

Employee Benefit Issues for Employers to Consider at the Year End and for the Coming New Year

Wes Covert
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Each year, employers are faced with a number of year end deadlines related to employee benefits as well as new requirements facing them in the coming year. This article is meant to provide a brief summary of those issues.

- **Cafeteria Plan Considerations:**
 - **Health and Dependent Care FSA Carryover, Grace Period, and Election Changes.** The Consolidated Appropriations Act, 2021 (CAA), IRS Notice 2021-15, and the American Rescue Plan Act of 2021 (ARPA) allowed employers to implement various optional changes to their Section 125 cafeteria plan. Such changes included expansion of health and dependent care FSA carryovers and grace periods, modification to election change events, temporary increase to the dependent care age limit, etc. Because such changes must be adopted by an amendment by the end of the first calendar year beginning after the end of the plan year in which the amendment is effective, any changes impacting the plan year in 2020 must be adopted by December 31, 2021. Employers must also operate their plans in accordance with the amendment's terms beginning on its effective date and inform eligible employees of the changes.
 - **Qualified Medical Expenses.** The CARES Act provided for new qualified medical expenses to be reimbursable under a cafeteria plan's health FSA as early as January 2020. Such new expenses include over-the-counter medications without a prescription and

Attorneys

Wesley H. Covert

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menstrual products. Amendments to provide for these changes that may have been implemented in 2020 must be adopted by December 31, 2021.

- **Group Health Plan Considerations:**

- **COVID-19 Testing, Vaccines, Telemedicine.** Additional COVID-19 related legislation required group health plans and insurers to cover COVID-19 testing and related preventive services without cost-sharing, preauthorization, or medical-management activities. IRS Notice 2020-15 added that telemedicine and other remote health benefits provided free of charge will not disqualify participants from Health Savings Account participation. Plan sponsors should consider any year end amendments to their plans to include these required changes.
- **Mental Health Parity Compliance.** The CAA introduced new requirements for plan sponsors and insurers to complete a comparative analysis of the group medical plan's nonquantitative treatment limitation rules in order to show compliance with mental health parity rules. The U.S. Department of Labor (DOL) has already begun enforcement of these new requirements and employers that sponsor self-insured health plans should complete the required analysis by utilizing the DOL's **self-compliance tool**.
- **No Surprises Act Compliance.** Although the regulating agencies reported some enforcement deadline delays to July 1, 2022, many changes of the No Surprises Act which is incorporated in the CAA are still effective for plan years beginning on or after January 1, 2022. Plan sponsors and insurers are held to a good-faith basis for compliance pending further guidance. Employers that sponsor self-insured plans should review their service agreements with their third-party administrators and network service providers and engage with their vendors to ensure timely compliance with the mandates. Group health plans also will need to be amended to reflect these changes in the law.

- **Retirement Plan Considerations:**

- **Hardship Distribution Amendment Deadline.** The Bipartisan Budget Act of 2018 changed the hardship distribution provisions of 401(k) plans by eliminating the suspension of employee elective deferrals as a result of a hardship withdrawal and requiring participants to certify that they have insufficient assets to satisfy the financial need. These plans must be amended by December 31, 2021, to implement these changes.
- **Pre-approved 401(k) and Other Defined Contribution Plans – Restatement Deadline.** Employers who sponsor pre-approved prototype or volume submitter plans have until July 31, 2022, to restate their plans as part of the “remedial amendment cycle.” It is likely that the retirement plan document providers have already contacted the sponsoring employers about this deadline. Nevertheless,

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employers who sponsor pre-approved plans should contact those responsible for maintaining their plan documents to confirm they are scheduled for a timely restatement.

- **Cybersecurity Compliance.** Since issuing best practice **guidelines** for retirement plan administrators in early 2021, the DOL has initiated fiduciary investigations of cybersecurity compliance. Plan administrators and fiduciaries should review their own practices to determine compliance with the new guidance and inquire of their vendor's compliance as well.
- **SECURE Act and related changes due in 2022.** Many newly required and optional changes to retirement plans were introduced by the SECURE Act, the CARES Act, and the CAA over the past couple of years which must be adopted by plan amendment by December 31, 2022. The required changes include (i) delaying the required beginning date for required minimum distributions from April 1 following the calendar year in which the participant reaches age 70½ to April 1 following the calendar year in which the participant reaches age 72, (ii) changing the distribution rules for benefits payable upon the death of a participant. The new rule under the SECURE Act generally applies to participants who die on or after January 1, 2020, and requires distributions within 10 years after the participant's death unless the beneficiary is the participant's spouse or a member of a specific list of other "eligible designated beneficiaries," and (iii) allowing part-time employees to be eligible to make elective deferrals if they work at least 500 hours for three consecutive years beginning for plan years that start on or after January 1, 2021.
- **ESG Investments.** The DOL released a final rule in October 2020 to clarify the fiduciary standards for selecting and monitoring investments which significantly limited plan fiduciaries from considering policy goals such as environment, social, or governance (ESG) factors that may not achieve the highest possible return for the plan. A year later (and following a new administration), the DOL issued a proposed rule in October 2021 that seeks to define the extent to which a plan fiduciary may take into account ESG factors in investing plan assets. Plan fiduciaries considering ESG investments should consider this new DOL guidance when implanting any investment policy changes.
- **Lifetime Income Disclosures.** The DOL requires defined contribution retirement plans to provide participants with new annual lifetime income disclosures to help workers understand how their savings under the plan translates to retirement income. The purpose of the disclosure is to illustrate how much money participants would receive each month if their total account balance were annuitized. This rule applies to all ERISA-covered defined contribution plans even if the plan offers annuities or lifetime income investment options. The first lifetime income disclosures must be issued no later than the participant statement for the second quarter of 2022 for participant-directed individual account plans. Non-participant directed plans have until the deadline for the annual

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statement for the first plan year ending on or after September 19, 2021 (for a calendar year plan, this would be October 15, 2022).

Plan fiduciaries face a number of new challenges and requirements in 2021 related to employee benefit plans and they should only expect additional challenges in 2022. Please contact your servicing Laner Muchin Employee Benefits Attorney if you have questions about any of these compliance issues.