

What Benefits Issues Should Employers Be Considering?

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Retirement Plans

1. Reducing or Eliminating Employer Contributions

- a. Discretionary employer contributions, including discretionary matching contributions, to a 401(k) plan can be reduced or eliminated without a plan amendment. The change should be communicated to plan participants.
- b. Safe harbor non-elective and matching contributions generally cannot be reduced or eliminated midyear unless (i) the employer is operating at an “economic loss” or (ii) the annual safe harbor notice, which is required to be delivered to employees, notes that the plan may be amended to suspend or reduce safe harbor contributions. Suspension or reduction under either exception cannot be effective until at least 30 days after all eligible employees receive a supplemental notice of the suspension or reduction. Employees must have a reasonable opportunity after receipt of the supplemental notice to modify their elective contributions. After suspension or elimination of safe harbor contributions, the plan will be subject to nondiscrimination testing (which the safe harbor contributions avoid).
- c. If an employer fails to make a required contribution, the plan’s tax qualification may be jeopardized, and the employer may be found to have engaged in a prohibited transaction or a fiduciary breach.

2. Loss of Eligibility. Most group health insurance plans require an employee to be working full time (typically defined as 30 hours per week, the maximum allowable under the Affordable Care Act) to be eligible for coverage. Many plans and policies will provide coverage for a limited period of time during unpaid, non-FMLA leave but would not otherwise provide coverage during a furlough or other absence. We have recently begun to see insurers relax these requirements due to the current crisis, agreeing to provide coverage to furloughed and reduced-hours employees for a limited period (e.g., through the end of May) so long as the premium is paid and the employer continues coverage on a uniform, non-discriminatory basis.

3. Hardship Distributions. Employers and plan administrators should expect to receive inquiries from participants regarding access to 401(k) plan retirement savings. COVID-19 could form the basis for a hardship distribution depending upon the terms of the plan. We expect the federal CARES Act to provide significant additional access to retirement funds without penalty, but the current state of the hardship distribution rules is summarized below.

Most plans limit hardship distributions to the IRS “safe harbor” reasons. The safe harbor definition includes the following events which COVID-19 has made more likely:

- a. Expenses for medical care for the employee, employee’s spouse, employee’s dependents or employee’s primary beneficiary.

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- b. Expenses and losses, including loss of income, incurred by the employee as a result of a FEMA-declared disaster if the employee's personal residence is within the disaster area. FEMA has not yet declared COVID-19 a disaster and historically has not declared a disaster for other virus outbreaks (such as Zika, H1N1, and SARS). Given the early impact of COVID-19, however, that may quickly change. Note that President Trump's recently declared national emergency does not constitute a FEMA disaster and thus, doesn't qualify as a hardship under the safe harbor definition.
 - c. Payments necessary to prevent the eviction of the employee from the employee's principal residence or foreclosure of the mortgage on that residence.
 - d. Funeral expenses for the employee, the employee's spouse, children, dependents, or beneficiary.
- 4. Loan Repayment Defaults.** Employees are likely to have trouble repaying plan loans. Employers can allow limited grace periods, but will be forced to treat the balance of the loan as a "deemed distribution" at the end of the quarter following the quarter in which the first payment is missed. The amount of the deemed distribution will be taxed as income to the employee plus a 10% penalty tax if the employee is less than age 59 ½.

Employees with plan loans who are placed on unpaid leave of absence (such as a furlough) can pause loan payments during the leave of absence without causing a deemed distribution of the loan as long as (i) the furlough period does not exceed one year and (ii) the loan is repaid by the end of the original term of the loan. The loan payments missed during the furlough period may be repaid by either continuing the original rate of repayment, with a balloon payment of the missed installments at the end of the term, or by ratably increasing the installments during the remainder of the repayment period.

- 5. Partial Plan Terminations.** If the number of participants in a retirement plan is reduced by 20% or more in a single plan year, which may occur as a result of COVID-19-related layoffs, the plan will have suffered a "partial termination." If a partial termination occurs, the retirement plan must 100% vest all participants who are affected by a partial plan termination. If the partial termination occurs due to a string of layoffs, this may require restoration of previously forfeited benefits. If the forfeited benefits have been distributed to other participants, this could require the employer to make additional contributions to the plan.
- 6. Plan Investments.** Plan fiduciaries should monitor investment performance, ask experts questions as to prudent actions, and properly document the steps taken by the fiduciaries to monitor the situation. Fiduciaries should check their plan investment policies to determine whether any actions are required at this time, and consult with their plan financial advisors about proper actions, if any.

Health Plans

- 1. Loss of Eligibility.** Most group health insurance plans require an employee to be working full time (typically defined as 30 hours per week, the maximum allowable under the Affordable Care Act) to be eligible for coverage. Many plans and policies will provide coverage for a limited period of time during unpaid, non-FMLA leave but would not otherwise provide coverage during a furlough or other absence. We have recently begun to see insurers relax these requirements due to the current crisis, agreeing to provide coverage to furloughed and reduced-hours employees for a limited period (e.g., through the end of May) so long as the premium is paid and the employer continues coverage on a uniform, non-discriminatory basis.

During FMLA leave, however, an employee is entitled to continuation of group health insurance coverage on the same terms as if he or she had continued to work. The employee must continue to make any normal contributions to the cost of the health insurance premiums to maintain coverage during FMLA leave.

Employers who had 20 or more employees on more than 50% of the employer's typical business days during 2019 are obligated to offer COBRA coverage to employees who lose coverage due to termination of employment or a reduction in hours. COBRA premiums typically equal the full insurance premium, without any employer subsidy, and sometimes includes an administrative fee of up to 2% of the premium (the full premium, plus a 2% administrative fee, is the maximum amount that an employee may be charged for COBRA coverage).

If an employer wishes to subsidize COBRA coverage, the employer should request written confirmation from the health insurer that this subsidy will not void coverage; many health insurance policies state that the insurer is not obligated to provide coverage if COBRA is subsidized. It is common for insurers to waive this requirement, but we expect insurers to be less lenient in the current environment. Some employers ask about continuing health insurance coverage following termination of employment. The better approach is usually to subsidize COBRA coverage instead. Self-insured health plans are subject to additional nondiscrimination rules and typically maintain a "stop loss" policy that will need to be considered.

IRS Notice 2020-15 provides relief to individuals who have medical coverage under a High Deductible Health Plan (a "HDHP"). These plans have become increasingly popular and now constitute a significant percentage of employer-provided health insurance policies. The relief states that, until further notice, a medical plan intended to be a HDHP will not fail to be a HDHP if it covers medical costs associated with testing and treating COVID-19 without application of the deductible or otherwise-applicable cost-sharing. This allows an individual covered by a HDHP to receive cost-free COVID-19 testing and related care (hospitalization, office visits, etc.) and still be eligible to contribute to a Health Savings Account for 2020.

If you have questions regarding these developments, please contact a member of the Labor, Employment & Benefits team.

For more guidance on issues related to the coronavirus pandemic, please visit our [COVID-19 resource center](#).

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