollovers as an "example" of not being required to change terms or procedures and acknowledged that plans normally are not required to accept rollovers, it seems reasonable to expect that a plan can apply its usual processes and restrictions to these contributions. For instance, if a participant has since terminated employment and the

[7] If another appropriate code applies, that code can be used instead.
[8] Notice 2020-50 says that a CRD is not treated as a hardship withdrawal for this purpose. Therefore, the normal exclusion of hardship withdrawals from classification as "eligible rollover distributions" will not apply to a CRD.
[9] A CRD recontribution will not be treated as a rollover contribution for purposes of the one-rollover-per-year limitation under Section 408(d)(3)(B).

plan does not accept rollovers from former employees, the IRS has not said the plan must nonetheless accept a CARES Act rollover from this terminated participant.

A plan administrator can rely on the participant's certification of "qualified individual" status for purposes of determining whether a repayment is in fact a CRD eligible for recontribution, absent actual knowledge to the contrary. Similarly, the usual protection against plan disqualification is available in the event a recontribution later is discovered to be invalid, if the plan administrator reasonably determined at the time of the recontribution that the recontribution was permissible and promptly pays out the amount of the invalid recontribution (plus investment earnings) upon learning of the invalidity.

Exemption from Rollover Notices and Withholding Rules

Although CRDs are eligible for this three-year rollover treatment, they are not subject to the usual rules for payment of eligible rollover distributions at the time payment is made. This means that individuals do not need to be offered direct rollover rights and notices, and that the usual requirement that 20% of the payment be withheld for taxes does not apply. The voluntary withholding requirements under Section 3405(b) of the Code and Section 35.3405-1T of the Treasury Regulations apply instead.

Effect on Section 409A Plans

Although a CRD is not treated as a hardship withdrawal for purposes of determining whether it is eligible to be recontributed under the three-year rollover rules described above, it could be treated as a hardship withdrawal for purposes of allowing cancellation (but not postponement or other delay) of a deferral election under a plan subject to Section 409A of the Code.

Participant Loans

Normally, the Internal Revenue Code limits loans to plan participants to the lesser of $50,000 (reduced by the excess of the highest outstanding loan balance during the one-year period ending on the day before the date of the loan over the outstanding loan balance on the date of the loan) or 50% of the participant's vested account balance as a loan. Under the CARES Act, for loans issued from March 27, 2020 through September 22, 2020, this amount was doubled for qualified individuals (as defined in the previous section for purposes of CRDs) to the lesser of (a) $100,000 (reduced under the usual rule for prior outstanding loan balance amounts) or (b) 100% of the participant's vested account.

In Employee Benefits Security Administration Disaster Relief Notice 2020-01, the Department of Labor ("DOL") confirmed that it would not consider a loan issued in accordance with the CARES Act to be in violation of the DOL's regulations regarding loan limits, even though the CARES Act did not specifically address those rules. Accordingly, plan sponsors could, if they wanted to do so, expand participant loan access as permitted by the CARES Act without running afoul of the DOL regulations.

Additionally, if a qualified individual had an outstanding loan on or after March 27, 2020, any due date that fell on or after March 27, 2020 and no later than December 31, 2020 could be delayed by one year.[10] The loan's repayment schedule must be appropriately adjusted to reflect the delay in payment and any interest accrued during the delay, and the end of the loan's term will be correspondingly extended. Since repayment suspension was permitted only for payments due through December, loan repayments had to resume in January 2021. IRS Notice 2020-50 provided a safe harbor method, pursuant to which the outstanding loan amount (taking into account the loan repayments not made during the suspension period and accrued interest) could be reamortized across the remaining term of the loan plus up to one year, starting in January 2021. Use of the safe harbor method was not mandatory, however. Notice 2020-50 also allowed plans to use other reasonable methods.

As was the case for CRDs, these loan changes were optional. Employers did not have to allow employees this expanded access, nor did they need to allow loan repayment suspensions. And as in the case of CRDs, plan amendments reflecting these changes were originally going to be due by the end of the 2022 plan year (with governmental plans entitled to a later deadline), but the IRS has extended the deadline to December 31, 2025 (with governmental plans entitled to a later deadline).

Required Minimum Distributions

Normally, qualified plans and IRAs must make "required minimum distributions" to participants and IRA owners who have attained a certain age (currently age 72, or age 70½ for individuals who had attained age 70½ prior to 2020),[11] as well as to beneficiaries of deceased participants. That requirement did not apply to IRAs and defined contribution plans for 2020, although defined benefit plans had to make payment as usual. In addition, individuals who had not yet taken their 2019 distributions from an IRA or defined contribution plan by the end of 2019 and who were due to receive those payments by April 1, 2020 did not need to take those distributions. Finally, beneficiaries who normally would have been required to complete payment from an IRA or defined contribution plan by the end of the fifth year after the participant or IRA owner's death can calculate that five-year deadline by disregarding 2020.[12]

The IRS said that employers had to continue to allow participants and beneficiaries to exercise existing rights to receive or defer payment, so employees and beneficiaries remained free to take payment if they preferred to do so. Employers had to work with their recordkeepers to decide whether to process payment as usual unless the participant or beneficiary requested that payment not be made, or whether to hold off on making payment unless requested to do so. The IRS also said that an employer could apply the same approach to making payment (or not) to installment payments that included but were not limited to

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[10] EBSA Notice 2020-01 confirmed that this suspension also is permissible notwithstanding the normal regulatory rules on loan repayments. However, plans which are dual-qualified in Puerto Rico should bear in mind that Puerto Rico law does not provide for a similar exception.

[11] IRA owners are subject to required minimum distributions regardless of employment status. Qualified plans, however, do not need to start required minimum distributions until a participant has both attained the requisite age and terminated employment, unless the individual is considered a "5% owner" of the business.

[12] Notice 2020-51 explained that if a participant or beneficiary died in 2020, the five-year or ten-year period (as applicable) is not extended.

required minimum distribution amounts, rather than doing so only for amounts that would otherwise have been required minimum distributions.[13]

Distributions that would otherwise have been required minimum distributions were not supposed to be subjected by the paying plan to the tax withholding rules applicable to rollover-eligible payments. However, the IRS gave employers flexibility to choose to offer rollover opportunities for these payments, as well as for other 2020 installment payments that included required minimum distributions waived by the CARES Act and would normally have been ineligible for rollover because they constituted part of a series of substantially equal periodic payments. The Notice also extended the normal 60-day rollover deadline for payments of these types.[14]

Amendments reflecting the RMD changes were originally going to be due by the end of the 2022 plan year (with governmental plans entitled to a later deadline), but the IRS has extended the deadline to December 31, 2025 (with governmental plans entitled to a later deadline). The IRS has provided a model amendment. More information is available in our LEGALcurrents here.

Pension Plan Funding Relief

Minimum required contributions for single-employer defined benefit plans that would normally have been due in 2020 were extended until January 1, 2021. The delayed contributions incurred interest between the original due date and the date the contributions were made. (In IRS Notice 2020-82, the IRS stated that contributions made on January 4, 2021 (the first business day of 2021) would be treated as made by January 1, 2021, although interest had to be calculated using the actual payment date.) The Pension Benefit Guaranty Corporation ("PBGC") had originally announced that it would not allow an employer that opted to delay contributions to take those contributions into account when calculating its variable-rate PBGC premiums, unless the delayed contributions were made by the time the premium payment was filed. However, the PBGC reversed that position on September 21, 2020, giving employers more flexibility. IRS Notice 2020-61 provides guidance on the Internal Revenue Code implications, and is available at https://www.irs.gov/pub/irs-drop/n-20-61.pdf; Notice 2020-82 is available at https://www.irs.gov/pub/irs-drop/n-20-82.pdf). PBGC guidance is posted at https://www.pbgc.gov/prac/single-employer-plan-sponsors-and-administrators-questions-and-answers; the update to the premium calculation rule was announced in a press release available at https://www.pbgc.gov/news/press/releases/pr20-04.

Furthermore, an employer was able to opt to calculate its plan's funded status for purposes of Section 436 distribution restrictions based on the plan's 2019 valuation. IRS Notice 2020-61 also provides more details on this provision of the CARES Act.

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[13] The IRS has said that stopping a series of substantially equal periodic payments in connection with the CARES Act waiver will not qualify for exemption from the Section 72(t) penalty tax, but that generally should not be an issue for individuals affected by the CARES Act waiver, given the ages involved.

[14] This extended deadline is also available for amounts which would have been required minimum distribution payments if not for the change in age from age 70 ½ to age 72 under the SECURE Act. Similar relief is offered for the repayment of waived required minimum distribution IRA payments to the distributing IRA.

In addition, the CARES Act expanded the definition of "cooperative and small employer charity" pension plans to include charitable employers whose primary exempt purpose is providing services with respect to mothers and children. This amendment applies to plan years beginning after December 31, 2018.

As discussed above, the American Rescue Plan Act of 2021 subsequently approved more comprehensive pension funding relief.

HEALTH AND WELFARE PLANS

The CARES Act added some additional coverage requirements to those imposed by the Families First Coronavirus Response Act (see our LEGALcurrents here) and eased some restrictions with the goal of facilitating access to care. Subsequent regulatory and legislative action have since provided further relief.

COVID-19 Testing and Preventive Care

As part of the Families First Coronavirus Response Act, Congress required employer-sponsored group health plans to provide COVID-19 diagnostic testing with no cost-sharing that has been approved by the Food and Drug Administration ("FDA"). In addition, plans must cover office visits with no cost-sharing if the office visit leads to the order of or administration of a COVID-19 test. Prior authorization and other medical management requirements cannot be applied. The CARES Act expanded testing, requiring group health plans and health insurance issuers to cover, without cost-sharing to the participant, COVID-19 testing:

- (1) where the test developer has requested or intends to request emergency use authorization;
- (2) developed in and authorized by a State that has notified the U.S. Department of Health and Human Services ("HHS"); and
- (3) any other test that HHS determines appropriate.

The CARES Act regulates reimbursement rates from group health plans and health insurers for providers of COVID-19 testing. If there has been a negotiated rate, group health plans are required to cover such testing at the in-network provider negotiated price throughout the emergency period. If the group health plan has not negotiated a rate with a provider, the amount will be equal to the cash price as listed by the provider on a public internet website. (Providers are required to publish cash prices on a public interest website.) Group health plans are also permitted to negotiate lower prices with the providers.

Under the CARES Act, group health plans and insurance issuers offering group or individual health insurance are required to cover any qualifying coronavirus preventive services, without cost sharing to the participant. A qualifying coronavirus preventive service is an item, service, or immunization that is intended to prevent or mitigate coronavirus disease that is

- (1) an evidence-based item or service with an "A" or "B" rating from the US Preventive Services Task Force ("USPSTF"), or
- (2) an immunization with a recommendation from CDC.

Currently under the Affordable Care Act, the law permits a plan to delay covering certain preventive services or medications until the plan year that begins one year after an item or service receives an A or B recommendation from the USPSTF. The CARES Act accelerated the timeframe for the plan to cover such

services or medications, requiring coverage with no-cost sharing 15 days after a recommendation is made by the USPSTF or CDC.

High Deductible Plans and Telehealth Services

Under the CARES Act, a health savings account-compatible high deductible health plan ("HDHP") is permitted to cover all telehealth services, including services beyond COVID-19-related services, before a participant has satisfied the plan deductible, without causing the plan to lose its status as a health savings account-compatible high deductible health plan. Subsequent IRS guidance (see our LEGALcurrents here) clarifies that this rule is effective with respect to services provided on or after January 1, 2020 and for plan years beginning on or before December 31, 2021. Employers with group health plans will need to decide whether to expand telehealth to provide all services prior to the deductible, including for enrollees in the qualified HDHP plan, and this will require a plan amendment.

Over-The-Counter Medical Products as Qualified Medical Expenses

Health flexible spending accounts ("HFSAs") and health reimbursement arrangements ("HRAs") may now be used to pay for over the counter medicines and drugs even without a prescription. Additionally, menstrual care products are now treated as a qualified medical expense which can be paid for using an HFSA and HRA. Employers are not required to allow their HFSA and HRAs to pay for these expenses, but will need to amend their plans to allow for the change should they choose to implement it.

In addition, the CARES Act allows health savings accounts ("HSAs") to pay, on a tax-free basis, for over-the-counter medicines and drugs (even without a prescription) and menstrual care products. No employer action is required to implement this HSA rule, as it is up to the employee to determine proper tax treatment of HSA distributions.

These changes apply to amounts paid after December 31, 2019.

DEADLINE EXTENSIONS

Previously, the DOL had the authority to extend Employee Retirement Income Security Act ("ERISA") related deadlines for one year during a Presidentially declared disaster or a terroristic or military action. The CARES Act expanded the DOL's authority by including public health emergencies declared by the Secretary of Health and Human Services under Section 319 of the Public Health Service Act.

In 2020, the DOL took advantage of this authority to extend a number of deadlines relating to participants, beneficiaries and claimants as well as deadlines for plan communications. The Department also announced modified fiduciary enforcement policies in the same set of guidance. More information about the extensions for participants, beneficiaries and claimants as well as the deadline for a plan to send a COBRA notice is available in our LEGALcurrents here. Details on the 2020 general extension for plan communications and the Department's modified fiduciary enforcement policies for fiduciaries acting diligently and in good faith are available in our LEGALcurrents here.

On February 26, 2021, two days before the one-year expiration date of the original deadline extension, the Department of Labor issued updated guidance, with the approval of the Department of the Treasury and the Department of Health and Human Services for matters within those departments' jurisdiction. The new

Disaster Relief Notice 2021-01 states that for purposes of calculating deadlines, the period until 60 days after the announced end of the pandemic national emergency will be disregarded, except that the disregarded period for an individual's or plan's specific deadlines may not extend for more than a year from the person's or plan's original deadline.

The Notice also continues the Department's enforcement relief for fiduciaries who act diligently and in good faith but miss deadlines due to the pandemic. As in the original guidance, fiduciaries are expected to make reasonable efforts to provide timely benefits, and the new Notice indicates that fiduciaries should consider the need to engage in affirmative outreach to individuals who will be negatively affected by the end of the deadline extension. Nonetheless, the Department acknowledges that full and timely compliance with ERISA may not always be possible and intends to focus on compliance assistance and provide appropriate grace period. More details are available in our LEGALcurrents here.

In terms of IRS deadlines, Notice 2022-45 made the extension available for provisions of the CARES Act relating to coronavirus-related distributions and plan loan relief, as well as with respect to qualified disaster distributions permitted by plans under the Taxpayer Certainty and Disaster Tax Relief Act of 2020. Amendments for qualified plans, 403(b) plans and IRAs will now be due December 31, 2025. Governmental plans have separate deadlines. The IRS has not addressed amendment rules for non-governmental 457(b) plans affected by the required minimum distribution changes, so those plans should consult counsel about their obligations.

The PBGC's disaster relief policy is tied to the IRS' extension authority, and therefore the PBGC aligned itself with IRS Notice 2020-23 by providing for the extension of a number of PBGC deadlines until July 15, 2020 as explained in this PBGC press release. Affected deadlines included premium payment deadlines but excluded certain deadlines considered to involve risks to plans and the PBGC, such as the deadlines for specified reportable events or for reporting large unpaid contributions.

SECTION 125/FSA RELIEF

The IRS issued guidance allowing additional flexibility for changing elections under Section 125 plans (often referred to as "cafeteria" plans, "flex" plans, or "flexible benefits" plans). The guidance also allowed additional time for "spending down" health care and dependent care flexible spending account balances and provided additional flexibility on some other flexible spending account rules. More information is available in our LEGALcurrents here. In addition, the Consolidated Appropriations Act, 2021 provided temporary relief regarding health care and dependent care flexible spending accounts ("FSAs"). Employers are not required to take advantage of the relief, but can do so if they wish. More information is available in our LEGALcurrents here.

OTHER EMPLOYEE BENEFITS CONSIDERATIONS

In addition to implementing the CARES Act provisions discussed above (to the extent desired, in the case of optional provisions), making updates as appropriate to Section 125 plan and flexible spending account rules, and identifying any adjustments to compliance deadlines, plan sponsors and fiduciaries should be mindful of the other implications of the pandemic for their benefit plans, such as:

Participant Payment Access

Participants facing financial stress may be seeking access to their retirement savings, but not have been able to qualify for a CARES Act loan or CRD in 2020, or be facing financial challenges in 2021 now that those provisions have expired. In some cases, access to retirement savings may be available under a plan's normal rules. For example, if plan loans are permitted, a participant can borrow under the usual rules and limits. Likewise, most defined contribution plans allow for payment at any time for individuals who have terminated employment, and some defined benefit plans do as well. Defined contribution plans often allow in-service payments to individuals who have reached a specified age (usually age 59½, the normal statutory minimum age for access to elective deferrals, qualified matching and nonelective contributions, or money purchase pension benefits), and may make certain types of contributions (most frequently rollover contributions and after-tax contributions) available without preconditions. Some defined benefit plans also offer in-service payment options to those who meet minimum age requirements.

If a plan allows for hardship withdrawals, individuals may be able to qualify if their financial need involves an approved hardship event under their plan. Most plans use the IRS' list of qualifying hardship events. This list includes common pandemic financial emergencies such as medical expenses, funeral expenses and the need to prevent eviction from or foreclosure on the participant's principal residence as qualifying hardships. Many plans also have now added a new hardship event authorized by the IRS in its regulations finalized in 2019, which permits a hardship withdrawal for individuals who experience "expenses and losses (including loss of income)" due to a disaster declared by the Federal Emergency Management Agency ("FEMA"), provided that "the employee's principal residence or principal place of employment at the time of the disaster was located in an area designated by FEMA for individual assistance with respect to the disaster."[15] Since many states were designated as disaster areas approved for crisis counseling (a form of individual assistance) as a result of the pandemic, individuals who have experienced expenses and losses as a result of the pandemic may qualify for a hardship withdrawal even if they do not fit the specific "qualified individual" definition necessary for a CRD, or if a CRD is unavailable (e.g., because the employer has opted not to offer this feature, or because the individual has already withdrawn $100,000). The Consolidated Appropriations Act, 2021 also enacted provisions similar to those for CARES Act loans and CRDs for individuals affected by non-COVID disasters in 2020, subject to specified restrictions and deadlines.

Employers whose defined contribution plans (excluding money purchase pension plans) include employer money other than qualified nonelective, qualified matching and safe harbor contributions may also opt to allow more expansive in-service access than usual for this money on a temporary basis. However, any decision to add a feature of this sort should be discussed with counsel to be sure the new feature is designed to comply with statutory restrictions on plan payments and to satisfy all other compliance requirements. Employers should also coordinate with their recordkeepers to be sure any new feature is administrable at a reasonable cost. An optional plan change of this sort likely will require an amendment before the end of the plan year in which it is implemented, unless the IRS grants administrative relief from the usual amendment deadlines. The CARES Act extended deadline will not apply.

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[15] This situation is not an approved hardship event under Puerto Rico law.

Of course, regardless of the distribution event, a plan that is subject to spousal consent requirements must be sure that proper spousal consent is obtained before making payment. Ongoing social distancing recommendations may make obtaining notarization more difficult. The IRS originally issued Notice 2020-42 to allow participants and beneficiaries making elections that require notarization (such as distribution requests for which spousal consent is required) to use remote notarization when permitted by state law or remote witnessing by a plan representative during 2020, if certain safeguards were met, and subsequently extended that relief through June 30, 2021 in Notice 2021-03[16]. Notice 2021-40 then extended the relief further, until June 30, 2022. The IRS is considering whether to allow remote notarization and witnessing on a permanent basis, and will accept comments on the issue until September 30, 2021. Nonetheless, plans need to bear in mind that not all states allow remote notarization. For example, the temporary pandemic-related authorization to use remote notarization in New York has expired.

On a final note with respect to distribution/withdrawal features, some recordkeepers waived distribution, loan and withdrawal fees for specified timeframes during the pandemic for some or all transactions. Fiduciaries should be aware of their obligation to issue updated fee disclosures as appropriate.

Plan Investment Oversight

The pandemic roiled financial markets worldwide, leading to significant losses in asset value and disrupting market liquidity. While the situation stabilized and then improved dramatically, with markets regaining liquidity and lost value, plan fiduciaries should keep in touch with their investment professionals regarding:

- The continued appropriateness of investment line-ups for participant-directed defined contribution plans
- Any recommendations for portfolio adjustment or rebalancing for fiduciary-managed plan assets
- Maintenance of adequate liquidity for the plan as a whole and with respect to specific investments
- Other actions recommended or insights provided by the investment professional

Plan fiduciaries who are concerned about their ability to meet their fiduciary responsibilities due to furloughs, illness, the press of other demands related to the pandemic, or other reasons may want to consider engaging an investment professional to take responsibility for investment oversight. This type of arrangement is often referred to as a "3(38)" investment management arrangement, in reference to Section 3(38) of ERISA, which sets forth the requirements an investment manager must meet in order to exercise discretionary investment authority as a plan investment manager. Many investment consultants offer both advisory arrangements (often called "3(21)" arrangements) and discretionary 3(38) arrangements. A plan fiduciary interested in retaining a new consultant during the crisis or increasing the responsibilities of an existing consultant to convert the relationship to a 3(38) relationship must, as always, act prudently and in the best interests of plan participants in selecting and monitoring the consultant, and must ensure that total compensation is reasonable for the services provided.

[16] See our LEGALcurrents here for details.

Benefit Reduction

Some employers reduced or eliminated plan contributions or benefit accruals, or are considering doing so. While in most cases it is permissible to make this type of change on a prospective basis, employers should consult counsel to be sure they understand any restrictions that may apply, whether a plan amendment is required and when such an amendment is due, and whether advance notice is required or advisable. For example, defined benefit plans and money purchase plans require a 45-day notice in most cases before future benefits can be reduced or stopped (a shorter notice period is available in some cases).

"Safe harbor" 401(k) and 403(b) plans are also subject to special notice and amendment restrictions. In Notice 2020-52, the IRS softened some of those restrictions temporarily. The Notice clarified that suspending or reducing contributions only for highly compensated employees does not cause a plan to lose safe harbor status, though it does require that affected highly compensated employees receive notice of the change and the opportunity to change their contribution elections. The Notice also allowed employers to give up safe harbor status and adopt an amendment reducing or suspending safe harbor contributions for all employees without requiring employers who did not reserve the right to do so in their annual safe harbor notices to demonstrate that the business was operating at an economic loss. To qualify for this relief, the amendment must have been adopted between March 13, 2020 and August 31, 2020.[17] Finally, employers that adopted such an amendment to reduce or suspend *nonelective* safe harbor contributions did not need to provide 30 days' advance notice of the reduction or suspension, so long as notice was provided by August 31, 2020 and the amendment itself was adopted by the effective date of the reduction or suspension.

Employers should in any event be mindful of the potential impact of any changes on non-discrimination testing and plan limits, such as the possible need to pro-rate the Section 401(a)(17) compensation limit. Employers with unionized workforces should make sure to discuss their collective bargaining obligations with labor counsel.

Partial Termination Concerns

If an employer significantly reduces its workforce, a plan may experience a "partial termination," requiring "affected participants" to become fully vested. While the existence of a partial termination ultimately depends on the facts and circumstances, the IRS takes the position that a 20% "turnover rate" (i.e., a 20% or greater reduction in plan participation) generally is considered "significant" enough to cause a partial termination. The IRS also has ruled that the turnover rate must be determined by dividing (i) the number of participating employees (this includes everyone eligible, whether actually contributing or not) who incurred an employer-initiated severance from employment (i.e., involuntary terminations other than death, disability, or retirement (on or after normal retirement age) during the partial termination measuring period by (ii) the sum of all participating employees at the beginning of that period and those individuals who became participating employees during that period.

In most cases, the turnover rate is calculated based on the plan year, absent a "related" series of terminations spread across multiple years that require aggregation. With this in mind, employees who are temporarily

[17] Normal prohibitions on reduction of accrued benefits required that the amendment be adopted no later than the effective date of the reduction or suspension, although the IRS did not address those requirements.

laid off or furloughed during the year but actively employed at the start and end of the year generally will not adversely affect the calculation. The IRS confirmed as much in Q&A 15 of its "Coronavirus-related relief for retirement plans and IRAs questions and answers" website (https://www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers), explaining that, "Subject to the facts and circumstances of each case, participating employees generally are not treated as having an employer-initiated severance from employment for purposes of calculating the turnover rate used to help determine whether a partial termination has occurred during an applicable period, if they're rehired by the end of that period. That means participating employees terminated due to the COVID-19 pandemic and rehired by the end of 2020 generally would not be treated as having an employer-initiated severance from employment for purposes of determining whether a partial termination of the retirement plan occurred during the 2020 plan year."

Similarly, an employee who is furloughed but still being credited with vesting service and otherwise treated as employed may be able to be counted as still active; the employer should review its particular situation with counsel in the absence of specific IRS guidance.

Under the Consolidated Appropriations Act, 2021, for plan years that include the period beginning on March 13, 2020 and ending on March 31, 2021 (i.e., 2020 and 2021, for calendar year plans), a plan will not be considered to have experienced a partial termination if the number of active participants covered by the plan on March 31, 2021 was at least 80 percent of the number of active participants covered by the plan on March 13, 2020. In new guidance posted to its website on April 27, 2021, the IRS clarified a number of issues related to this partial termination relief, including:

- Allowing employers to use a reasonable, good faith interpretation of the term "active participant covered by the plan," applied in a consistent manner, when determining the number of active participants covered by a plan on the dates in question (the IRS did not address the issue, but presumably, in keeping with the normal rules for counting plan participants for partial termination purposes, a good faith definition of "active participants" should include individuals eligible to participate in a 401(k) or 403(b) plan, even if they have not chosen to contribute),
- Confirming the treatment of partial plan years, with the guidance stating that a plan year is covered by the relief if any part of it falls within the March 13, 2020 to March 31, 2021 period,
- Which participants are included when calculating the 80 percent figure (notably, that a person does not need to have been a participant on both March 13, 2020 and March 31, 2021 to be counted), and
- That the statutory relief is not limited to reductions related to COVID-19.

More details about the general rules for partial termination calculations are available in our LEGALcurrents here. The IRS questions and answers are available at https://www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers#partial-termination.

Participant Education

Plan fiduciaries are not obligated to provide participants with investment or financial education or advice, and must meet various legal requirements if they choose to do so. However, many employers have engaged

in additional outreach regarding physical, mental and financial wellness as a response to employee stress relating to the pandemic. For example, employers want to make sure their employees know about physical and mental health care resources available under their group health and employee assistance programs, and may want to highlight financial wellness resources available through the employee assistance program, the 401(k) plan recordkeeper or other vendors. Plan fiduciaries should be sure communications are designed to meet applicable legal rules as well as to accomplish the employer's communications goals, and should review any materials provided to participants by recordkeepers, claims administrators or other vendors.

Pension Plan Concerns

The CARES Act provided some additional flexibility for plan funding and the ARPA made more comprehensive changes. Regardless of the statutory minimums, however, plan fiduciaries still need to ensure that funding levels overall and liquidity levels in particular are adequate for the plan to pay benefits. Plan fiduciaries also need to monitor the plan's and employer's situations to identify any circumstances that might require a reportable event or Section 4062(e) filing.[18] For example, if the employer goes into default on a loan with an outstanding balance of $10,000,000 or more (even if the lender waives the default), a filing generally will be required. Some reportable events, including the loan default event, were *not* eligible for the PBGC's disaster relief extension.

Employee Leave-Donation Programs

In Notice 2020-46, the IRS provided guidance on leave-based donation programs for donations directed to charitable organization providing pandemic relief, and extended the program through 2021 in Notice 2021-42. Under these programs, an employer can allow employees to elect to forego time off work and have a cash donation in lieu of leave made to charitable organizations providing pandemic relief, without incurring tax on the value of the donated leave. The donated amount is not deductible by the employee, but can be deducted by the employer under the charitable or business deduction rules if the employer meets the usual qualifications. Donations must have been paid before January 1, 2022, and must have been paid to a Code Section 170(c) charitable organization providing pandemic relief in a state, the District of Columbia, or one of the five U.S. territories covered by the disaster declaration.

The IRS has also issued frequently asked questions confirming that the usual leave-sharing rules set forth under IRS Notice 2006-59 apply to donations of leave by an employee to another employee affected by COVID-19 under a leave-sharing program that meets Notice 2006-59's requirements (https://www.irs.gov/newsroom/leave-sharing-plans-frequently-asked-questions).

If you have any questions regarding this LEGALcurrents, please contact any member of the Employee Benefits and Executive Compensation group at 585.232.6500, 716.853.1616, or visit www.hselaw.com.

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[18] See our newsletter at https://hselaw.com/files/Single-Employer_Defined_Benefit_Plans_October_2015.pdf.

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