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OVERVIEW FROM THE EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION GROUP

The spring and summer of 2021 have shown no sign that President Biden's administration is slowing down from the frenetic pace of the 2020 calendar year. Guidance continues to be issued in relation to COVID-19 pandemic relief enacted by Congress, including the 100% premium assistance for COBRA continuation coverage and employee retention tax credits. In addition to COVID-19 relief, the IRS and DOL continue to publish guidance on recently passed legislation and each of their regulatory priorities, with the DOL focusing on compliance with its recent cybersecurity practices guidance and new mental health parity requirements for employers who sponsor group health plans that were enacted by the CAA.

In this newsletter, we provide an overview of the guidance that has emerged since our last newsletter in the first quarter of 2021, with an eye toward assisting plan sponsors in complying with these new and often imminent compliance obligations.

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GLOSSARY OF COMMONLY USED TERMS

The following defined terms are used throughout this Newsletter:

"ARPA" means the American Rescue Plan Act of 2021.

"CAA" means the Consolidated Appropriations Act of 2021.

"CARES Act" means the Coronavirus Aid, Relief, and Economic Security Act.

"COBRA" means the Consolidated Omnibus Budget Reconciliation Act.

"Code" means the U.S. Internal Revenue Code of 1986, as amended.

"DOL" means the U.S. Department of Labor.

"EEOC" means the Equal Employment Opportunity Commission.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

"GINA" means the Genetic Information Nondiscrimination Act of 2008.

"IRA" means individual retirement account.

"IRS" means the U.S. Internal Revenue Service.

"SECURE Act" means the Setting Every Community Up for Retirement Enhancement Act Of 2019.

COVID-19: FURTHER GUIDANCE & EXTENSIONS

Congress Extends Tax Credits for COVID-19-Related Paid Leaves through September 30, 2021

By Sarah Bhagwandin & Denise Erwin

Congress extended the availability of refundable tax credits for Eligible Employers who provide paid family leave or sick leave from April 1, 2021 to September 30, 2021 in connection with COVID-related illness. Under ARPA, employers with fewer than 500 employees and certain governmental employers (without regard to the number of their employees) that provide paid sick or family leave that would otherwise qualify under the Emergency Paid Sick Leave Act or Emergency Family and Medical Leave Expansion Act ("Eligible Employers") are eligible for tax credits relating to the wages paid during the applicable leaves.

Leave that will qualify Eligible Employers for the tax credit under ARPA applies to an employee who is unable to work because of the employee's personal health status or the employee's need to care for others, which includes leave needed because the employee:

- is under a Federal, State, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- has COVID-19 symptoms and is seeking a medical diagnosis, is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of COVID–19 and the employee has been exposed to COVID–19 or the employee's employer has requested the test or diagnosis;
- is obtaining the COVID-19 vaccine, or recovering from conditions related to obtaining the COVID-19 vaccine;
- is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
- is caring for a child whose school or place of care is closed, or whose child care provider is unavailable due to COVID-19 precautions.

On June 11, 2021, the IRS issued **extensive FAQs** addressing how to implement the applicable leaves and qualify for the tax credits. The FAQs cover a wide range of topics, including what documentation an employer should maintain to substantiate that an employee qualifies for a leave, the amount of the available credits and how to calculate the same, how to claim the tax credits on an employer's quarterly tax return, how to claim the tax credit when a 3rd party payer reports the employer's federal employment taxes (such as a reporting agent, a payroll service provider, a PEO , CPEO, or Section 3504 agent), and how to coordinate paid sick leave and paid family leave for a single employee.

Eligible Employers who wish to offer COVID-related paid sick leave and family leave and wish to qualify for the tax credits should take the following steps:

1. Review their existing paid-leave policy as it relates to COVID-related reasons, and update the same to incorporate the new guidance provided by the IRS and extend it through September 30, 2021.
2. Review what documentation the employer requires from employees to substantiate the need for a leave, and update the same to conform with the requirements of ARPA. (Note: It is permissible for an employer to add additional substantiation requirements to what is required under ARPA.)
3. Review the FAQs to confirm their understanding of the requirements under ARPA, and work with their payroll provider to implement the leaves and report the related wages on Form 941.
4. Communicate the available paid leaves to employees.

IRS Extends Tax-Relief for Employer-Sponsored Leave Donation Programs through December 31, 2021

By Sarah Bhagwandin & Denise Erwin

In response to the COVID-19 pandemic, the IRS granted tax relief for employer-sponsored leave donation programs that allow employees to donate vacation, sick, or personal leave in exchange for cash payments made by their employers to charitable organizations for the relief of victims of the COVID-19 pandemic. Under the tax relief set out in IRS Notice 2020-46, employees were not taxed on such donations as long as the donation was made before January 1, 2021. The conditions of the leave programs and the related tax relief under IRS Notice 2020-46 are outlined **here**.

On June 30, 2021, the IRS **extended this tax relief** to donations made before January 1, 2022. Given that this extension has been made mid-year, it may be too late for an employer who did not already have such a donation program in place to adopt one now. However, for employers who have already adopted a leave-donation program pursuant to IRS Notice 2020-46 and who have continued the program, this extended favorable tax treatment for employees is welcome relief.

IRS Provides Guidance on Claiming the Employee Retention Credit in 2021

By Randy Scherer

In April, the **IRS released guidance** for employers claiming the Employee Retention Credit ("ERC") under the CARES Act, as modified by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 and ARPA. Employers may now claim a credit against the employer's share of the Social Security tax equal to 70% of the qualified wages paid to employees during the first two quarters of 2021. Qualified wages are limited to $10,000 per employee per quarter, therefore the maximum ERC is $7,000 per employee each quarter. Separate limits apply to certain "recovery startup businesses" that commenced operations on or after February 15, 2020.

To be eligible to receive the ERC, an employer must experience either:

- A full or partial suspension of the operation of its trade or business in the first two quarters of 2021 because of governmental orders limiting commerce, travel, or group meetings due to COVID-19, or
- A decline in gross receipts in a calendar quarter in 2021 where the gross receipts are less than 80% of the gross receipts in the same calendar quarter in 2019.

For large employers (i.e., employers that averaged more than 500 full-time employees in 2019), qualified wages are those wages paid to employees that are not providing services because of suspended operations or due to the decline in gross receipts. For small employers (i.e., employers that averaged 500 or fewer full-time employees in 2019), qualified wages are those paid to all employees during a period of suspended operations or during the quarter that the employer had a decline in gross receipts regardless of whether the employees are providing services.

To claim the ERC for the first two quarters of 2021, employers must report total qualified wages for purposes of the ERC on their federal employment tax returns (usually Form 941). Employers should also report any qualified sick leave and qualified family leave wages on Form 941.

Small employers may request an advance payment of the ERC on Form 7200 (Advance of Employer Credits Due to COVID-19). Prior to requesting the ERC, employers must reduce employment tax deposits so that the advanced payments received are not more than the employment tax deposits made to the IRS. The advance payment is limited, however, and may not exceed 70% of the average quarterly wages paid in calendar year 2019. Large employers are not eligible to receive advance payments.

Small employers may not file Form 7200 to claim an advance payment after filing Form 941 for the same quarter. Form 7200 should be filed as early as possible to ensure it will not be processed after Form 941 has been processed. Employers may file Form 7200 several times during each quarter for subsequent payments that are eligible for credits.

ARPA extended availability of the ERC to the third and fourth quarters of 2021, and the IRS issued **Notice 2021-49** to provide guidance on the ERC for qualified wages paid after June 30, 2021.

PPE as a Medical Expense

By Patrick Becker

On March 26, 2021, the **IRS announced** that amounts paid for personal protective equipment ("PPE") for the primary purpose of preventing the spread of COVID-19 are treated as amounts paid for medical care under Code Section 213(d). PPE includes masks, hand sanitizer, and sanitizing wipes. Amounts paid by a taxpayer for PPE for use by the taxpayer, the taxpayer's spouse, or the taxpayer's dependents are deductible under Code Section 213(a) if the taxpayer's total medical expenses exceed 7.5% of adjusted gross income and the taxpayer is not compensated by insurance or otherwise for those amounts.

PPE expenses also may may be paid from or reimbursed under health FSAs, Archer medical savings accounts, HRAs, or HSAs. If a group health plan's terms do not permit such reimbursement, then the group health plan may be amended retroactive to January 1, 2020, to provide for such reimbursement without losing tax favorable status under Code Section 105(b) or impacting the qualification of a cafeteria plan under Code Section 125. The amendment must be adopted no later than the last day of the 1st calendar year beginning after the end of the plan year in which the amendment is effective. Retroactive amendments may not be adopted after December 31, 2022, and the group health plan must be operated consistent with the amendment's terms beginning on the amendment's effective date.

Plan sponsors should review their existing plan documentation and practices to determine whether a retroactive amendment or operational change relating to PPE reimbursement is necessary. We recommend that any such change is communicated to participants as soon as practicable.

EEOC Provides Guidance on Employer COVID-19 Vaccine Incentives

By Randy Scherer

In late May 2021, the EEOC promulgated **guidance** on employer incentives for employees and their families who receive the COVID-19 vaccine. Under the guidance, employer incentives offered to employees who either receive a COVID-19 vaccination from the employer or provide documentation that they received a vaccination through a pharmacy or health care provider are permissible under both GINA and the ADA.

The EEOC further advised that employers may offer incentives to employees to provide documentation that their family members received a COVID-19 vaccine from a health care provider. The employer cannot offer incentives to employees in exchange for the employees' family members receiving the vaccine from the employer or its agent under GINA. However, the employer may offer employees' family members vaccines without an incentive.

GINA and the ADA require any incentive that an employer offers to employees be voluntary. Incentives, therefore, cannot be so significant that employees feel coerced into getting the vaccine. Due to the nature of vaccine screening questions, a significant incentive could make employees feel pressured to disclose protected medical and/or genetic information.

The EEOC's guidance does not provide a bright line rule to determine when an incentive becomes significant enough to be coercive. As a parallel, it may be helpful to look at incentives for employer wellness programs to determine when an incentive becomes coercive. Such incentives have included reductions in the employee's share of health care premiums or co-pays and direct payments of cash or cash equivalents (e.g., gift cards). Under the EEOC's proposed wellness program rules issued in January 2021, employers were limited to providing only *de minimis* incentives (e.g., a water bottle or gift card of modest value) for participation in wellness programs. The Biden administration withdrew those proposed rules, however, and may reevaluate and issue new proposed rules. Employers should monitor the new rules for additional insight on what would be considered a permissible incentive to receive a COVID-19 vaccine.

Although there remains some uncertainty, the EEOC guidance is clear that employers may incentivize employees to get the COVID-19 vaccine. *De minimis* incentives would likely not be deemed coercive. Employers who are considering providing an incentive to employees to receive a COVID-19 vaccine are encouraged to discuss the proposed incentives with a member of their BCLP team.

We would like to thank St. Louis summer associate Scott Franc for his assistance in preparing this article.

COBRA CONTINUATION COVERAGE

DOL and IRS Issue Separate Guidance on the 100% COBRA Premium Assistance Benefit under ARPA

By Serena Yee, Stephen Evans & Lisa Van Fleet

ARPA requires employers, insurers and plans to pay 100% of the required premium for continuation coverage during a subsidy period extending from April 1, 2021 through September 30, 2021 on behalf of "Assistance Eligible Individuals". Such premium expenses are reimbursed by the federal government through refundable FICA tax credits. We previously summarized the COBRA premium assistance under ARPA in a blog post, available by clicking here.

On April 7, 2021, the DOL provided guidance in the form of FAQs published on a dedicated COBRA premium assistance website, which also includes the following model notices:

- A model ARPA general notice and COBRA election notice
- A model COBRA continuation coverage notice and election form for second election opportunity
- A model alternative notice for use with insured coverage subject to state "mini-COBRA" requirements
- A model notice of expiration of the COBRA premium assistance for plans to notify Assistance Eligible Individuals 15-45 days before expiration of their COBRA premium assistance
- A summary of the COBRA premium assistance provisions

The DOL will consider use of the model notices to be good faith compliance with the COBRA and ARPA notice obligations.

The IRS subsequently issued Notice 2021-31 on May 18, 2021, providing its own guidance on COBRA premium assistance in a Q&A format. Key points for employers from the DOL and IRS guidance are summarized below.

Assistance Eligible Individual (AEI)

- An Assistance Eligible Individual (or AEI) is an individual who (1) is a qualified beneficiary who is eligible for COBRA continuation coverage during all or part of the subsidy period by reason of an involuntary termination of employment or reduction in hours and (2) elects COBRA continuation coverage.
  - An AEI includes a qualified beneficiary whose continuation coverage extends into the subsidy period as the result of the extension of the usual maximum COBRA continuation period due to a disability determination or second qualifying event; provided the original qualifying event was a reduction in hours or an involuntary termination of employment.
  - Only a termination of employment that is involuntary can qualify an individual for premium assistance but a reduction in hours can be voluntary or involuntary. For example, a reduction in hours due to a change in the company's hours of operation, transferring from a full-time position to a part-time position, a temporary leave of absence, and participation in a lawful labor strike all count as a qualifying reduction in hours.
  - Involuntary termination for gross misconduct does not qualify for the COBRA premium assistance.
  - Since only qualified beneficiaries can be AEIs, a spouse, or dependent child who subsequently is enrolled in plan coverage by a qualified beneficiary during an annual enrollment period occurring after the COBRA qualifying event and domestic partners do not qualify for premium assistance.
- An AEI will not qualify for premium assistance if eligible for other group health coverage, such as through a new employer's plan, a spouse's plan, or Medicare. However, individuals with individual health insurance coverage or Medicaid are permitted to switch to COBRA coverage and apply for the premium assistance.
  - An individual is considered "eligible" for other health coverage or Medicare only if he or she can enroll in such coverage. For example, an AEI who was eligible for other group health

plan coverage or Medicare at the time he or she lost coverage due to a reduction in hours or involuntary termination but did not enroll remains eligible for premium assistance if he or she is unable to enroll in that other coverage (e.g., applicable enrollment period has expired).

  - An offer of retiree coverage under the same group health plan will not adversely impact the AEI's eligibility for COBRA premium assistance.

- Although not mandated, employers can require individuals to provide a self-certification or attestation regarding their eligibility status with respect to a reduction in hours or involuntary termination of employment and/or their eligibility for disqualifying health plan coverage or Medicare. Employers can rely on the self-certification or attestation for purposes of substantiating eligibility for the credit, unless the employee has actual knowledge that the attestation is incorrect.

- An individual can qualify as an AEI more than once.

Involuntary Termination

- For purposes of the premium assistance, the IRS guidance provides that an "involuntary termination" is a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services. Examples of an involuntary termination include but are not limited to the following:
  - An employer's failure to renew an employee's employment agreement, unless the parties understood at the time they entered into the agreement, and at all times when services were being performed, that the agreement was for specified services over a set term and would not be renewed.
  - An employee-initiated termination of employment either for good reason in response to employer action that results in a material negative change in the employee's employment relationship analogous to a constructive discharge or where the employee had knowledge that he/she would have been terminated by the employer in the absence of the employee-initiated termination or retirement.
  - Resignation as the result of a material change in the employee's geographic location of employment or a material reduction in hours.
  - Employee's participation in a window program under which employees with impending terminations are offered a severance arrangement to terminate employment within a specified period of time.
  - Includes an involuntary termination for cause

- An employee's death is not considered an involuntary termination of employment.

Additional Election Opportunity

- The DOL guidance clarifies the additional COBRA election opportunity:
  - Any qualified beneficiary whose qualifying event was a reduction in hours or involuntary termination of employment prior to April 1, 2021, and either did not elect COBRA when it was first offered or previously elected COBRA but is no longer enrolled (e.g., due to the failure to pay premiums) is eligible for a second opportunity to elect COBRA continuation coverage; provided the qualified beneficiary's maximum period of COBRA coverage would have extended beyond March 31, 2021.
  - Individuals have 60 days from the provision of the notice of the second election opportunity to elect COBRA and may choose retroactive coverage commencing on the date of their loss of coverage or, if later, April 1, 2021 or coverage on a prospective basis.
  - If an AEI elects COBRA continuation coverage with premium assistance but declines to elect coverage retroactive to the qualifying event occurring before April 1, 2021, that individual may not subsequently elect retroactive COBRA continuation coverage back to the qualifying event after the 60-day second election has ended.
  - The additional election opportunity does not extend the period of COBRA coverage beyond the original maximum period of COBRA coverage.

Administration of Premium Assistance

- An AEI's federal or state continuation coverage during the subsidy period must be provided with a credit against future premium payments (following the expiration of the subsidy period) or a refund.
  - Individuals who are required to make COBRA premium payments in order to receive fully- or partially-subsidized COBRA coverage under a

severance agreement may need to be issued a refund or have the terms of their severance agreement amended to remove the premium payment requirement during the subsidy period.

- Once the premium assistance ends following the expiration of the subsidy period, unsubsidized COBRA coverage automatically continues and the premium for the first period of coverage after September 30, 2021 will be timely if paid according to the terms of the plan, subject to any applicable extension under the COVID-19 National Emergency extension.

- If the elected COBRA continuation coverage includes one or more individuals who are not AEIs, the premium amounts are allocated first to the premiums for the AEIs, based on the cost of COBRA continuation coverage (without COBRA premium assistance) for only AEIs, and then to the premiums for the individuals who are not AEIs. If the total cost of the coverage for all covered individuals does not exceed the premium costs applicable only to the AEIs, then no portion of the premium is allocated to individuals who are not AEIs, and the COBRA premium assistance is the full applicable COBRA premium amount. If the coverage of an individual who is not an AEI increases the total COBRA premium for all individuals, that incremental additional cost is not COBRA premium assistance for purposes of the credit.

- If an AEI elects retroactive coverage for a period beginning before April 1, 2021, the employer may require the individual to pay the premiums for that period of COBRA continuation coverage, subject to the extended due dates under the COVID-19 National Emergency extension guidance.
  - If the individual fails to pay any amount towards the total premiums due for periods of retroactive COBRA continuation coverage, the employer may treat the individual as having not elected COBRA coverage until the first period of coverage beginning on or after April 1, 2021. If, by the applicable deadline, the individual pays only a portion of the total premiums due for retroactive coverage, the plan may credit those premiums to the earliest months of the retroactive COBRA continuation coverage and resume providing COBRA continuation coverage as of the first period of coverage beginning on or after April 1, 2021.

- The second election opportunity applies only to federal COBRA and not any state level "mini-COBRA" coverage, although individuals who elect such "mini-COBRA" coverage are eligible for the COBRA premium assistance.

- The COBRA premium assistance applies until the earliest of (1) the first date the AEI becomes eligible for other group health plan coverage (with certain exceptions) or Medicare coverage, (2) the date the individual ceases to be eligible for COBRA continuation coverage, or (3) the end of the last period of coverage beginning on or before September 30, 2021.

Notice Guidance

- COBRA notices provided to individuals with qualifying events occurring prior to April 1, 2021, and during the subsidy period, should include the forms necessary for an individual to apply for COBRA premium assistance.

- The DOL guidance clarifies the COBRA notice requirements under ARPA:
  - A general notice of the premium assistance and the forms necessary to apply must be provided to all qualified beneficiaries who have a qualifying event that is a reduction in hours or involuntary termination of employment during the subsidy period. The notice may be provided separately or with the COBRA election notice.
  - No later than May 31, 2021, employers were required to provide COBRA premium assistance information and the forms necessary to apply to COBRA qualified beneficiaries whose qualifying event was a reduction in hours or involuntary termination of employment occurring prior to April 1, 2021, unless the qualified beneficiary's maximum COBRA coverage period would have ended before April 1, 2021.
  - Employers must provide notice of the expiration of the period of premium assistance 15-45 days before the premium assistance expires, which must include information that the individual may be eligible for coverage without any premium assistance through COBRA or coverage in the Health Insurance Marketplace.

- The deadlines to provide the ARPA-required information and forms are unaffected by the extended COVID-19 National Emergency deadline relief provided in EBSA Disaster Relief Notice 2021-01. The COVID-19 National Emergency extension continues to apply to the general COBRA deadlines, but see the summary of IRS guidance below on

the effect of a second election opportunity on a qualified beneficiary's extended COBRA election deadline.

- Normal COBRA penalties continue to apply to employers who fail to satisfy the COBRA and ARPA requirements.

Tax Credits

- Employers covering the COBRA premiums for the AEIs under a self-insured group health plan claim the tax credit using Form 941.
- The employer becomes entitled to the tax credit as of the date on which it receives the potential AEI's election of COBRA continuation coverage for any periods of coverage that began before that date (or the date the employer reimburses the AEI for the premium amounts for which the individual should have received COBRA premium assistance).
- The amount of the tax credit that can be claimed is limited to the premium that would have been charged to an AEI in the absence of the premium assistance, and does not include any amount of subsidy that the employer would have otherwise provided. For example, if a severance arrangement provides that the employer will pay 50% of the COBRA premium, a credit can be claimed only for the portion of the COBRA premium that the employer actually would have charged to the AEI.
- The tax credit for individual coverage under a health reimbursement account (HRA) is limited to 102% of the amount reimbursed to the AEI.
- The employer may (1) reduce the deposits of federal employment taxes, including withheld taxes, that it would otherwise be required to deposit, up to the amount of the anticipated credit, and (2) request an advance of the amount of the anticipated credit that exceeds the federal employment tax deposits available for reduction by filing Form 7200 (Advance Payment of Employer Credits Due to COVID-19) before the earlier of (1) the day the employment tax return for the quarter in which the employer is entitled to the credit is filed, or (2) the last day of the month following that quarter.
- If an AEI receiving COBRA premium assistance fails to notify the employer of his or her eligibility for disqualifying health coverage and continues receiving COBRA premium assistance, the employer is not required to refund the tax credits attributable to the period of continuation coverage after the individual's eligibility for COBRA premium assistance ended to the IRS, unless the employer knew of the individual's eligibility for the other coverage.

Who Gets the Credit? COBRA Premium Assistance Part II Q&As

By Serena Yee & Rick Arenburg

On July 26, 2021, the IRS issued **Notice 2021-45** to supplement its guidance on COBRA premium assistance in **Notice 2021-31**. This round of Q&As focuses heavily on clarifying which entity is entitled to claim the premium assistance credit.

- **Extended Coverage Periods**
  Where an individual's original 18-months of COBRA continuation coverage arising from a reduction in hours or involuntary termination of employment expired prior to April 1, 2021, the individual may still qualify for premium assistance if a disability determination, second qualifying event or extension under state-mandated continuation coverage occurs that extends the individual's maximum continuation period beyond April 1, 2021. This is the case even if the individual has not yet notified the plan or insurer of the occurrence of the extension-triggering the event or his or her intent to elect to extend the continuation coverage.
- **Premium Assistance for Dental-Only and Vision-Only Coverages**
  An individual with dental-only and/or vision-only continuation coverage will cease to be eligible for COBRA premium assistance if he or she subsequently becomes eligible to enroll in other disqualifying group health plan coverage or Medicare, even if the other coverage does not include the dental and/or vision benefits provided by the previously elected COBRA continuation coverage.
- **State Continuation Coverage**
  Premium assistance is available to individuals enrolled in a state continuation coverage even if participation is limited to only a subset of residents (e.g., state employees only) as long as the coverage is comparable to Federal COBRA

- **Claiming the Premium Assistance Credit**
  The new guidance offers the following clarifications on which entity, a "Premiuim Payee", is entitled to claim the premium assistance credit:
  - For a group health plan that is subject to Federal COBRA or is not subject to Federal COBRA but is self-funded, the common law employer maintaining the plan is the Premium Payee with respect to the assistance eligible individuals whose reduction in hours or involuntary termination serves as the basis for the individual's eligibility for continuation coverage
  - For a group health plan subject to both Federal COBRA and state-mandated continuation coverage, the common law employer is the Premium Payee even if the state-mandated continuation coverage requires individuals to pay the premiums directly to the insurer after the period of Federal COBRA ends.
  - If a group health plan (other than a multiemployer plan) subject to Federal COBRA covers the employees of two or more employers (regardless of whether the employers are part of the same controlled group or are unrelated employers), each common law employer is entitled to the credit for its respective employees or former employees, except to the extent a third-party payer is the Premium Payee, as described in Notice 2021-31, Q&A-82 (e.g., PEO), or in certain business reorganization situations.
  - An entity that provides health benefits to the employees of another entity (e.g., MEWA) may not claim the premium credit unless the entity is a third-party payer of such employees' wages. The respective common law employers are the Premium Payees.
  - If a selling group remains obligated to make COBRA continuation coverage available to the M&A qualified beneficiaries after a business reorganization (e.g., stock or asset sale), the entity in the selling group that maintains the group health plan is entitled to the premium credit.
  - A state agency maintaining a group health plan that covers employees of various state agencies and local governments and is subject to Federal COBRA is the Premium Payee if it usually receives the COBRA premium payments.
  - An employer offering fully insured health coverage, which is not subject to Federal COBRA, through its participation in a Small Business Health Options Program (SHOP) exchange is entitled to the premium credit if: (1) the SHOP exchange offers multiple insurance choices to the employees; (2) the SHOP exchange provides a single invoice to the employer with all premiums aggregated and allocates and pays the applicable premium amounts to the insurers; (3) the employer has a contractual obligation to pay all applicable COBRA premiums to the SHOP exchange; and (4) the employer would have received the state continuation coverage premiums directly from the assistance eligible individuals in the absence of the COBRA premium assistance.

Are Your COBRA Notices Sufficient to Avert a Costly Challenge?

By Lisa Van Fleet & Randy Scherer

While the COBRA continuation coverage subsidy requirements imposed by ARPA (previously discussed on our blog **here** and **here**) are at the forefront of employers' minds, recent litigation trends should motivate plan sponsors to review their standard COBRA election notices to ensure they comply with the general requirements in the regulations promulgated by the DOL.

COBRA regulations[1] require COBRA notices be written in a manner that can be understood by the average plan participant. Required information includes:

1. The name and plan under which continuation coverage is available;
2. The name, address, and phone number of the plan administrator;
3. Identification of the qualifying event;
4. Identification of the qualified beneficiaries (by status or name) who are recognized by the plan as being entitled to elect continuation coverage due to the qualifying event;

1. 29 CFR 2590.606-4(b)(4).

5. An explanation of the procedures for electing coverage, and the consequences of failing to elect coverage;
6. A description of the coverage available;
7. The time period for which the coverage is available; and
8. The cost of coverage and due dates for payments.

A spate of recent litigation reminds us that failure to include required information in COBRA election notices may expose the plan sponsor and the plan administrator to claims from participants and beneficiaries. Further, if the information included in COBRA election notices is likely to confuse participants and beneficiaries, there may be potential liability for failure to provide a notice written in a manner calculated to be understood by the average plan participant.

In *Green v. FCA US LLC*[2], the plaintiffs alleged that the COBRA election notices sent by the defendants were deficient because they included an "ominous warning" that suggested plaintiffs could be subject to civil and criminal penalties if they submitted incorrect, or even incomplete, information when electing COBRA. According to the plaintiffs, this warning was unnecessary, and it "confused and discouraged them, at least in part" from electing COBRA continuation coverage. The plaintiffs also alleged that the notices failed to identify the name and contact information of the plan administrator.

In an order granting in part and denying in part the defendants' motion to dismiss, the court determined that the failure to include the name and contact information of the plan administrator was a "bare procedural violation, divorced from any concrete harm" to the plaintiffs, as they did not allege an injury-in-fact based on this failure. The court dismissed the claim based on this failure due to lack of standing under Article III.

However, the court denied the defendants' motion to dismiss the claim based on the warning regarding potential civil and criminal penalties for submitting incorrect or incomplete information. The court held that the plaintiffs had plausibly alleged the notice was not written in a manner calculated to be understood by the average plan participant, as the assertion that participants could be subject to penalties for providing *incomplete* information was not a "strictly accurate statement of the law."

Several other recent claims regarding defective COBRA election notices have ended in settlement. By way of example, the court in *Holmes v. WCA Mgmt. Co., L.P.*[3] recently approved a Joint Motion for Preliminary Approval of Class Action Settlement in the amount of $210,000. In *Holmes*, the plaintiffs alleged the defendants provided deficient COBRA notices that (1) failed to provide and explain the continuation coverage termination date; (2) failed to include information regarding how COBRA coverage can be lost before the omitted termination date; (3) failed to identify the plan administrator for the group health plan; and (4) was not written in a manner calculated to be understood by the average plan participant. Currently, there are multiple COBRA election notice cases pending in the courts.

Plan sponsors should take steps to ensure their COBRA notices meet all of the requirements found in the DOL regulations. The DOL has provided **model COBRA notices** that may be used, and use of such notices, when properly completed, will be considered good faith compliance with COBRA notice requirements. For plan sponsors opting not to use the DOL model notices, comparing the notices that are used against the model notices is advisable. Plan sponsors should also consider some of the common pitfalls that have given rise to recent COBRA notice litigation, taking particular care to:

1. Include the group health plan administrator and contact information, as well as important deadlines and the process for electing coverage;
2. Review notice language to ensure it is clear and is not likely to mislead or confuse participants;
3. Issue the notice within the required timeframe, typically within 14 days of receiving notice of a qualifying event for the COBRA election notice;

2. Case No. 2:20-cv-13079-GCS-DRG (E.D. Mich. 2021).

3. Case no. 6:20-cv-698-PGB-LRH (M.D. Fla. 2021).

4. Provide notices in Spanish (or other appropriate language) for employees who primarily speak Spanish (or such other language); and

5. Review regulations, guidance, and model notices to ensure all required information is included, or have employee benefits counsel do so.

While plan sponsors are understandably preoccupied with the new the COBRA responsibilities imposed by recent legislation, they should take this as an opportunity to review carefully their standard COBRA notices. Following the simple steps outlined above will go a long way towards accomplishing that vital review and may prevent potentially costly headaches down the line.

ADDITIONAL UPDATES

Update on Q4 2020 and 2021 Trump Administration Rules

By Adam Braun

In the fourth quarter of 2020, agencies under the outgoing Trump administration proposed and finalized several rules that impact health & welfare and retirement plans. Upon taking office in January 2021, the Biden administration quickly moved to halt the implementation of some of these rules, and both the Biden administration and members of Congress signaled that they would seek to unwind others.

By way of an update, as of the date of this newsletter, below is the status of the following rules relating to health & welfare and retirement plans:

- **The ESG Rule and Proxy Voting Rule** (published Dec. 2020).
  In a **May 2021 Executive Order entitled "Climate-Related Financial Risk"**, President Biden directed that the Secretary of Labor consider a proposed rule that would suspend, revise, or rescind both the ESG rule (which requires that plan fiduciaries select investments solely based on financial factors, without consideration of any environmental, social, and governance factors) and the proxy voting rule (which requires that plan fiduciaries consider the financial significance of any proxy vote or exercise of stockholder rights and adopt policies and procedures regarding how such rights will be exercised). The proposed rule would be published for notice and comment by September 2021. The DOL announced in March 2021 that it would not enforce, or otherwise pursue enforcement actions against plan fiduciaries based on a failure to comply with, both the ESG rule and the proxy voting rule.

- **Prohibited Transaction Exemption (PTE) 2020-02** (published Dec. 2020).
  In April 2021, the DOL released **FAQs** pertaining to PTE 2020-02, which permits certain fiduciaries providing investment advice to offer other investment advisory services. Among other guidance, the FAQs confirm that PTE 2020-02 became effective in February 2021 (subject to a nonenforcement policy through December 2021 pursuant to FAB 2018-02) and that the DOL anticipates providing further guidance regarding fiduciary investment advice, which may include amending PTE 2020-02. PTE 2020-02 is further discussed in this newsletter on page 19.

- **Amendments to the HIPAA Privacy Rule** (originally released Dec. 2020).
  The comment period for amendments to the HIPAA Privacy Rule, which introduce significant changes to the administration and sharing of protected health information (PHI), was extended through May 6, 2021 due to "a significant amount of public interest." The final amendments have not yet been published.

- **The Interim Final Rule on Lifetime Income Disclosures** (published Aug. 2020).
  The Interim Final Rule on Lifetime Income Disclosures, which requires defined contribution plans to provide lifetime income illustrations to participants to help them better understand their potential retirement income stream from their plan balance, remains subject to DOL review. The DOL issued Temporary Implementing FAQs on July 26, 2021, which are further discussed in this newsletter on page 22.

For additional information regarding these rules and the Biden administration's regulatory freeze, please see our **Q1 2021 Newsletter**.

IRS Updates Operational Compliance List for Retirement Plans

By Randy Scherer

The IRS updated its Operational Compliance List for retirement plans for the first time since June 2020. The Operational Compliance List can assist qualified retirement and 403(b) plan sponsors by identifying changes in legal requirements and guidance that affect plan operations. Although the requirements may take effect during a calendar year, conforming amendments may not be due until later.

Most of the changes in the update pertain to operational requirements for the 2020 plan year, arising from clarifications found in IRS Notices **2020-68** (which clarifies certain changes found in the SECURE Act and the Bipartisan American Miners Act of 2019) and **2020-86** (which offers guidance on SECURE Act changes with respect to safe harbor plans), as well as changes found in the CARES Act and the CAA. The IRS also included two changes effective in 2021 and one in 2022. Plan sponsors should be aware of the following changes:

- SECURE Act provisions, including:
  - Clarification regarding qualified birth and adoption distributions.
  - Foster care difficulty-of-care payments treated as Section 415 compensation.
  - Reduction in the minimum age for in-service distributions from qualified pension and governmental 457(a) plans from 62 to 59 ½.
  - Participation of long-time, part-time employees in 401(k) plans (effective in 2021).
- Changes to safe harbor plans, including:
  - Increased maximum permissible automatic deferral rate under a qualified automatic contribution arrangement from 10% to 15% after the first full plan year of participation.
  - Relaxed rules for safe harbor nonelective contributions.
- CARES Act changes affecting qualified retirement plans, most notably:
  - For certain individuals affected by COVID-19, plans were permitted to provide for (a) "coronavirus-related distributions" during the 2020 calendar year, with favorable tax treatment and recontribution options, (b) plan loans of up to $100,000 for the period beginning March 27, 2020 and ending September 22, 2020, and (c) suspension of repayments of existing plan loans for the period beginning March 27, 2020 and ending December 31, 2020. If any of these special rules were implemented, any necessary retroactive amendment must be adopted on or before the last day of the first plan year beginning on or after January 1, 2022 (or January 1, 2024 for governmental plans). IRS Notice **2020-50** provided further guidance on coronavirus-related distributions and loans.
  - Required minimum distribution ("RMD) requirements that were waived for 2020. Plan amendments for the RMD waiver must be adopted on or before the last day of the first plan year beginning on or after January 1, 2022 (or January 1, 2024 for governmental plans). IRS Notice **2020-51** provided further guidance on RMD waivers.

In addition to the changes above, the Operational Compliance List noted two more changes plan sponsors should be aware of:

- Temporary relief from physical-presence requirements for spousal consents and certain other retirement plan elections (originally provided for in 2020 by IRS Notice **2020-42**, and extended through June 30, 2021 by IRS Notice **2021-03**)
- Updates to the life expectancy and distribution periods used to calculate RMDs, effective for distributions in calendar years beginning on or after January 1, 2022.

The Operational Compliance List is a good resource for plan sponsors to stay apprised of recent changes to qualified retirement plan requirements, as well as optional amendments they may wish to implement. Plan sponsors should remember that the Operational Compliance List does not include all new guidance or legislation pertaining to qualified retirement plans, but it can serve as an effective starting point to ensure such plans remain in compliance with IRS rules.

ERISA Fiduciary Obligations Expanded to Include Mitigation of Cybersecurity Risks

By Lisa Van Fleet & Serena Yee

Update: Since the time this article was originally published on the Benefits BCLP blog, we have received anecdotal reports that the DOL is actively seeking cybersecurity information in its new and ongoing audits, which DOL personnel have confirmed in informal public comments to practitioners. Employers should actively review and update their current practices and be prepared to provide information to the DOL upon request.

The clouds have been forming on the horizon for years now: from the courts we have seen emerging lines of ERISA litigation asserting fiduciary obligations to protect the privacy rights of participants, and from the regulatory agencies we have heard an acknowledgment of the need for guidance regarding fiduciary responsibility with respect to cybersecurity risks. A **call to action** for plan fiduciaries came in April 2021 from the DOL in the form of new Cybersecurity Guidance for Plan Sponsors, Plan Fiduciaries, Record-Keepers, and Plan Participants.

The DOL guidance provides:

1. Tips for Hiring a Service Provider With Strong Cybersecurity Practices
2. Cybersecurity Program Best Practices for plan fiduciaries, record-keepers, and other service providers
3. Online Security Tips for participants to help them reduce the risk of fraud and loss to their retirement accounts and report identify theft and cybersecurity incidents

Cybersecurity Governance Programs

Plan fiduciaries who have not yet developed a cybersecurity governance program should do so now, and existing programs should be re-evaluated and updated in light of this guidance. Such cybersecurity governance programs should address all three aspects of the guidance (i.e., development of **best practices** which include guidelines for hiring service providers and participant education).

More specifically, a strong cybersecurity governance program should:

- Develop, document and regularly monitor and update a formal cybersecurity program
- Conduct annual risk assessments
- Have a reliable annual third party audit of security controls
- Clearly define and assign information security roles and responsibilities
- Have strong access control procedures
- Ensure that any assets or data stored in a cloud or managed by a third party service provider are subject to appropriate security reviews and independent security assessment
- Conduct regular cybersecurity awareness training
- Implement and manage a secure system development life cycle program
- Have an effective business resiliency program addressing business continuity, disaster recovery, and incident response
- Encrypt sensitive data, stored and in transit
- Implement strong technical controls in accordance with best security practice
- Appropriately respond to any past cybersecurity incidents
- Follow **tips for hiring a service provider** with strong cybersecurity practices
- Educate participants with respect to **online security**

Cybersecurity Litigation

The emerging litigation relating to cybersecurity litigation also provides helpful insight. These cases generally follow two lines of claims. The first is that participant data is a plan asset entitled to the same fiduciary protections and prohibited transaction rules applicable to plan funds. Under this theory, the use of participant data for any purpose other than for the exclusive purpose of providing plan benefits would constitute a fiduciary breach. To date, the courts have been split on their acceptance of this theory. While some courts have rejected the theory in the absence

of DOL guidance expanding plan asset protection to participant data, there have been several significant court approved settlements suggesting participant data may be viewed as a plan asset. Careful re-evaluation of the use of participant data in light of this litigation trend can offer fiduciaries some protection until more reliable guidance is established.

The second line of litigation seeks to impose liability on plan fiduciaries when a participant's benefits are fraudulently withdrawn from their accounts. In these cases, good cybersecurity governance measures, including participant education, have been instrumental in defending such claims.

Show Your Work: FAQs on Non-Quantitative Treatment Limitation Comparative Analyses

By Steve Evans & Serena Yee

Update
Since the time this article was originally published on the Benefits BCLP blog, we have received anecdotal reports that the DOL is actively seeking the information described in this article and required under the CAA in its new and ongoing audits, which DOL personnel have confirmed in informal public comments to practitioners. Employers should ensure they are in compliance with the treatment limitation comparative analyses requirements and be prepared to provide information to the DOL upon request.

Among the requirements under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA"), group health plans and health insurance issuers must apply any processes, strategies, evidentiary standards or other factors underlying non-quantitative treatment limitations ("NQTLs") to mental health or substance use disorder ("MH/SUD") benefits comparably and no more stringently than to medical/surgical benefits.

The CAA included provisions designed to enhance transparency with respect to compliance with MHPAEA, including a requirement that group health plans and health insurance issuers perform and document comprehensive NQTL comparability analyses. We previously summarized the CAA's requirements in our Q1 2021 Newsletter, available **here**.

On April 2, 2021, the DOL **issued answers to frequently asked questions** prepared jointly with Treasury and the Department of Health and Human Services concerning the CAA's requirements. The key takeaways from the FAQs include:

- **No Delay in Compliance.**
  The Departments are not providing a delay in the compliance requirements under the CAA and stated that group health plans and health insurance issuers should now be prepared to make their NQTL comparative analyses available upon request by the Departments or a state authority.
- **Comparative Analyses Must Include Detailed Supporting Evidence and Discussion.**
  The Departments will not consider a NQTL comparative analysis which includes only general, conclusory statements regarding compliance to meet the requirements of MHPAEA and CAA. Instead, detailed written explanations of specific plan terms and practices at issue and the basis for the conclusion that the plan or issuer's NQTLs comply with MHPAEA must be provided. In an effort to support compliance, the FAQs set forth specific, minimum information that the Departments will look for in a comparability analysis, and direct group health plans and health insurance issuers to refer to its **MHPAEA Self-Compliance Tool**, which outlines a process for conducting comparative analyses of NQTLs and provides guidance on documents to support the analysis and conclusions.
- **Practices and Procedures to Avoid.**
  The Departments provided a list of practices and procedures which should be avoided in responding to requests from the Departments and state authorities. Generally, these include providing large volumes of documents without a clear explanation of their relevance or identifying or referencing processes, strategies, evidentiary standards, and factors without clear and detailed analysis and discussions of how they were defined or applied. Of particular note, the Departments included in this list the failure to update an analysis that has become stale due to the passage of time, a change in plan structure, or for other reasons, which highlights the need for plans and issuers to actively monitor MHPAEA compliance and update their comparative analyses as circumstances and plan terms change.

- **Other Required Disclosures.**
  Consistent with previous MHPAEA guidance, the Departments confirmed that plans subject to ERISA must make its NQTL comparative analyses and other relevant information available plan participants, beneficiaries, and enrollees upon request. Further, NQTL analyses fall within the scope of a claimant's right to reasonable access to documents and information relevant to a claim for benefits under ERISA.

- **Near Term Enforcement Priorities.**
  The DOL's near term enforcement focus for NQTLs includes:
  - Prior authorization requirements for in-network and out-of-network inpatient services;
  - Concurrent review for in-network and out-of-network inpatient and outpatient services;
  - Standards for provider admission to participate in a network, including reimbursement rates; and
  - Out-of-network reimbursement rates (i.e., a plan or issuer's methods for determining the usual, customary, and reasonable charge).

IRS Clarifies Rules for Dependent Care Assistance Programs

By Jennifer Stokes

On May 10, 2021, the IRS released Notice **2021-26**, which clarifies taxability of dependent care assistance programs ("DCAPs") for 2021 and 2022, including the carry-over of unused balances from one plan year to the next and extended grace periods for incurring expenses.

Section 129 of the Code provides an exclusion from gross income for amounts paid for dependent care assistance benefits under a DCAP, and employees often contribute to the DCAP through payroll deduction under a cafeteria plan. For 2020, the exclusion could not exceed $5,000. Unused DCAP funds have not been available to be carried over to a subsequent plan year, but were allowed a 2 ½ month grace period after the applicable plan year. If the sum of DCAP benefits used in the taxable year exceeds the applicable limit for the year, the excess is taxable. While DCAP amounts may be carried over during the 2 ½ month grace period, the grace period does not increase the applicable limit for the year in which any such carryover is used.

The Taxpayer Certainty and Disaster Tax Relief Act of 2020 allows plans to be amended to permit unused DCAP amounts to be carried over from a plan year ending in 2020 to a plan year ending in 2021 and from a plan year ending in 2021 to a plan year ending in 2022, or to permit an extended period for incurring claims for a plan year ending in 2020 or 2021 to 12 months after the end of the plan year with respect to unused benefits remaining in the DCAP. In addition, the limit for the 2021 taxable year was increased to $10,500. It is important to note this increase is only applicable for the individual's 2021 taxable year, not the plan year. Accordingly, in the case of a DCAP offered with a non-calendar plan year beginning in 2021 and ending in 2022, the increased exclusion amount will not apply to reimbursement of expenses incurred during the 2022 portion of the plan year.

IRS Notice **2021-15**, issued February 18, 2021, provides that unused DCAP benefit amounts carried over from prior years or available during an extended period for incurring claims are not taken into account in determining the annual limit applicable for the following year, thus clarifying that DCAP participants may continue to make contributions up to the maximum annual permissible plan limit even if they had carried over unused funds or are benefiting from an extended grace period. In addition, IRS Notice 2021-26 clarifies that DCAP benefits that would have been excluded from income if used during the taxable year ending in 2020 or 2021 remain eligible for exclusion from the participant's gross income, as applicable. IRS Notice 2021-26 also clarifies that benefits carried over from a plan year ending in 2020 or 2021 or permitted to be used pursuant to an extended claims period are disregarded for purposes of application of the DCAP limit for the subsequent taxable years of the employee.

We would like to thank St. Louis summer associate Mckenna Gossrau for her assistance in preparing this article.

Top Mistakes in IRS VCP Filings

By Patrick Becker

The IRS offers a formal opportunity to correct certain types of plan qualification failures through its Voluntary Correction Program ("VCP"), one of the retirement plan correction programs under the IRS's Employee Plans Compliance Resolution System. The **IRS recently updated its webpage listing out the most common mistakes** with taxpayer's VCP submissions.

These top mistakes include:

- Online submission issues:
  - Failure to combine PDF documents into a single PDF file that is less than 15 MB,
  - Incorrect completion of the pay.gov Form 8950,
  - Failure to pay the correct user fee, and
  - Making multiple submissions when an issue is discovered after submission.
- Data contained in the submission did not line up with other documents submitted (such as the plan sponsor or plan name).
- The submission did not include the plan name, employer identification number, and plan number on every page submitted.
- The operational failure description did not specify the plan section that was not followed or the number of affected participants.
- The submission did not state a plan qualification failure. The IRS will not review the submission to identify the plan failure for the plan sponsor.
- Calculations of corrective contributions were not sufficiently detailed.
- For submissions involving participant loans,
  - The submission did not include the loan policy or loan agreement entered into with the participant, or
  - The reamortized loan exceeded the 5-year period that applied to the original loan.

To ensure a smooth and timely review by the IRS, plan sponsors should consult with a member of their BCLP team to ensure any VCP submission is carefully reviewed and these top mistakes are avoided.

DOL Adopts New Fiduciary Advice Exemption

By Cass Hollis & Steve Schaffer

The **DOL adopted PTE 2020-02, *Improving Investment Advice for Workers and Retirees* ("PTE 2020-02")**, effective as of February 16, 2021. PTE 2020-02 provides relief from the prohibited transaction rules for investment fiduciaries who provide advice to retirement plan sponsors and investors as well as IRAs. The DOL issued PTE 2020-02 to promote investment advice that is in the best interests of plan participants, beneficiaries, and IRA owners and to minimize conflicts of interest. PTE 2020-02 permits financial institutions and investment advisors to receive reasonable commissions, 12b-1 fees and mark-ups/downs and other payments in certain principal transactions.

To comply with PTE 2020-02, financial institutions and investment professionals must

- Acknowledge in writing to the investor that they are a fiduciary (the DOL provided model language for this purpose in the preamble to PTE 2020-02);
- Provide a written, accurate description of the services and disclosure of material conflicts of interest sufficient to allow a reasonable person to assess the scope and severity of such conflicts;
- Adhere to the Impartial Conduct Standards;
- Adopt policies and procedures to ensure compliance with the Impartial Conduct Standards and to minimize conflicts of interest;
- Document and disclose specific reasons that a rollover recommendation is in the investor's best interests and evidence of the consideration of all available alternatives to the rollover (including leaving the assets in the retirement plan and modifying the existing investment options available under that plan), fees and expenses associated with each alternative, whether the employer covers administrative expenses under the retirement plan, and the level of services available for all alternatives; and

- Perform an annual retrospective compliance review to identify possible violations of the established policies and procedures and prepare a report of the results which is certified by a senior executive officer of the financial institution.

For purposes of PTE 2020-02, the Impartial Conduct Standards are intended to protect consumers and ensure that financial institutions and investment professionals conduct themselves in a prudent manner and pursuant to the basic standards of fair dealing. To comply with the Impartial Conduct Standards, the advice given must be in the best interests of investors and the advisor must comply with the duties of prudence and loyalty in providing the advice. The investment advisor should not charge more than reasonable compensation for its services and should comply with the "best execution" requirements for investment transactions under the federal securities rules. Finally, the investment advisor should not make misleading statements about investment transactions and other relevant matters.

Financial institutions and investment professionals are not permitted to rely on PTE 2020-02 for 10 years after conviction of crimes relating to their provision of investment advice to retirement plan investors, or if they have exhibited a pattern or practice of violating the exemptions conditions, intentionally violated the exemption's conditions or provided misleading information to the DOL in any examination relating to their conduct.

The DOL's primary concern in issuing PTE 2020-02 is rollover recommendations provided by investment advisors to plan participants and beneficiaries, given the economic incentive for an investment advisor to recommend that plan participants and their beneficiaries roll assets from a retirement plan to an IRA maintained with their own financial institution. In the preamble to PTE 2020-02, the DOL clearly states that a rollover recommendation is covered as fiduciary advice to the extent such advice also meets the DOL's 5-part test set forth in the 1975 regulations for determining who is an investment advice fiduciary, which requires that the advice be part of an ongoing investment advice relationship (even if the rollover recommendation is the beginning of the relationship), be pursuant to a mutual agreement with the investor, be the primary basis for the investor's investment decision and be individualized based on the needs of the plan or the IRA.

PTE 2020-02 provides a correction procedure for violations of the requirements of the exemption by financial institutions. A financial institution may correct a violation of the exemption within 90 days after the financial institution learns of, or should have learned of, a violation; provided that the violation did not result in investment losses for the retirement investor or the financial institution made the investor whole. Within 30 days of the correction, the financial institution must notify the DOL and the person responsible for the annual retrospective review of the violation. The violation and correction must be specifically described in the annual retrospective review for the year in which it occurred.

The DOL considered delaying the effective date of PTE 2020-02 to allow time for further review and analysis; however, the DOL determined that the fundamental investor protections provided in PTE 2020-02 were of the utmost importance and should be implemented as scheduled. The DOL indicated that it will continue to evaluate and analyze the requirements of PTE 2020-02 and anticipates that it will take further action and issue additional guidance related to its regulation of fiduciary investment advice.

LOOKING AHEAD

On the Horizon – New Retirement Plan Design Opportunities! Meet: "Securing a Strong Retirement Act of 2021", aka "SECURE 2.0"

By Sarah Bhagwandin

There is significant legislation working its way through the House that promises to offer new design opportunities to retirement plan sponsors, while improving plan participants' opportunities to save for retirement. Congress' continued bi-partisan efforts to reform the regulation of private retirement plans has been fruitful, resulting most recently in **proposed legislation, "Securing a Strong Retirement Act of 2021"**, aka SECURE 2.0. The bill passed out of the House Ways and Means Committee with unanimous approval on May 5, 2021 and now goes to the House for approval. It is expected that in 2021 or 2022 the bill will become law.

Here is an overview of the major provisions of SECURE 2.0:

- **Matching Contributions for Student Loan Payments**
  Employers will be able to add a feature to the 401(k) plan whereby a participant's "qualified student loan payment" would be treated as an elective deferral, eligible for an employer matching contribution. For example, for a plan that matching elective deferrals 100% on the first 3% of deferrals, a student loan payment that is at least 3% of the participant's annual compensation would result in a commensurate employer matching contribution to the 401(k) plan of 3% of compensation. The new feature would be available starting with the 2022 Plan Year.

  For purposes of ADP testing, the bill would allow a plan to test the contributions of the population of employees who make student loan payments separately from the contributions of the population of employees who make 401(k) contributions to the plan.

- **Expanding Coverage and Increasing Retirement Savings:**
  - Catch-Up Contribution Limits increases to $10,000 for individuals between the ages of 62 and 64. (Higher limit not available for individuals age 65 and older.)
  - Required Automatic Enrollment – 401(k) plans established after the passage of the bill would be required to automatically enroll all employees for deferrals at 3%, with a 90-day opt-out window.
  - Minimum Required Distribution Age increased incrementally to age 75 for individuals who attain age 74 after 12/31/2031.
  - Mandatory cash-out limit raised from $5,000 to $6,000, with the requirement that if, within 6 months, a participant does not make a distribution election or accept direct payment, the plan administrator must transfer the benefit to the Office of Retirement Savings Lost and Found. The Office would then periodically search for non-responsive participants.
  - Long-Term, Part-Time employees must be eligible to make elective deferrals to a plan after 2, rather than 3, consecutive years of being credited with at least 500 hours of service. Importantly, the bill clarifies that service performed before 2021 is disregarded for vesting purposes for this group of newly eligible employees.

- **Simplifications and Clarifications to Existing Plan Rules:**
  - Office of Retirement Savings Lost and Found - The bill requires the establishment of an online searchable database, to be managed by the PBGC, within 3 years of the passage of the bill, to be known as the "Retirement Savings Lost and Found". Further, the bill directs the Secretary of Labor, in consultation with the Secretary of Treasury, to issue a Final Rule within 3 years of passage of the bill on what steps plan fiduciaries must take to locate missing participants, and what practices and procedures they must implement to maintain up-to-date contact information on deferred vested participants, to satisfy their fiduciary duties.
  - o Repayment of Qualified Birth and Adoption Distributions – If a participant wishes to repay

to his or her account a withdrawal made under the Qualified Birth and Adoption Distributions, the repayment must be made within 3 years of taking the withdrawal.

- Self-Certification for Deemed Hardship – Plan administrators of 401(k) and 403(b) plans may rely on an employee's certification that a distribution is on account of a financial hardship of a type that is deemed in the Treasury regulations to be an immediate and heavy need.
- Penalty Free Withdrawals in the Event of Domestic Abuse – The bill would allow a penalty-free withdrawal of the lesser of $10,000 or 50% of a participant's vested benefit of the plan for a participant who self-certifies he or she is the victim of domestic abuse.
- 457(b) Plan Election Changes – Participants would be allowed to change their deferral election any time prior to the date that compensation being deferred is available. Currently, changes to elections under a 457(b) plan must be made prior to the beginning of the month to which deferrals are made.

We will be tracking this legislation and provide updates on how these and other provisions in the bill change over the coming months.

THEY'RE HERE: Lifetime Income Illustrations for Defined Contribution/ 401(k) Plans

By: Serena Yee and Lisa Van Fleet

The SECURE Act requires that at least once per year, the benefit statements for ERISA-covered defined contribution plans (including 401(k) plans) show participants' and beneficiaries' account balances in the form of two lifetime income illustrations:

- Monthly payments in the form of a single life annuity, and
- Monthly payments in the form of a qualified joint and survivor annuity.

On September 18, 2020, the DOL published an Interim Final Rule, which

- prescribed a set of assumptions that must be used when converting a participant's current account balance (assumed to be 100% vested) into a lifetime income stream; and
- provided optional model language that could be used to explain the assumptions used for the lifetime income illustrations.

The Interim Final Rule effective date is one year from its publication date (i.e., September 18, 2021).

In response to public comments, the IRS issued **Temporary Implementing FAQs** on July 27, providing clarification on the following time-sensitive issues:

- **Effective Date for participant-directed plans**
  Plans that issue quarterly statements must first comply on a benefit statement for a quarter ending within 12 months after the effective date. Since the Interim Final Rule becomes effective September 18, 2021, plans that must issue quarterly statements can incorporate their first lifetime illustration on any quarterly statement up to the second calendar quarter of 2022 (ending June 30, 2022). Any delay beyond the second calendar quarter of 2022 (September 30, 2022) would be problematic since it would be after the end of the 12-month period following the effective date.
- **Effective Date for non-participant-directed plans**
  The lifetime income illustrations must be on the statement for the first plan year ending on or after September 19, 2021. For most plans this will be the statement for calendar year 2021, which is furnished no later than the last date for timely filing of the 5500 for that year for a calendar year plan (October 15, 2022).
- **Use of projected account balances to normal retirement age or other illustrations based on the DOL's 2013 advance notice of proposed rulemaking to satisfy the Interim Final Rule**
  Although the SECURE Act requires lifetime income illustrations that differ from the illustrations proposed in the 2013 advance notice of proposed rulemaking, the DOL notes that the Interim Final Rule specifically allows for additional lifetime income illustrations based on its recognition that many retirement plans have been providing

various types of illustrations, including illustrations of the type contemplated by the advance notice of proposed rulemaking. The implication is that plans may continue to include such illustrations but it must still include the specific illustrations required under the Interim Final Rule.

- **Transitional relief**
  The DOL made no commitment to providing transitional relief if the final rule is not issued significantly in advance of September 18, 2021; but rather, stated its intent to issue a final rule as soon as practicable and acknowledged commenters concerns that to the extent the final rule differs materially from the Interim Final Rule there may not be sufficient transition time for plan administrators to accommodate such changes.

Given the imminent compliance deadline and still-shifting guidance, plan administrators should be preparing to provide the required lifetime income illustrations based on the current state of guidance as set forth in the Interim Final Rule, while simultaneously monitoring the regulatory horizon for further developments.

IRS Announces New 2022 Inflation Adjusted Limits for HDHPs, HSAs, and HRAs (Revenue Procedure 2021-25)

Type of Limitation	2022	2021
High Deductible Health Plans (HDHPs) - Sec. 223(c)(2)(A)		
Deductible minimum for self-only coverage	$1,400	$1,400
Deductible minimum for family coverage	$2,800	$2,800
Out-of-pocket expenses limit for self-only coverage	$7,050	$7,000
Out-of-pocket expenses limit for family coverage	$14,100	$14,000
Health Savings Accounts (HSAs)		
Sec. 223(b)(2)(A) deduction limit for an individual with self-only coverage under HDHP	$3,650	$3,600
Sec. 223(b)(2)(B) deduction limit for an individual with family coverage under HDHP	$7,300	$7,200
Health Reimbursement Arrangements		
Maximum amount that may be made newly available for the plan year (which begins in the calendar year) for an excepted benefit HRA (under Section 54.9831-1(c)(3)(viii))	$1,800	$1,800

GETTING IN TOUCH

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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