

## Updates

December 09, 2020

### Employee Benefit Plan Developments—2020 Year in Review

Employee benefits professionals have faced many challenges in 2020. We have seen remarkable changes to state and local requirements, an onslaught of new benefits legislation and governmental policies, shifting reporting and compliance requirements, and an avalanche of guidance aimed at helping plan sponsors cope with the COVID-19 pandemic. While businesses have adapted in real time, the impending end of this hectic year seems an appropriate time to look back on some of these developments and consider their longer-term effects. The following is not a comprehensive review of every impactful change, but instead a highlight of several key developments that employers and other plan sponsors should consider as 2021 approaches.

For convenience, we added identifiers in headings to denote the employee benefit plan focus of the section as Retirement, Health and Welfare, or Nonqualified, or all such plans.

#### **DOL Notice and Access Safe Harbor (Retirement)**

The U.S. Department of Labor (DOL) issued final regulations effective July 27, 2020, establishing a new "notice and access" safe harbor for electronic distribution of ERISA-required documents. *See* [85 Fed. Reg. 31,884](#) (May 27, 2020). The notice and access safe harbor is available only for retirement plan documents. For more information on the requirements of this new rule, review our prior [update](#).

#### **CARES Act and COVID-19 Relief and Other Considerations**

Congress and various federal agencies issued COVID-19-related relief in the [Coronavirus Aid, Relief, and Economic Security Act](#) (the CARES Act) (Pub. L. No. 116-136 (March 27, 2020)) and subsequent guidance. Much of the relief related to employee benefit plans will expire at the end of 2020. It is possible that some relief may be extended as the pandemic continues to spread.

- *Coronavirus-related Plan Distributions (Retirement)*  
Eligible retirement plans (such as 401(k) and 403(b) plans, and IRAs) may offer "coronavirus-related distributions" (CRDs) to "affected individuals" from January 1, 2020, through December 30, 2020. CRDs can be offered in an amount up to \$100,000 and with favorable income inclusion and repayment options. *See* CARES Act § 2202(a). Additional Internal Revenue Service (IRS) guidance is available in [Notice 2020-50](#) (providing procedures for individuals who take coronavirus-related distributions from retirement plans) and [Notice 2020-62](#) (modifying safe harbor notice explanations).
- *Plan Loan Repayment Suspensions (Retirement)*  
An affected individual who has an outstanding loan from a qualified retirement plan on or after the date that the CARES Act was enacted (March 27, 2020) may request a one-year delay of loan payments that are due on or before December 31, 2020. *See* CARES Act § 2202(b)(2). The terms of the affected individual's plan loan must be adjusted to reflect the delayed payment due date, plus interest. Qualified retirement plans must allow such delay upon request by an affected individual. Additional IRS guidance is available in [Notice 2020-50](#).
- *Required Minimum Distributions Restart in 2021 (Retirement)*  
The CARES Act temporarily suspended required minimum distributions (RMDs) from certain defined contribution retirement plans and IRAs that were due to be made in 2020. *See* CARES Act § 2203(a)(I). However, RMDs must resume in 2021.
- *Cafeteria Plan Midyear Election Changes (Health and Welfare)*  
An employer that adopted midyear election changes in 2020 for its cafeteria plan, as permitted under IRS [Notice 2020-29](#) and [Notice 2020-33](#), must amend the plan to reflect such changes by adopting a formal plan amendment on or before December 31, 2021. Permitted changes included enrolling, dropping, or

changing plan options (if applicable) under the plan's healthcare coverage, as well as enrolling, dropping, or changing contributions to health flexible spending accounts and dependent care assistance programs. Additional information about these permitted changes can be found in our prior [update](#).

- *COBRA Administration During COVID-19 Pandemic National Emergency* (Health and Welfare)  
For the first 60 days of 2021, and perhaps longer if the pandemic national emergency is extended, health plans will need to continue to toll certain COBRA deadlines pursuant to [joint guidance](#) issued by the DOL, IRS, and the U.S. Department of Health and Human Services (HHS). Complying with the guidance often requires close coordination between the health plan sponsor and its COBRA administrator or insurance carrier. An individual who experiences a COBRA qualifying event but is unable to notify the plan to elect COBRA, or to pay for COBRA, has until the end of the relief period to raise their hand and request to be enrolled.
- *Telehealth* (Health and Welfare)  
In 2020, with a likelihood of continuing through 2021, there has been much effort and advocacy to make it easier for employers, health plans, and issuers to offer telehealth benefits without risking compliance issues under the ACA or under other federal or state requirements. Potentially, certain relief made available during the pandemic will be made permanent or expanded. Specifically, under the CARES Act, for plan years beginning on or before December 31, 2021, a high deductible health plan may temporarily cover certain telehealth and other remote care services without a deductible, or with a deductible below the minimum annual deductible otherwise required by law. This will not jeopardize a high deductible health plan participant's eligibility to contribute to a health savings account. *See* CARES Act § 3701(a). Additionally, the DOL has issued [FAQs](#) that allow a large employer to offer coverage only for telehealth and remote care services to employees not otherwise eligible for coverage under another group health plan offered by the employer. Nondiscrimination standards will continue to apply.
- *Retirement Plan Partial Terminations* (Retirement)  
The IRS issued guidance on the impact of COVID-19-related furloughs and layoffs on a partial plan termination analysis for qualified retirement plans. [See Coronavirus-Related Relief for Retirement Plans and IRAs: Questions and Answers](#), Q&A-15 (rev. September 19, 2020). The IRS stated that employees who were rehired by the end of the review period would not generally be considered to have experienced an employer-initiated severance when evaluating a partial plan termination. If there is a partial plan termination, affected participants (those who experienced an employer-initiated severance) must be 100% vested.
- *E-signatures and Remote Notary Guidance from IRS* (Retirement)  
In response to the COVID-19 pandemic, the IRS issued temporary relief from the physical presence requirement in [Notice 2020-42](#). Retirement plans often require participant elections and spousal consents to be notarized or witnessed by a plan representative. The notice allows for remote notarization in states that permit them. Plan representatives may also witness a signature remotely using certain safeguards, as specified in the notice. This relief is available from January 1, 2020, through December 31, 2020, so, absent an IRS extension, the standard physical presence requirements will resume on January 1, 2021.

### **Electronic Power of Attorney (All)**

Starting in January 2021, the IRS intends to launch a new secure submission platform on its website and a new webpage, "[Submit Forms 2848 and 8821 Online](#)," that will allow tax professionals to upload third-party authorization forms electronically. The IRS has [described the new platform](#) requiring tax professionals to enter their username and password or complete a registration to authenticate their identities. The proposed system will allow taxpayers and tax professionals to sign forms electronically or with ink and then upload the image to the IRS.

### **Financial Factors in Selecting Plan Investments Final Rule (Retirement)**

On November 13, 2020, the DOL published a final rule revising its "investment duties" regulation under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). *See* [Financial Factors in](#)

[Selecting Plan Investments](#) (the Final Rule), 85 Fed. Reg. 72,846 (November 13, 2020). The Final Rule is effective January 12, 2021, (60 days after publication in the Federal Register). Of note in this latest installment of guidance, the DOL adopts a position that ERISA fiduciary investment decisions "must be based only on pecuniary factors." Thus, ERISA plan fiduciaries generally are prohibited from considering unrelated objectives such as related to environmental, social, and governmental (also known as "ESG") factors, except in applicable "tie-breaker" situations. There are special requirements applicable to qualified default investment alternatives.

### **Long-Term, Part-Time Employee Tracking Under SECURE Act (Retirement)**

Under the Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act), plan sponsors must allow long-term, part-time employees to enroll in a 401(k) plan beginning in 2024. See [Further Consolidated Appropriations Act, 2020](#), Div. O § 112, Pub. L. No. 116-94 (December 20, 2019). A long-term, part-time employee is an employee who completes three consecutive twelve-month periods with at least 500 hours of service in each period. While participation in the plan is not required for three more years, plan sponsors may need to begin tracking the hours and retaining records of long-term, part-time employees starting in January 2021. The eligibility requirement only applies to elective deferrals, not employer contributions, although employers could choose to make long-term, part-time employees eligible for employer contributions and a special vesting rule applies if so.

### **California Consumer Privacy Act Amendment (All)**

The California Privacy Rights Act of 2020 (passed as Proposition 24 on California's November 3, 2020, general election ballot) extended the California Consumer Privacy Act's (CCPA's) employment-related and business-to-business exemptions until at least January 1, 2023. (These exemptions were initially set to expire on January 1, 2021, but the California State Assembly extended them through January 1, 2022.)

Under the CCPA's employment-related exemption, employees, contractors, job applicants, directors, and business owners are not considered "consumers" for purposes of CCPA coverage. Employment-related information is treated as "personal information" under the CCPA and, absent the employment-related exemption, would subject employers to the restrictions imposed by—and grant employees the rights afforded under—the CCPA. Employee benefit plan participant data (e.g., name, address, Social Security number, and insurance policy information) may already be carved out from CCPA coverage without the employment-related exemption due to the CCPA's HIPAA exemption (generally carving out Protected Health Information of a group health plan that is a "Covered Entity") and ERISA preemption (although ERISA preemption has not been litigated, nor has formal guidance been issued by the California attorney general). However, the employment-related exemption's extension gives benefit plan sponsors additional comfort until at least January 1, 2023, that they will not need to respond to participants' CCPA requests to "know" with whom their personal information is shared (e.g., any third parties with whom data is shared), to delete personal information, or to opt out of the sale of their personal information. This may also color how plan sponsors choose to address the CCPA in vendor contracts going forward.

### **Retirement Plan Cybersecurity (Retirement)**

Plaintiffs filed several sets of claims against the ERISA fiduciaries of qualified retirement plans based on the alleged absence of sufficient controls designed to protect defined contribution participant accounts and data. Examples include: *Berman v. Estee Lauder, Inc.*, No. 3:19-cv-06489 (N.D. Cal. March 2, 2020) (notice of settlement); *Bartnett v. Abbott Laboratories*, No. 2020 CV 2127 (N.D. Ill. October 2, 2020) (Memorandum Order and Opinion dismissing Abbott Laboratories as a party); and *Harmon v. Shell Oil Co.*, No. 20-021 (S.D. Tex. January 24, 2020) (complaint). These filings serve to remind plan fiduciaries to confirm with their recordkeepers, third-party administrators, and other service providers that they have implemented procedures to protect participants' accounts from unauthorized withdrawals and to protect confidential participant information from improper use, access, and disclosure. Consideration should also be given to other processes and contract responses.

## **Amendments for Public Company Deferred Compensation Plans (Nonqualified)**

The Tax Cuts and Jobs Act of 2017 resulted in a change under Code Section 162(m) (which generally limits to \$1,000,000 the amount a public company may deduct for compensation paid to "covered employees") requiring that a covered employee in any tax year must be treated as a covered employee for all subsequent tax years. This created a tension for a subset of deferred compensation plans which allow a plan to delay payment to the extent the company reasonably anticipates that if the payment is not made as scheduled, the company's related compensation deduction would be limited by Code Section 162(m). Such delayed payment provision is supported by Treasury regulations under Code Section 409A. However, given the 162(m) change, this provision could result in a delay without end. In response, proposed regulations issued in December 2019 under Code Section 162(m) allow a deferred compensation plan to be amended by December 31, 2020, to eliminate 162(m) payment delay provisions, if any, without resulting in an impermissible acceleration for 409A purposes or a material modification of a grandfathered deferred compensation plan.

## **2021 IRS Annual Limitations (All)**

The IRS has issued annual limitations for 2021. Key changes applicable to employee benefits plans include:

- Section 415(c) maximum annual contribution increased from \$57,000 to \$58,000.
- Compensation limit under Section 401(a)(7) increased from \$285,000 to \$290,000.
- ESOP limit for determining the maximum account balance subject to the five-year distribution limit increased from \$1,150,000 to \$1,165,000.

Please refer to our recent [blog post](#) for a complete list of the IRS annual limitations.

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