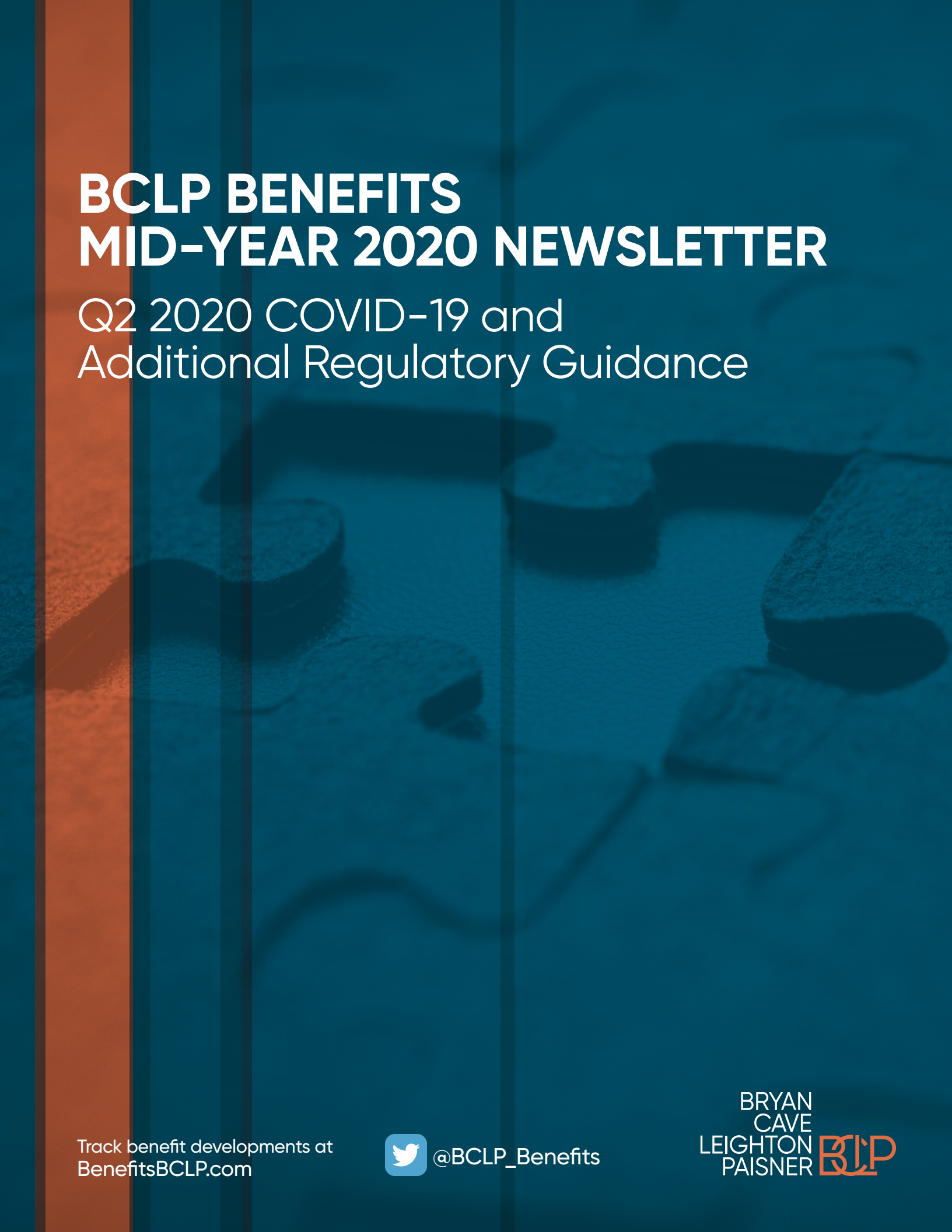
BCLP BENEFITS MID-YEAR 2020 NEWSLETTER

Q2 2020 COVID-19 and Additional Regulatory Guidance



Track benefit developments at BenefitsBCLP.com

@BCLP_Benefits

BRYAN CAVE LEIGHTON PAISNER BCLP

CONTENTS

OVERVIEW FROM THE EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION GROUP 3

GUIDANCE RELATED TO COVID-19 4

DOL Further Eases Requirements for Health Plans during Pandemic in New Round of FAQs 4

IRS Guidance Expands CARES Act Relief for Qualified and Nonqualified Retirement Plans: Executive Summary for Plan Sponsors 7

IRS Clears the Air on 2020 RMDs 9

IRS Provides Clarification and Relief for Safe Harbor Plans: Plan Sponsors Must Act Before August 31, 2020 to Take Advantage of Relief 10

Additional COVID-19 Guidance from the DOL, IRS, and PBGC 11

GUIDANCE UNRELATED TO COVID-19 13

DOL Adds a New Electronic Delivery Safe Harbor – but Only for Retirement Plans 13

Additional Guidance Unrelated to COVID-19 16

OVERVIEW FROM THE EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION GROUP

In the second quarter of 2020, we have seen employers faced with continued challenges as they manage the impact of the COVID-19 pandemic on their businesses and begin the process of returning to normal operations. The flurry of regulatory guidance from governmental agencies responsible for employee benefit plan oversight that began earlier this year in response to the COVID-19 pandemic and the Families First Coronavirus Response Act ("FFCRA") and Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") also has continued unabated. In addition, the Department of Labor and the Internal Revenue Service have also been busy releasing guidance unrelated to COVID-19.

In this newsletter, we have provided summaries of five of these items – three related to COVID-19 and the fifth summarizing the Department of Labor's ("DOL") final electronic disclosure rule. In addition to these longer summaries, we have also included short notes describing the additional guidance that has been released.

If you have any questions about a topic included in this newsletter, please contact a member of our Employee Benefits & Executive Compensation Group.

Richard Arenburg
Partner – Atlanta
+1 404 572 6765
richard.arenburg@bclplaw.com

Patrick Becker
Associate – Atlanta
+1 404 572 6786
patrick.becker@bclplaw.com

Sarah Bhagwandin
Counsel – Denver
+1 303 866 0214
sarah.bhagwandin@bclplaw.com

Adam Braun
Associate – St. Louis
+1 314 259 2457
adam.braun@bclplaw.com

Denise Erwin
Counsel – Denver
+1 303 866 0631
denise.erwin@bclplaw.com

Stephen Evans
Associate – St. Louis
+1 314 259 2387
steve.evans@bclplaw.com

Cass Hollis
Counsel – Atlanta
+1 404 572 6676
cass.hollis@bclplaw.com

Steven Schaffer
Partner – Atlanta
+1 404 572 6830
steven.schaffer@bclplaw.com

Randall Scherer Jr.
Associate – St. Louis
+1 314 259 2446
randy.scherer@bclplaw.com

Jennifer Stokes
Partner – St. Louis
Leader, EBEC Group
+1 314 259 2671
jennifer.stokes@bclplaw.com

Lisa Van Fleet
Partner – St. Louis
+1 314 259 2326
lavanfleet@bclplaw.com

Serena Yee
Counsel – St. Louis
+1 314 259 2372
sfyee@bclplaw.com

Jonathan Hull
Paralegal – St. Louis
+1 314 259 2359
jhull@bclplaw.com

Julie Wagner
Paralegal Specialist – St. Louis
+1 314 259 2637
jawagner@bclplaw.com

GUIDANCE RELATED TO COVID-19

DOL Further Eases Requirements for Health Plans during Pandemic in New Round of FAQs

By Serena Yee and Sarah Bhagwandin

On June 23, 2020, the Departments of Labor and Health and Human Services and Treasury ("Departments") jointly issued a new set of FAQs relating to the implementation of the FFCRA and the CARES Act.

Application to Self-Insured Group Health Plans

Although we were not aware of any ambiguity on this issue, the Departments confirmed that self-insured group health plans are subject to the mandated coverage for COVID-19 testing without cost-sharing (*i.e.*, deductibles, copays and coinsurance) or imposition of prior authorization or other medical management requirements when those items or services related to the diagnostic testing are furnished on or after March 18, 2020 and during the applicable emergency period. The Departments also included regulatory contact information for individuals who believe that their plans are not providing the required coverage.

Covered COVID-19 Tests

Under the FFCRA, the mandated coverage extends to all in vitro diagnostic tests for the detection of SARS-CoV-2 or the diagnosis of COVID-19 and the administration of such test that:

- Is approved, cleared or authorized under the Federal Food, Drug and Cosmetic Act;
- The lab or manufacturer (*i.e.*, the developer) has requested or intends to request emergency use authorization under section 546 of the Federal Food, Drug and Cosmetic Act (unless or until the emergency use authorization request is denied or the developer fails to submit its request within a reasonable timeframe);
- Is developed in and authorized by a state that has notified HHS of its intention to review tests designed to diagnose COVID-19; or
- HHS has determined appropriate in guidance (no other tests have been specified by HHS)

In an effort to assist plans in determining which tests must be covered, all in vitro diagnostic tests that have received emergency use authorization under section 564 of the Federal Food, Drug and Cosmetic Act are listed on the COVID-19 Emergency Use Authorization for Medical Devices section of the Food and Drug Administration (FDA) website. A list of labs and commercial manufacturers that have notified FDA of the self-validation of its own COVID-19 test and are offering the test as outlined in FDA guidance as well as states that have notified the FDA that they have authorized labs within the state to develop and perform COVID-19 testing also are listed on the FDA website.

In the event that a lab or manufacturer subsequently fails to timely submit an emergency use authorization or significant problems are identified with a test, the FDA will remove the developer and the test from the list. However, while the test is included on the list, it must be covered.

Medically Appropriate Testing

Coverage for testing is required when testing is determined to be medically appropriate for the individual by the individual's attending health care provider. The Departments have provided clarification on the following issues:

- The health care provider need not be directly responsible for providing care to the individual to be considered an attending provider, as long as the provider makes an individualized clinical assessment to determine whether the test is medically appropriate.
- Coverage extends to at-home testing if ordered by the attending health care provider who has determined that the test is medically appropriate for the individual based on current accepted standards of medical practice.
- If an individual receives multiple tests, coverage is required to the extent the tests are diagnostic and medically appropriate for the individual, as

determined by the attending provider. A plan is not required to cover testing for general workplace health and safety, public health surveillance or any other purpose not primarily intended for individualized diagnosis and treatment of COVID-19 or another health condition.

- A plan must cover any facility fee relating to the furnishing or administration of a COVID-19 test or the evaluation to determine the individual's need for testing.

Balance Billing

It was contemplated that a provider will be reimbursed either at a negotiated rate or an amount that equals the cash price for such service as listed by the provider on a public website. In either case, the amount the plan reimburses the provider constitutes payment in full for the test with no cost sharing to the individual or other balance due. If a plan seeks to negotiate with the provider to determine a reimbursement rate (*e.g.*, a negotiated rate with the provider is not in effect or the provider has not published a cash price) state laws governing reimbursements may apply. The Departments acknowledge that the CARES Act is silent with respect to the reimbursement amount where the provider has not made public a cash price for the test and the plan and the provider cannot agree upon a rate that the provider will accept as payment in full. In such cases, the method for determining reimbursement will be governed by applicable state law.

With respect to COVID-19 testing received in an emergency department of an out-of-network hospital, the minimum payment standards applicable to a non-grandfathered plan for determining the amount payable for out-of-network emergency services are superseded and the plan must reimburse the out-of-network provider an amount equal to the provider's published cash price. In the alternative, the plan may negotiate a rate that is lower than the cash price. Note, the CARES Act requires providers of diagnostic tests for COVID-19 to publish the cash price.

Advance Notice Requirements – Revocation of COVID-19 Special Coverage

In the last set of FAQs issued in April, the Departments announced that they would not enforce the requirement that health plans provide 60-days' advance notice when there is a material modification to the terms of the plan when those changes are made in connection with the diagnosis and treatment of COVID-19. Under the enforcement relief policy, plans must provide notice of the changes as soon as reasonably practicable.

In this set of FAQs the Departments address the revocation of coverage changes in connection with the diagnosis and treatment of COVID-19 upon the expiration of the national health emergency declaration. The Departments will consider a plan to have satisfied its obligation to provide advance notice of a material modification to the plan terms if it had previously notified participants of the general duration of the additional benefits coverage or reduced cost-sharing (*i.e.*, applies only during the COVID-19 health emergency) or notifies the participants of the general duration within a reasonable timeframe in advance of the reversal of the changes.

Telehealth and Remote Care Services

The Departments are providing general relief from the group market reforms under the Affordable Care Act (*e.g.*, coverage for preventive care, external review requirements, etc.) for group health plans sponsored by large employers that provide coverage solely for telehealth and other remote care services to employees who are not eligible for any other group health plan offered by the employer. However, the following nondiscrimination standards continue to apply:

- Prohibition on pre-existing condition exclusions or other discrimination based on health status
- Prohibition on rescissions
- Requirements relating to parity in mental health or substance use disorder benefits.

The relief extends for the duration of any plan year beginning before the end of the national health emergency.

Grandfathered Health Plan Status

A plan generally loses its grandfathered status if it eliminates all or substantially all benefits to diagnose or treat a particular condition or increases cost-sharing requirements above certain thresholds as compared to the terms of the plan that were in effect March 23, 2010. To the extent a plan added benefits or reduced or eliminated cost sharing only for the period in which the national emergency related to COVID-19 is in effect, the plan will not lose its grandfather status solely due to the reversal of such changes and restoration of the terms of the plan in effect prior to the emergency.

Note that the Departments also recently issued a proposed rule providing that a high-deductible health plan (HDHP) may increase its fixed-amount cost-sharing requirements (*e.g.*, deductible) to the extent necessary to maintain its status as an HDHP without losing grandfather status. The proposed rule also provides an alternative method of measuring permitted increases in fixed-amount cost sharing that would allow plans to better account for changes in the costs of health coverage over time. Public comments to the proposed rule are due by Aug. 14, 2020.

Mental Health Parity and Addiction Equity Act

The Departments will not take enforcement action against a plan that disregards benefits for items and services required to be covered without cost-sharing under the FFCRA in performing the "substantially all" and "predominant" tests for financial requirements and quantitative treatment limitations.

Wellness Programs

Under the 2013 wellness regulations, health contingent wellness programs must provide a reasonable alternative standard (or waiver of the applicable standard) for obtaining a reward to individuals for whom it is unreasonably difficult due to a medical condition, or medically inadvisable, to satisfy the applicable standard.

In the FAQs, the Departments confirm that a plan may waive a standard for obtaining a reward (including any reasonable alternative standard) under a health contingent wellness program if participants or beneficiaries are facing difficulty in meeting the standard due to circumstances related to COVID-19. Any such waiver must be offered to all similarly-situated individuals.

Individual Coverage Health Reimbursement Arrangements (HRAs)

Employers offering employees individual coverage HRAs are required to provide employees with important information regarding the terms of the HRA and certain consequences of accepting or not accepting the individual coverage HRA at least 90 days before the start of the plan year. Recognizing that the timing for providing the required notice is subject to the relief under EBSA Notice 2020-21 for notices that would have otherwise been required to be furnished between March 1, 2020 and 60 days after the end of the national emergency, the Departments encourage employers to consider providing the required information to employees at least early enough in advance so that employees are not adversely affected due to the following:

- Insufficient time for employees to weigh their coverage options and enroll in individual health insurance coverage or Medicare.
- Missing important information about enrolling in individual health insurance coverage through an open enrollment or special enrollment period.
- Lack of understanding about the consequences of the offer or acceptance of individual coverage HRA on eligibility for a premium tax credit and the information needed when applying for advance payments of premium tax credits through the Health Insurance Marketplace or to verify eligibility of a special enrollment period.

IRS Guidance Expands CARES Act Relief for Qualified and Nonqualified Retirement Plans: Executive Summary for Plan Sponsors

By Denise Erwin & Stephen Evans

The IRS recently issued Notice 2020-50 ("Notice") which provides eagerly anticipated guidance under the CARES Act regarding Coronavirus-related Distributions ("CRDs") and Coronavirus-related plan loans ("CPLs") from qualified retirement plans. The Notice also provides related relief for nonqualified deferred compensation plans.

The following is what plan sponsors need to know when implementing and administering CRDs and CPLs:

Qualified Plans

- The Notice expanded the definition of "Qualified Individuals" eligible for CRDs and CPL relief under the CARES Act.
  - The CARES Act provided that Qualified Individuals included any individual:
    - who was diagnosed with the SARS-CoV-2 virus or COVID-19,
    - whose spouse or dependent was diagnosed with COVID-19, or
    - who, due to COVID-19, experienced adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to a lack of childcare, or the closing or reduction in hours of a business owned or operated by the individual.
  - Under the expanded definition in the Notice, Qualified Individuals will also now include individuals who experience adverse financial consequences as a result of any of the following:
    - The individual having:
      - a reduction in pay (or self-employment income) due to COVID-19, or
      - a job offer rescinded or a start date for a job delayed due to COVID-19.
    - The individual's spouse or a member of the individual's household (defined as anyone who shares the individual's personal residence) being furloughed or laid off or having work hours reduced due to COVID-19, being unable to work due to lack of childcare due to COVID-19, having a reduction in pay (or self-employment income) due to COVID-19, or having a job offer rescinded or start date for a job delayed due to COVID-19.
    - Closing or reducing hours of a business owned or operated by the individual's spouse or a member of the individual's household due to COVID-19.
- The Notice provides sample participant self-certification language plan sponsors can rely on to determine "Qualified Individual" status unless the plan sponsor has actual knowledge to the contrary.
  - Clarifies plan sponsors have no duty to inquire.
  - Does not require participants to specify which category applies.
  - Can be accepted for both current and former employee participants.
- The Notice includes additional CRD Guidance:
  - Qualified individual can take a CRD regardless of any need for the funds. The amount of the CRD is not required to correspond to the extent of the adverse financial consequence experienced.
  - If plan sponsor does not amend the plan to permit CRDs, the plan sponsor cannot treat a distribution as a CRD. Participants can still do so if the distribution otherwise qualifies.
  - Plan Sponsor Tax Treatment of CRDs:
    - Must report any CRD in Box 7 of Form 1099-R whether or not recontributed.
    - Permitted to use distribution Code 1 (early distribution, exception applies) or distribution Code 2 (early distribution, no known exception).

        - 20% withholding not required.
        - Not required to offer a direct rollover or provide a 402(f) notice.
        - Plan must be consistent in its treatment of similar distributions.
    - Individual Tax Treatment of CRDs:
        - Must report CRD on 2020 tax return and Form 8915-E.
        - Income inclusion all in year of distribution or ratably over 3 years.
        - All CRDs received in a taxable year must be treated consistently
        - Recontributions reported on Form 8915-E, amended tax return required.
        - If recontribution exceeds amount otherwise includable in gross income for a tax year, excess amount can be carried forward or carried back.
    - CRD Recontributions:
        - Only a CRD that is eligible for tax-free rollover treatment may be recontributed.
        - CRDs made to beneficiaries cannot be recontributed.
- The Notice provides the following CPL Guidance:
    - Confirms loan relief only available for Qualified Individuals and that plan sponsors are permitted to decide whether, and to what extent, to apply CPL rules to the plan. For Qualified Individuals who incur a deemed distribution from a plan not adopting the CARES Act CPL rules, such individuals may be eligible under their particular circumstances to designate the distribution as a CRD and receive the favorable CRD tax treatment.
    - Provides a safe harbor that plan sponsors can rely on in implementing suspension of loan repayments otherwise due through the end of 2020, if the following conditions are satisfied:
        - Repayments must resume in January 2021.
        - Interest accruing during suspension period must be added to the remaining principal balance.
        - The loan must be reamortized and repaid in substantially equal payments over the remaining term of the loan plus up to 1 year from the date the loan was originally due to be repaid.

Nonqualified Plans

- The Notice permits cancellation of deferral elections without violating Code § 409A if a CRD is received.
    - CRD treated as a hardship withdrawal for purposes of Code § 409A rules.
    - Deferral election must be cancelled not merely postponed or delayed.

IRS Clears the Air on 2020 RMDs

By Adam Braun & Rick Arenburg

In the last six months, retirement plan sponsors and participants have witnessed significant developments regarding the proper treatment of required minimum distributions ("RMDs"). A failure to recognize and timely act upon these developments will jeopardize a plan's tax-qualified status due to operational or documentary failures.

In December 2019, the SECURE Act amended the RMD rules to extend the required beginning date for RMDs to April 1 of the calendar following the year in which a plan participant turns 72 (instead of 70 ½). Then, just as plan sponsors were working to comply with the SECURE Act's amendment, the CARES Act, adopted in March 2020, waived RMDs that otherwise were payable in 2020 for defined contribution plans and IRAs (but not defined benefit plans or 457(b) plans) under new Code Section 401(a)(9)(I). The back-and-forth triggered many questions, including with respect to actions that plan sponsors and participants need to take for 2020 RMDs that were distributed prior to the CARES Act.

IRS Notice 2020-51, issued June 23, 2020, resolved many of those questions by, among other relief:

- Providing that the payor of a distribution made in 2020 that would have been a RMD prior to the SECURE Act (*e.g.*, a participant who attained age 70½ in 2020 and received a distribution in January 2020, immediately the SECURE Act's amendment became effective) is not required to treat the distribution as an eligible rollover distribution;
- Permitting all 2020 RMDs distributed but later exempted by CARES Act to be rolled over or returned to an eligible retirement plan by August 31, 2020;
- Allowing participants to choose whether or not to include 2020 RMDs in distributions received in 2020; and
- Confirming, among other Q&As included in the Notice, that:
  - The CARES Act waiver does not apply to defined benefit plans;
  - 2020 RMDs that were distributed prior to the CARES Act can generally be rolled back into the same distributing plan (assuming the plan permits rollovers); and
  - If any portion of a distribution includes a 2020 RMD, that portion may not be treated as an eligible rollover and is subject to voluntary withholding (10%).

The Notice also provides alternative sample defined contribution plan amendments to implement the CARES Act's RMD waiver and establish a plan's default treatment for paying or withholding 2020 RMDs (unless a participant elects otherwise). Under the CARES Act, plan sponsors must approve this amendment by the end of the first plan year that begins after December 31, 2021.

In light of this guidance, plan sponsors and participants should review and, if necessary, adjust their treatment of 2020 RMDs by the applicable deadlines.

IRS Provides Clarification and Relief for Safe Harbor Plans: Plan Sponsors Must Act Before August 31, 2020 to Take Advantage of Relief

By Lisa Van Fleet and Randall D. Scherer Jr.

The IRS recently released guidance (Notice 2020-52) relating to safe harbor plans. The guidance (i) clarifies the requirements that apply to mid-year amendments which reduce contributions solely with respect to highly compensated employees ("HCEs"), and (ii) provides COVID-19 temporary relief with respect to mid-year amendments that reduce or suspend certain safe harbor contributions. Given the imminent expiration of this temporary relief (August 31, 2020), sponsors of safe harbor plans should promptly review the relief to evaluate whether they wish to take advantage of it.

Clarification Regarding Mid-year Amendments that Reduce Contributions to HCEs

The IRS clarified that contributions to safe harbor Section 401(k) or Section 401(m) plans on behalf of an HCE are not included in the definition of safe harbor contributions. As such, any mid-year changes to a plan that reduce only contributions made on behalf of HCEs are not considered a reduction or suspension of safe harbor contributions. Such reductions are therefore not subject to certain restrictions that apply with respect to reduction of safe harbor contributions.

However, a mid-year change that reduces only contributions on behalf of HCEs is considered a mid-year change to a plan's required safe harbor notice content for purposes of the requirements set forth in IRS Notice 2016-16. To satisfy those requirements, an updated safe harbor notice and election opportunity must be provided to HCEs to whom the mid-year changes apply.

COVID-19 Temporary Relief for Certain Mid-year Amendments that Reduce or Suspend Safe-Harbor Contributions

Normally, mid-year amendments that reduce or suspend safe harbor matching contributions or safe harbor nonelective contributions are allowed only when the following requirements are satisfied.[1]

1. The employer must be operating at an economic loss for the plan year, or
2. The employer has included in the plan's safe harbor notice for the plan year a statement that:
   - The plan may be amended during the plan year to reduce or suspend the safe harbor contributions; and
   - The reduction or suspension will not apply until at least 30 days after all eligible employees are provided notice of the reduction or suspension.

Under the newly issued guidance, plan amendments adopted between March 13, 2020 and August 31, 2020 that reduce or suspend safe harbor contributions for the plan year will not be treated as failing the above described requirements. As described below, notice requirements may still apply with respect to these amendments.

Additionally, plan amendments adopted between March 13, 2020 and August 31, 2020 that reduce or suspend safe harbor *nonelective* contributions will not be treated as failing the supplemental notice requirements under applicable regulations[2] merely because a supplemental notice is not provided to eligible employees at least 30 days before the reduction or suspension of such contributions is effective. The supplemental notice must be provided to eligible employees, however, no later than August 31, 2020, and the plan amendment must be adopted no later than the effective date of the reduction or suspension of contributions. No similar relief is provided with respect to the timing of supplemental notices for the reduction of safe harbor matching contributions, as the matching contribution level communicated to employees directly affects employee decisions regarding elective contributions (and employee contributions, when applicable).

In addition to Section 401(k) and Section 401(m) safe harbor plans, the relief provided by this notice applies to Section 403(b) plans that comply with the Section 401(m) safe harbor rules pursuant to Section 403(b)(12).

[1] Treas. Reg. §§ 1.401(k)-3(g)(1)(i)(A) and (ii)(A) and 1.401(m)-3(h)(1)(i)(A) and (ii)(A).
[2] Treas. Reg. §§ 1.401(k)-3(g)(1) (ii) and 1.401(m)-3(h)(1)(ii).

Additional COVID-19 Guidance from the DOL, IRS, and PBGC

Joint DOL and IRS Relief from COBRA, Special Enrollment, and Claims Related Deadlines. Under this relief, the days during the period beginning on date the COVID-19 national emergency that was declared on March 1, 2020 and extending 60 days following the declared end of the national emergency ("Outbreak Period") must be disregarded when calculating certain plan-related deadlines. If the applicable period for calculating a deadline commenced prior to March 1, 2020, the deadline for the applicable period will be suspended during the Outbreak Period, and the days during the applicable period will resume being counted following the end of the Outbreak Period. If the applicable period first commenced after the start of the Outbreak Period, the deadline will be suspended and the full period will be available following the Outbreak Period. The following deadlines are covered by this relief:

- The deadline to notify a plan of a COBRA qualifying event that is a divorce, legal separation, loss of dependent status, or a disability.
- The deadline to elect COBRA and make an initial premium or monthly premium payment.
- Special enrollment due to acquisition of a new dependent, loss of other coverage, termination of Medicare or state Children's Health Insurance Program (CHIP) coverage or qualifying for premium assistance under Medicare or CHIP.
- The time period for filing a claim under a plan.
- The time period to appeal a denied claim under a plan.
- The time period to request external review of a clam or appeal involving medical judgment or a rescission of coverage.
- The runout period or grace period for a healthcare flexible spending account which would have ended on March 31, 2020.

We previously covered this relief in a blog post, which you can read here.

DOL Section 518 Relief for Plan Fiduciaries and Plan Sponsors. In addition to the relief for plan participants described above, the DOL also issued specific relief for plan sponsors and fiduciaries with respect to deadlines for furnishing notices or disclosures to plan participants, beneficiaries and other persons provided that the plan sponsors and fiduciaries act in good faith to furnish the notices or disclosures as soon as administratively practicable under the circumstances. "Good faith" includes the use of electronic alternative means of communicating with plan participants who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites. This relief extends to the following types of notices and disclosures: annual funding notices, summary annual reports, summary plan descriptions and summaries of material modifications, QDRO notices, periodic pension benefit statements required by ERISA section 105, general plan notices (such as plan fee disclosures), QDIA notices, notices of adverse benefit determinations and appeals and blackout notices. The DOL also issued relief for procedural failures with respect to retirement plan loans and distributions if such failures are solely attributable to COVID-19 and the plan administrator makes a good faith diligence effort to comply with the requirements and a reasonable attempt to correct the errors as soon as administratively practicable. For addition information, see EBSA Disaster Relief Notice 2020-01.

PBGC COVID-19 Relief. On April 10, 2020, the Pension Benefit Guaranty Corporation ("PBGC") announced that premium payments, ERISA section 4010 filings, and most other filings that would have been due during the period beginning April 1, 2020 and ending on July 14, 2020 are now due on July 15, 2020 (see complete posting of the relief here). When the IRS provides relief to employee benefit plans because of a major disaster by delaying the Form 5500 due date, as the IRS did by including a Form 5500 extension under Notice 2020-23, the PBGC's disaster relief policy provides that many PBGC due dates are similarly extended. An important note is that the PBGC's extended due dates do not apply to certain important or time-sensitive PBGC filings that may indicate a high risk of harm to pension plan participants or the insurance program (*e.g.*, ERISA section 4043 filings to report a loan default or liquidation) (see the list of exceptions here). Filers affected by the exceptions may request individual extensions.

Relief for Mid-Year Code Section 125 Plan Changes. The IRS issued Notice 2020-29, which provides that an employer is *permitted, but not required*, to allow employees to make changes to their elections under the employer's cafeteria plan.

- For employer-sponsored health coverage, an employee may be permitted to:
  - Make a new election on a prospective basis if the employee initially declined coverage;
  - Prospectively revoke a current health coverage election and enroll in different health coverage sponsored by an employer (*e.g.*, a change from self-only to family coverage); or
  - Prospectively revoke a current health coverage election, provided the employee attests that he/she will immediately enroll in or have other coverage not sponsored by the employer (*e.g.*, a spouse's plan, Medicare, Medicaid, individual coverage, etc.).
- For health flexible spending accounts ("FSA"), an employee may be permitted to make a new election, or decrease or increase an existing election on a prospective basis (subject to a permissible limitation that an election cannot be less than amounts already reimbursed).
- For dependent care FSAs, an employee may be permitted to revoke an election, make a new election, or decrease or increase an existing election on a prospective basis (subject to a permissible limitation that an election cannot be less than amounts already reimbursed).
- A plan may permit unused amounts remaining in a health FSA or dependent care FSA as of the end of a grace period or plan year ending in 2020 to be used to pay or reimburse eligible expenses incurred through December 31, 2020.

Extension of Certain Plan-related Deadlines to August 31, 2020. The IRS issued Notice 2020-35, which extends a limited number of deadlines to complete actions related to retirement and savings arrangements which were required to be completed on or after March 31, 2020. The deadlines extended under Notice 2020-35 include:

- Interest-free corrections of employment tax reporting errors (extended to July 15, 2020);
- Filing Form 5498-series information returns for IRAs, Coverdell education savings accounts, health savings accounts, and Archer medical savings accounts (extended to August 31, 2020).
- Application for a funding waiver for a defined benefit plan that is not a multiemployer plan (extended to July 15, 2020);
- With respect to multiemployer defined benefit pension plans, certification of funded status and the notice to interested parties, adoption of a funding improvement or rehabilitation plan, and the annual update of a funding improvement or rehabilitation plan (each of which is extended to July 15, 2020);
- For pre-approved defined benefit plans, adoption of a pre-approved defined benefit pension plan based on the 2012 Cumulative List, filing a request for a determination letter under the second six-year cycle, or other actions with respect to disqualifying provisions during the remedial amendment period that would have ended Aril 30, 2020 (each of which is extended to July 31, 2020);
- Completion of all corrective actions with respect to a compliance statement issued under the Voluntary Correction Program (extended to July 15, 2020); and
- The time to request approval of a substitute mortality table (extended to July 15, 2020).

Families First Coronavirus Response Act and EEOC Return to Work Guidance. The DOL has continued to issue guidance interpreting the FFCRA to assist employers in administering its requirements. The EEOC has also provided guidance for employers as their employees return to work. Our colleagues have covered these topics and more on their blog, BCLP At Work. Recent posts include:

- Managing FFCRA "Child Care" Leave During The Summer
- 4 Takeaways from the EEOC's New Guidance on Antibody Testing, Older Workers, and Accommodations
- EEOC Reminders to Include in Return to Work Communications

GUIDANCE UNRELATED TO COVID-19

DOL Adds a New Electronic Delivery Safe Harbor – but Only for Retirement Plans

By Serena Yee & Sarah Bhagwandin

The DOL issued final regulations, effective July 27, 2020, supplementing the two long-standing safe harbors for electronic delivery of plan-related information to participants (*i.e.*, participant's use of a computer is part of his or her integral job duties and participant gives actual consent) with a new safe harbor that allows for delivery through a website or directly by email.

Covered Documents

The new safe harbor can be used by a retirement plan to distribute any documents or information required to be distributed under Title I of ERISA (*e.g.*, summary plan descriptions, fee disclosures and blackout notices). However, the safe harbor does not apply to documents or information that must be furnished only upon request. In addition, the DOL explicitly states that the safe harbor is not applicable to any disclosures relevant to welfare benefit plans.

Documents distributed electronically under the new safe-harbor, whether posted through a website or sent directly to a covered individual (as defined below) by e-mail, must meet the following criteria:

- The document must be presented in a manner calculated to be understood by the average plan participant and be searchable electronically by number, letters or words; and
- Is presented in a widely-available format suitable for both reading online and printing on paper and can be permanently retained in an electronic format.

Covered Individuals

The new safe harbor is applicable only to participants, beneficiaries and other individuals who furnish the employer or plan administrator with an electronic address, which may include an email address or number to an internet-connected mobile-computing device (*e.g.*, a smartphone) at which the covered individual may receive a notice of internet availability (NOIA).

Methods for obtaining a usable electronic address include:

- Employer-assigned work email address to employee for employment-related purposes. Assignment of an email address solely for the purpose of furnishing documents and information pursuant to this safe harbor is insufficient. The safe harbor prohibits plan administrators and plan service providers from assigning electronic addresses. Electronic addresses obtained through a commercial locator service also may not be used;
- Employee provides a personal electronic address to the plan administrator or plan sponsor as part of the job application process or on other human resource documents; or
- Individual provides an electronic address in connection with a request from the plan administrator or plan service provider on plan enrollment paperwork or to establish the individual's online access to plan documents and account information.

A spouse or other non-employee beneficiary entitled to ERISA disclosures must affirmatively provide the employer, plan sponsor or plan administrator with an electronic address.

A plan administrator may continue to rely on the new safe harbor for employees who have terminated employment. However, if the electronic address utilized by the plan administrator for purposes of the new safe harbor is the employer-assigned work email address, the plan administrator must take steps at the time of the employee's termination to either ensure the continued accuracy and availability of the former employee's electronic work address or obtain a new electronic address.

Initial Notice of Electronic Delivery

In order to rely on the new safe harbor, the plan administrator must notify each covered individual in writing (and in paper form) that covered documents will be furnished electronically to an electronic address. Such written notification must be written in a manner calculated to be understood by the average plan participant and must include the following information:

- Identification of the electronic address that will be used for the individual;
- Any instructions necessary to access the covered documents;
- Statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a subsequent version of the covered document;
- Statement of the right to request and obtain a paper version of the covered documents, free of charge, and a description of how to exercise such right; and
- A statement of the covered individual's right, free of charge, to opt out of electronic delivery and to receive only paper versions of the covered documents with a description of how to exercise such right.

Internet Posting of Covered Documents

The safe harbor includes a number of requirements if the plan administrator intends to make covered documents available through a website.

- Standards for Internet Website
  - The plan administrator must ensure the existence of the internet website at which covered individuals can access the covered documents and that the website protects the confidentiality of personal information relating to any covered individual; and
  - The documents must be available on the website no later than the date on which the covered document is required to be furnished under ERISA and must remain available for at least one year or if later, the date it is superseded by a subsequent version of the covered document.

  For purposes of the safe harbor, the term "website" refers to a traditional internet website as well as any other internet or electronic-based information repository, such as a mobile application, to which covered individuals have been provided reasonable access.

- Notice of Internet Availability ("NOIA")

  At the time a covered document is made available on the website, the plan administrator must furnish a NOIA to covered individuals using their respective electronic addresses. The NOIA must be furnished separately from any other documents or disclosures and must be written in a manner calculated to be understood by the average plan participant. Although the use of pictures, logos or similar design elements is permissible, the contents of the NOIA must be limited to:
  - A prominent statement (*e.g.*, as the title, legend or subject line) that reads: "Disclosure About Your Retirement Plan";
  - A statement that reads: "Important information about your retirement plan is now available. Please review this information";
  - Identification of the covered document by name (*e.g.*, your quarterly benefit statement) and a brief description of the covered document if identification by name only would not reasonably convey the nature of the covered document to the covered individual;
  - The internet website address or a hyperlink to the address that leads the covered individual either directly to the covered document or a login page that provides a prominent link to the covered document once the covered individual logs on;
  - A statement of the covered individual's right to request and obtain a paper version of the covered document, free of charge, and a description of how to exercise such right;
  - A statement of the covered individual's right, free of charge, to opt out of electronic delivery and to receive only paper versions of the covered documents with a description of how to exercise such right;
  - A cautionary statement that the covered document is not required to be available on the

website for more than one year or, if later, after it is superseded by a subsequent version of the covered document; and

- A contact number for the plan administrator or other designated plan representative.

The NOIA may include an optional statement as to whether any action on the part of the covered individual is invited or required in response to the covered document and how such action may be taken.

The plan administrator may furnish a combined NOIA each plan year for more than one covered document; provided the next plan year's combined NOIA is furnished no more than 14 months later.

The system for furnishing the NOIA must be designed to alert the plan administrator if a covered individual's electronic address has become invalid or inoperable (*e.g.*, undeliverable message). If the plan administrator is unable to remedy the situation (*e.g.*, obtain a new electronic address) timely, it must treat the covered individual as if he or she had elected to opt-out of electronic delivery and provide the covered document in paper form until a new electronic address is obtained.

Sending Covered Documents By Email

In addition to making covered documents available through a website, the new safe harbor provides an alternative approach to providing documents electronically. Plan administrators can email covered documents directly to the covered individual using the electronic address obtained from the individual. To satisfy the safe-harbor, the plan administrator must comply with the following:

- The administrator must take reasonable measures to protect the confidentiality of personal information relating to the covered individual;
- The covered document is sent by email (either in the body of the email or as an attachment) no later than the date by which the covered document is required to be furnished to the covered individual under ERISA;
- The subject line of the transmittal e-mail says, "Disclosure About Your Retirement Plan"; and
- The transmittal e-mail includes the following:
  - If the document is attached to the e-mail, rather than included in the body of the e-mail, identification of the covered document by name (*e.g.*, your quarterly benefit statement) and a brief description of the covered document if identification by name only would not reasonably convey the nature of the covered document to the covered individual;
  - A statement of the covered individual's right to request and obtain a paper version of the covered document, free of charge, and a description of how to exercise such right;
  - A statement of the covered individual's right, free of charge, to opt out of electronic delivery and to receive only paper versions of the covered documents with a description of how to exercise such right; and
  - A contact number for the plan administrator or other designated plan representative.

Opt-Out Requirements

Covered individuals must have the right to globally opt-out of electronic disclosures, free of charge, and elect to receive a paper version of the covered documents. The administrator must promptly comply with an opt-out request from a covered individual. In order to satisfy the new safe harbor, plan administrators must adopt reasonable procedures for managing elections or requests to opt-out. The regulations expressly provide that a procedure is not reasonable if it unduly inhibits or hampers the initiation or processing of a request or election.

Additional Guidance Unrelated to COVID-19

Guidance Related to Health FSA Carryovers and Individual Coverage HRAs. Notice 2020-33 provides for an increase in the permitted carryover amount applicable to health FSAa under cafeteria plans and clarifies the rules relating to the timing of reimbursement of employer contributions to individual coverage health reimbursement accounts ("HRAs") for the payment of health insurance premiums for individual coverage in the Small Employer Marketplace or through Medicare.

- Increase in Health FSA Carryover Limit to $550. Currently, an employee is permitted to carryover up to $500 of unused amounts in a health FSA as of the end of a plan year, which carryover amounts may be used to reimburse medical care expenses incurred in the immediately following plan year. Under the guidance, the maximum amount of unused amounts that a plan may permit to be carried over to 2021 is increased to $550. In order to permit the increased permitted carryover amount, a plan must be amended no later than the last day of the plan year from which amounts may be carried over and employees must be notified regarding the change.
- Contributions to Individual Coverage HRAs. Generally, payments or reimbursements made for medical care expenses incurred during a plan year are excluded from an employee's income for the plan year in which the medical care is provided, not when the amounts are billed or paid. Under the guidance, a plan may treat an expense for health insurance premiums as incurred on the first day of each month of coverage, the first day of the period of coverage or the date the premium is paid. Under a calendar year plan, an individual coverage HRA may reimburse a health insurance premium that begins on January 1 of the plan year even if the individual paid the premium prior to January 1 of the plan year.

Updated Model COBRA Notices. The DOL issued new model "initial" and "event" COBRA notices, the primary purpose of which is to provide a better explanation of the interaction between making a COBRA election and Medicare eligibility. The Department is precluded from challenging the adequacy of an employer's COBRA notices if the model notices are used. Following are links to the updated notices and related FAQ document:

- COBRA Model Notice FAQs
- COBRA Model General Notice
- COBRA Model Election Notice

We continue to see frequent cases where the adequacy of employers' COBRA notices and the inclusion of certain information, such as statements that individuals may be subject to civil and criminal penalties for failing to provide complete information or providing false information, are being challenged. Consider having COBRA materials reviewed by legal counsel in light of these developments.

Proposes Class Exemption on Improving Investment Advice for Workers & Retirees. The DOL issued a proposed class exemption from the prohibited transaction provisions of ERISA and the Code titled "Improving Investment Advice for Workers & Retirees" which would generally align the DOL's guidance on investment advice with the Securities and Exchange Commission's Regulation Best Interest. The proposed exemption would provide broad relief permitting financial institutions and investment professionals to receive reasonable compensation as a result of providing fiduciary investment advice, including advice to roll over assets from any employee benefit plan to an IRA, and to engage in certain principal transactions which would otherwise be prohibited under ERISA and the Code. To qualify for the exemption, investment advice would be required to satisfy "Impartial Conduct Standards" designed to protect the interests of employee benefit plans and their participants and beneficiaries, IRA owners, and related fiduciaries, including a "best interest" standard, a requirement to charge only reasonable compensation, and a requirement to not make any materially misleading statements. Comments on the proposed exemption are due on or before August 6, 2020. More information and a copy of the exemption are available by clicking here.

Proposed DOL Regulation on Financial Factors in Selecting Plan Investments. The DOL proposed amendments to the ERISA "Investment Duties" regulation to establish guidelines for plan fiduciaries in making investment decisions which consider environmental, social, and governance (ESG) factors. The proposed rule would:

- Codify the requirement to select investments based on relevant financial considerations;
- State that compliance with the fiduciary duty of loyalty prohibits fiduciaries from subordinating the interests of participants and beneficiaries to non-pecuniary goals;
- Require fiduciaries to consider other available investments to meet their prudence and loyalty duties under ERISA in furthering the purposes of the plan;
- Add regulatory text setting forth the required investment analysis and documentation requirements for the limited circumstances in which ESG factors may be considered; and
- Add a new provision on selecting designated investment alternatives for individual account plans.

In practice, these proposals, if enacted, would place considerable restrictions on the consideration of ESG factors by plan fiduciaries and may require a review and updates to current investment policies. This is a growing area of interest for the DOL, which earlier this year had started sending letters to plans requesting a laundry list of documents related to the plans' consideration of ESG factors. Comments on the proposed rule are due July 30, 2020. The proposed rule can be read by clicking here.

DOL Request for Information Pooled Employer Plans under the SECURE Act and Multiple Employer Plans. The DOL issued a request for information containing various questions related to implementation of the SECURE Act's pooled employer plan provisions and the DOL's multiple employer plan regulation and possible prohibited transactions involving such plans. Comments are due July 20, 2020. The request for information can be read by clicking here.

Mental Health Parity and Addiction Equity Act (MHPAEA) Self-Compliance Tool. The DOL published proposed revisions to its 2018 MHPAEA Self-Compliance Tool, which is designed to enable group health plans, plan sponsors, plan administrators, health insurance issuers, and others to determine whether a group health plan or health insurance issuer complies with the MHPAEA requirements and additional related requirements under ERISA. Comments are due by July 24, 2020. The proposed Self-Compliance Tool is available by clicking here.

Proposed Rule Implementing the Excise Tax on Remuneration in Excess of $1 million and Excess Parachute Payments paid Tax-Exempt Organizations. The IRS issued a long-awaited proposed rule implementing the provisions of Code Section 4960 (added by the 2017 Tax Cuts and Jobs Act), which imposes an excise tax at the rate equal to the corporate tax rate (21% in 2020) on the amount of remuneration in excess of $1 million or any excess parachute payment paid by a tax-exempt organization to one of the five highest compensated employees during the taxable year or who was in that group for any preceding taxable year beginning after December 31, 2016. Comments are due by August 10, 2010. The proposed rule can be read here.

Proposed Rule Implementing the Elimination of the Qualified Transportation and Commuting Expense Deduction. The IRS issued a proposed rule to address the Tax Cuts and Jobs Act's elimination of the deduction under Code Section 274 for expenses related to certain transportation and commuting benefits provided to employees by their employers for taxable years beginning after December 31, 2017. The proposed rule also includes guidance to determine the amount which is nondeductible and whether an exception may apply. Comments are due August 24, 2020. The proposed rule can be read here.

DOL Information Letter Regarding Private Equity Investment Options in 401(k) Plans. The DOL published informal guidance providing that, under certain circumstances, the use of private equity investments as an investment alternative in individual account plans such as 401(k) plans will not violate a plan fiduciary's duties under Sections 403 and 404 of ERISA. Before making private equity investment options available, plan fiduciaries should consider the risk and benefits associated with the private equity investment, including (i) whether the investment would provide participants with the opportunity to invest their accounts among more diversified investment options with an appropriate range of expected returns net of fees and risks over a multi-year period, (ii) whether the investment fund is overseen by plan fiduciaries or managed by appropriate experienced investment professionals, and (iii) whether the investment fund has limited the allocation of investments to private equity in a way that is designed to address the unique characteristics associated with such an investment and has adopted features to provide liquidity for participants. For additional information, see Information Letter 06-03-2020.

Spring 2020 Regulatory Agendas. The DOL, IRS, and PBGC published their Spring 2020 regulatory agendas, which indicate a multitude of rules in the regulatory pipeline. For more information on the items included on each agency's agenda, see the following:

- PBGC Spring 2020 Regulatory Agenda
- DOL/EBSA Spring 2020 Regulatory Agenda
- IRS Spring 2020 Regulatory Agenda

bclplaw.com