Providing Employee Benefits During the COVID-19 Pandemic

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As employers grapple with the many issues related to responding to the impact of the COVID-19 pandemic on their businesses and employees, employee benefit issues can sometimes fall through the cracks. The information below is meant to address some of the common employee benefit issues that we have seen over the past few weeks.

Group Health Benefits

Employers have addressed health insurance concerns in several ways depending on their circumstances. Here are a few issues to consider related to employer-provided health insurance.

Extending coverage eligibility under the health plan or policy

We have seen a number of insurance carriers extend eligibility beyond what otherwise would be covered under the policy during a leave of absence (including non-FMLA leaves), a period of reduced hours, or layoff during these unprecedented times. As a result, many employers are reviewing the terms of their plan documents and insurance policies to understand their options in order to determine whether a change is necessary to accommodate a coverage extension. *Note: Employers should communicate with their insurance carrier and/or stop-loss coverage provider. Extending health coverage may be well-intended but if the coverage is extended without the applicable coverage provider's approval, the coverage may be denied later.*

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Subsidizing the cost of health coverage for employees on reduced hours or a temporary layoff

In order to lessen the impact of a reduction in hours, leave of absence, furlough or temporary layoff, some employers have paid for a greater portion or the full cost of the health insurance coverage for such employees. Employers certainly may pay the costs of coverage, but they should do so in a non-discriminatory fashion by not favoring, for example, highly-compensated employees. Additionally, employers should heed the advice above and verify with the plan's applicable insurance provider that extending the coverage is permitted.

Timely offering COBRA continuation coverage

In general, if an eligibility extension is not available as described above, COBRA continuation coverage should be offered when a reduction in hours (i.e., due to non-FMLA leave, moving to part-time, layoff, etc.) or termination of employment (i.e., a qualifying event) causes a loss of health coverage. Another common qualifying event during these times is the expiration of FMLA leave. If an employee does not return to work following an FMLA leave (or informs the employer during the FMLA period that he or she is not returning to work), then a qualifying event has occurred. The COBRA election notice should be provided to the employee within 44 days of the qualifying event if the employer administers COBRA "in-house." If the employer uses an outside COBRA administrator, then the employer must inform the COBRA administrator of the qualifying event within 30 days, and the COBRA administrator must then provide the COBRA election notice within 14 days of being notified of the qualifying event. The employee then has 60 days from the later of the qualifying event or the loss of coverage to elect COBRA. *Note: If the employer uses the Affordable Care Act's Look-Back Measurement Method for determining an employee's full-time status for particular employees, COBRA should not begin until after the employee's "stability period" has ended.*

Paying for COBRA continuation coverage

Where an employee loses eligibility for coverage due to a reduction in hours associated with a leave of absence, furlough, temporary layoff, or a change in status from full-time to part-time, the employee typically would be offered the opportunity to continue coverage under COBRA with the employee paying the full cost of the COBRA coverage. However, some employers instead are choosing to subsidize the cost of COBRA by continuing to pay the employer share or even paying some greater amount. As stated above, employers may pay the costs of coverage, but they should do so in a non-discriminatory fashion by not favoring, for example, highly-compensated employees.

Collecting health care premiums from employees during a leave or layoff

If eligibility for health care benefits is maintained during a paid leave, furlough or layoff, the employer may collect the premiums through payroll reductions as usual. If payroll deductions are not sufficient to pay for the employee's premium, an employee may remit payments on an after-tax basis.

If eligibility for health care benefits is maintained during an unpaid leave, furlough or layoff, the employer may collect the employee's share of the premium from the employee in order to maintain the coverage. The two most common ways to collect the premium are (1) pay-as-you-go, or (2) catch-up. Pay-as-you-go provides for premium payments during the leave, furlough or layoff while catch-up allows the employee to repay the employer for his or her employee-portion of premiums when he or she returns to work. For the catch-up method, collecting premiums may present administrative challenges when the employee returns to work due to wage payment laws. Employers should outline the terms of the repayment options for employees either prior to the unpaid leave, furlough or layoff or as soon as administratively possible thereafter. If an employee fails to pay the required premium, coverage may be terminated for non-payment. Please note that special rules apply for collecting premiums and terminating coverage during an FMLA leave.

Trends in health coverage and the impact of new legislation on health benefits

Here is a summary of various changes to health benefits due to the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and trends in health coverage we have seen over the last few weeks:

- Health plans (fully-insured and self-insured) must now cover COVID-19 diagnostic testing and the related services without any cost-sharing or pre-authorization requirements, or medical management restrictions.
- HSAs, Health FSAs, and HRAs may reimburse the cost of over-the-counter medications without a prescription.
- A new FMLA-covered leave of absence was created by the FFCRA in the event an employee must take a leave of absence to care for a child due to a COVID-19 related school closing. Health plan coverage must be extended to such employee pursuant to the usual terms and conditions associated with FMLA-covered leaves of absence (i.e., coverage must be maintained during the leave, limitations on coverage termination and premium collection efforts, etc.). For additional details on the impact of the FFCRA on employers, please see our FFCRA *Fast Laner* updates.

- A group health plan will not fail to be a high deductible health plan by not having a deductible for telehealth and other remote care services.
- In light of social distancing recommendations, employers are expanding coverage for telehealth services to facilitate remote diagnosis and promoting employee assistance programs, which often include mental health and financial assistance counseling services.
- Some insurance carriers and employer-sponsored self-insured health plans are implementing subsidized COVID-19 related *treatment* This optional benefit goes beyond the required coverage mandate under the FFCRA and CARES Act for COVID-19 related *testing*.
- Additionally, some insurance carriers and employer-sponsored self-insured health plans are implementing a limited special enrollment period to allow employees who previously waived coverage for themselves or a dependent during the last open enrollment period to enroll in the health plans.

Collective bargaining issues

Employers who are subject to a collective bargaining agreement (CBA) need to consider the terms of the CBA before making any changes to a single-employer health plan or changes to their contributions to a multiemployer health plan. Employers that contribute to a multiemployer health and welfare plan may also need to review the terms of any participation agreement or trust agreement in addition to the CBA in order to fully understand their contribution obligations (for example, during leaves of absence).

The FFCRA allows employers who contribute to a multiemployer health plan to meet their emergency sick leave and expanded FMLA leave requirements by making such leave payments to the multiemployer health plan, so long as the plan makes the payments to the impacted employee. *Note: a short-term disability benefit offered under a multiemployer health plan is not a substitute for an employer's obligation to make leave payments under the FFCRA. Furthermore, if the CBA does not require and/or the multiemployer Plan does not allow emergency FFCRA leave payments to be paid through the multiemployer plan, any required emergency FFCRA leave payments will need to be made outside of the multiemployer plan directly to the employee unless the CBA and plan are amended.*

Retirement Plan Benefits

Given recent legislation affording employers new options under their retirement plans, the following issues related to a company's qualified retirement plan should be considered.

Reducing or suspending a company matching or nonelective contribution to a 401(k) plan

As with nearly all issues impacting a company's retirement plan, any change begins with the terms of the plan document. Reducing or suspending a *discretionary* matching or nonelective contribution to a 401(k) plan is relatively straightforward. The employer would need to contact the plan administrator to suspend or reduce the discretionary contribution and then notify participants of the change on a prospective basis.

"Safe harbor" plans are subject to additional requirements. Safe-harbor plans may be amended to reduce or eliminate safe harbor contributions during a plan year only if: (1) the safe harbor notice includes a statement that the employer may reduce or eliminate the safe harbor contributions during the plan year; or (2) the employer is operating at an economic loss (i.e., the employer and related employers in the same controlled group would likely need to show that its expenses exceed income for the year using generally accepted accounting principles). To amend a safe harbor plan, the employer also must send a supplemental safe harbor notice to employees explaining the consequences of the plan amendment and how employees can change their deferral elections. In addition, the effective date of the plan amendment to reduce or eliminate safe harbor contributions cannot be earlier than 30 days after employees are provided the supplemental notice.

Employers should keep in mind that reducing or eliminating safe harbor contributions will cause the plan to lose its safe harbor status, which means that it will be subject to 401(k) nondiscrimination testing for that plan year. If the plan fails nondiscrimination testing, a portion of contributions for the highly-compensated employees may need to be distributed to them, among other potential corrective actions.

In-service distributions from qualified retirement plans

Many retirement plans provide for various types of in-service distributions for participants such as hardship distributions, distributions after age 59½, and plan loans. While all of these in-service distribution options remain available to plan participants (in accordance with the terms of the plan), the CARES Act introduced expanded in-service distribution options.

NEW - Expanded in-service distributions and plan loan options available for COVID-19 hardships

Plan sponsors may allow employees who have been financially impacted by the COVID-19 pandemic to receive a penalty-free, in-service distribution of up to $100,000. Additionally, defined contribution plans that offer plan loans may offer loans up to the lesser of $100,000 or the participant's fully vested plan account balance. For additional details, please see our prior *Fast Laner* article on the CARES Act. *Note: These new* *in-service distributions are optional which means that employers have flexibility when implementing such changes so long as the employer does not violate the restrictions set forth in the CARES Act. For example, employers may implement a COVID-19 related in-service distribution that is less than $100,000.*

NEW - Suspension of 2020 required minimum distributions

The CARES Act eliminated all required minimum distributions (RMDs) in 2020 for participants in all defined contribution plans (e.g., profit sharing, 401(k), and 403(b) plans). This allows employees an opportunity to delay the receipt of distributions in order to give the financial markets time to recoup some of the losses incurred due to the COVID-19 pandemic.

NEW - Delayed payments to single-employer pension plans

The CARES Act delays any minimum funding contributions that would otherwise be due in 2020 for single-employer pension plans (including quarterly contributions) until January 1, 2021. Interest will accrue on such delayed contributions.

<u>Nonqualified Deferred Compensation Plans</u>

Employers with nonqualified deferred compensation arrangements should be aware of the rules and exceptions under Internal Revenue Code (Code) Section 409A that will permit cancellation of deferrals and certain early distributions in difficult economic scenarios. While Section 409A generally requires that deferral elections be irrevocable, in the case of an unforeseeable emergency or hardship, a participant may cancel (not just postponed) his or her deferral election, so long as the plan permits it. Any subsequent deferrals then will be subject to the rules regarding initial deferrals. Likewise, NQDC plans may allow for unscheduled distributions in the case of unforeseeable emergency that results in financial hardship to the participant.

If making payments under a NQDC plan would jeopardize the employer's ability to continue as a going concern, scheduled payments may be delayed until the tax year during which making such payment will not jeopardize the company. In the case of plans that generally are not subject to Section 409A due to application of the short-term deferral exception, which requires payments to be made by no later than March 15 following the year in which the right to payment becomes legally binding, the exception continues to be available even where payment is delayed past March 15 as a result of unforeseeable administrative impracticability or where making payment would jeopardize the employer's ability to continue as a going concern.

In addition to the issues under Section 409A discussed above, public companies also have a myriad of issues to consider with respect to performance-based compensation under Code Section 162(m) and Securities and Exchange Commission and market rules, including those associated with possible options repricing and exchanges.

Additional Employee Benefits

In addition to the benefits offered to employees through a health or retirement plan, employers also have a couple of unique benefit opportunities during this crisis to offer to employees.

Tax-free payments offered to employees via Tax Code Section 139

Section 139 of the Code allows employers to make direct "qualified disaster relief payments" to employees that are tax-free to the employee and deductible as a business expense to the employer. Because President Trump declared the COVID-19 pandemic a disaster, employers may establish funds that make such payments to employees, so long as the payments reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of COVID-19. To ensure that they meet IRS expectations, employers implementing such a program should consider establishing eligibility and payment criteria, an oversight committee, and a separate account for the fund.

Employer-provided student loan repayments

Under the CARES Act, an employer may make payments on an employee's qualified student loan subject to an annual limit of $5,250, before January 1, 2021. The payments to the employee or lender will not be taxable to the employee. Additional rules apply under the Code for such payments.

Life and disability insurance benefits during a leave or layoff

Eligibility for disability and life insurance benefits may be impacted due to a leave of absence, furlough or layoff due to active-at-work eligibility requirements. The respective insurance carriers should be consulted regarding their interpretation of the eligibility terms of the plan or policy and whether any exceptions can be made. In addition, employees who lose eligibility for life insurance should be made aware of any conversion options.