Employee Benefits in the Time of COVID-19

New Guidance and Challenges for Employers
May 14, 2020

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ALL ERISA PLANS

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Key Concept: "Outbreak Period"

Begins on March 1
Ends on the earlier of:

- 60 days after the end of the "National Emergency"
- A date announced by EBSA and the IRS at a future time
- February 28, 2021

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Notices & Disclosures

Rule

During the Outbreak Period

- Good faith standard applies to **method** of delivery
  - Electronic delivery (email, text, internet) specifically permitted if plan sponsor has a reasonable belief that the recipient will be able to access the document.
- Good faith standard applies to **timeliness** of delivery
  - As soon as reasonably possible is soon enough

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Notices & Disclosures

Examples
- For all plans:
  - SPDs
  - SMMs
  - SARs
- For retirement plans:
  - Benefit statements
  - Annual funding notices
  - Participant fee disclosures
  - Blackout period notices

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Fiduciary Compliance

DOL → Fiduciaries

During the Outbreak Period
  - DOL will focus on compliance assistance, not penalties.
  - DOL will provide grace periods where appropriate.
  - Example: Deadlines for deciding claims and appeals

Fiduciaries → Participants & Beneficiaries

During the Outbreak Period
  - Goals are to prevent loss of benefit & avoid undue delay
  - Fiduciaries expected to act reasonably & prudently
  - Example: Remittance of participant contributions

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Claims & Appeals Procedures

Rule

When calculating certain deadlines, the Outbreak Period is disregarded.

Which deadlines?

- Deadline for filing claims
- Deadline for filing appeals
- Deadline for requesting external review (major medical only)
- Deadline for perfecting request for external review (major medical only)

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Claims & Appeals Procedures

Example One

Ethan Employee is enrolled in a major medical plan. Ethan received services on April 1, 2020. Ordinarily, under the terms of the plan, Ethan would be required to file his claim by April 1, 2021. However, the Outbreak Period must be disregarded. Ethan's new deadline is 1 year after the end of the Outbreak Period.

Example Two

Emily Employee is enrolled in a retirement plan. On September 20, 2019, Emily received notice that her claim was denied. Ordinarily, under the terms of the plan, Emily would be required to file her appeal within 180 days—by March 18, 2020. However, the Outbreak Period must be disregarded. At the beginning of the Outbreak Period, Emily had 18 days to file her claim. Emily's new deadline is 18 days after the end of the Outbreak Period.

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Claims & Appeals Procedures

Open Questions

- Is a plan amendment required?
- Should employers explain the changes to participants and beneficiaries?
- If so, with which ones?
  - Everyone vs. Those whose claims have been denied
- If so, through what communication vehicle?
  - Formal (SMM) vs. Informal (letter or email)

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HEALTH & WELFARE PLANS

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Claims and Appeals Procedures

Special Issue for Self-Funded Medical Plans: Stop-Loss Coverage

- Stop-loss coverage reimburses the employer when claims costs exceed a certain dollar amount
  - Which claims count toward that threshold?
  - Typically, the policy will say that the claim must be incurred during a certain period and paid during a certain period. For example: The claim must be incurred and paid during 2020.
- Given the extended deadline for filing claims, there is a risk that more claims than usual are not paid within the specified period.

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COBRA Deadlines Extended

Rule

When calculating certain deadlines, the Outbreak Period is disregarded.

Which deadlines?

- Deadline for qualified beneficiary (QB) to elect COBRA
- Deadline for QB to make premium payments
- Deadline for QB to notify plan of certain qualifying events (divorce, legal separation, loss of "child" status)
- Deadline for QB to notify plan of disability determination

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COBRA Deadlines Extended

Example One

Edward Employee and his spouse are enrolled in his company's medical plan. On May 1, 2020, Edward and his spouse divorce. Under the ordinary rules, Edward must notify the COBRA administrator within 60 days—by June 30, 2020. However, the Outbreak Period must be disregarded. Edward's extended deadline is 60 days after the end of the Outbreak Period.

Example Two

Ella Employee is enrolled in her company's medical plan. Ella terminates employment on May 1, 2020. She elects COBRA on June 30, 2020. Under the ordinary rules, Ella must make her initial premium payment within 45 days—by August 15, 2020. However, the Outbreak Period must be disregarded. Ella's extended deadline is 45 days after the end of the Outbreak Period. BUT NOTE: The plan is not required to provide coverage until Ella pays the premium.

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COBRA Deadlines Extended

What Employers Should Be Thinking About

- Should our COBRA election notices be revised to explain the extension? If so, what should they say about the election deadline? About the payment deadline?
- What about people whose 60-day COBRA election period has ended? What about people who elected COBRA but whose 45-day payment period has expired? Should we (or our COBRA administrator) reach out to them to explain the extension?
- Should our general COBRA notice—which mentions the 60-day deadline for QBs to notify the plan of certain events—be revised to address the extension?

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Special Enrollment Deadlines Extended

Background

- Major medical plans must allow midyear "special enrollment" in certain circumstances, if enrollment is timely requested:
  - Loss of other coverage (30 days)
  - Gain a dependent due to marriage, birth, adoption, or placement for adoption (30 days)
  - Gain eligibility for premium assistance under Medicaid or CHIP (60 days)
  - Loss of eligibility under Medicaid or CHIP (60 days)
- Other plans (for example: dental or vision plans) may also allow special enrollment

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Special Enrollment Deadlines Extended

Rule

When calculating certain deadlines, the Outbreak Period is disregarded.

Which deadlines?

- Deadline for individual to request special enrollment in a major medical plan
- NOTE: For other types of plans that voluntarily allow special enrollment, an extension is not required.

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Coverage for COVID-19 Testing

Background

- Major Medical Plans must provide coverage
  - No-Cost Sharing—in-network or out-of-network
  - No Medical Management or Pre-Authorization
- High-Deductible Health Plans
  - Providing such coverage does not affect HSA eligibility

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Coverage for COVID-19 Testing

Updates and Clarifications

- Which tests are included?
  - Not only tests for COVID-19 itself, but also tests for COVID-19 antibodies
  - Tests must still meet technical requirements
- Who decides whether tests are necessary?
  - The treating physician. (No second guessing!)
- What is the effective date of the testing coverage?
  - Must be provided as of March 18, 2020.
  - May be provided retroactively to January 1, 2020.
  - NOTE: Same date for optional telehealth coverage.

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Coverage for COVID-19 Testing

Updates and Clarifications

- Are plans required to communicate this change to enrollees?
  - Yes, by either SBC or SMM.
  - Agencies will not enforce the requirement that an SBC be provided 60 days prior to the change.
  - Agencies expect change to be communicated as soon as "reasonably practicable."

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Section 125 Plans

New Mid-Year Elections Permitted During CY 2020

- Employer-Sponsored Health Coverage
  - If employee did not previously enroll, may elect coverage
  - If employee enrolled, may change plans
  - If employee enrolled, may drop coverage (must attest to enrollment in other coverage)
- Health Care and Dependent Care Flexible Spending Accounts
  - If employee did not previously enroll, may elect coverage
  - If employee is enrolled, may increase or decrease the amount of the election, or may drop coverage

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Section 125 Plans

New Flexibility for Flexible Spending Accounts

- FSAs with Grace Periods (both Health Care and Dependent Care)
  - Ordinarily, amounts contributed in a given plan year could be used for expenses incurred up to 2.5 months after the end of the plan year. (For CY plans, through March 15, 2020.)
  - NEW: May be used for expenses incurred through December 31, 2020.
  - NOTE: For health care FSAs, extended period may affect an individual's HSA eligibility.

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Section 125 Plans

New Flexibility for Flexible Spending Accounts

- FSAs with Carryovers (Health Care only)
  - FSA allows carryover amounts from Year 1 to be used for expenses incurred in Year 2.
  - NEW: May be used for expenses incurred through December 31, 2020. (Most helpful to FY plans.)
  - NOTE: For health care FSAs, extended period may affect an individual's HSA eligibility.
- Maximum carryover amount increased to 20% of annual contribution limit.
  - $550 may be carried over from plan year that starts in 2020 to plan year that starts in 2021.

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Section 125 Plans

Plan Amendment

- All of the above require a plan amendment.
- Amendment must be adopted on or before December 31, 2021.
- Amendment may be effective retroactive to January 1, 2020 if:
  - Plan is operated in accordance with guidance (Notice 2020-29 and Notice 2020-33); and
  - Employer informs all eligible employees of the changes.

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RETIREMENT PLANS

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Retirement Plans: Distributions and Loans

CARES Act Retirement Plan Distributions (Statutory Provisions)

- From January 1, 2020 to December 30, 2020, for participants "affected by the coronavirus," 401(k), 403(b), and 457(b) plans may make in-service distributions of up to $100,000.
- Distributions of up to $100,000 from qualified and 403(b) plans are exempt from the 10% penalty for premature distribution.
- Distributions from qualified, 403(b) and governmental 457(b) plans are ineligible for rollover and not subject to 20% federal income tax withholding.
- Distributions may be included in the participant's income over a 3-year period and may be repaid to an eligible retirement plan over a 3-year period.

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Retirement Plans: Distributions and Loans

CARES Act Loan Provisions (Statutory Provisions)

- Between March 27, 2020, and September 22, 2020, for participants "affected by the coronavirus," the generally applicable limits for loans from qualified, 403(b), and government plans are expanded to the lesser of $100,000 or 100% of the vested account balance.
- Any loan repayments otherwise due between March 27, 2020 and December 31, 2020 may be deferred for 1 year from each payment due date, and the otherwise applicable maximum loan term may be extended by the deferral period.

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Retirement Plans: Distributions and Loans

IRS FAQs Issued May 4, 2020 – General Provisions (Distributions and Loans)

- The FAQs are only an interim measure. The IRS is working on more formal guidance and anticipates issuing it in the near future.
- The guidance will be modeled after IRS Notice 2005-92, which interpreted similar legislative provisions enacted after Hurricane Katrina.
- The IRS is reviewing requests from the public to exercise its statutory authority and expand the list of circumstances that will qualify for CARES Act distributions and loans.

Retirement Plans: Distributions and Loans

IRS FAQs Issued May 4, 2020 – General Provisions (Distributions and Loans)

- CARES Act distributions are optional from the plan sponsor's perspective.
- Plan sponsors may rely on a participant's self-certification of qualification under the CARES Act, unless the plan sponsor has actual knowledge to the contrary. The burden of proof (and recordkeeping) is on the participant.

Retirement Plans: Distributions and Loans

IRS FAQs Issued May 4, 2020 – CARES Act Distributions

- If a plan sponsor does not adopt CARES Act distributions, and a participant meeting CARES Act eligibility standards receives an otherwise available distribution (for example, due to employment termination or after age 59½), the participant may treat up to $100,000 of the distribution as a CARES Act distribution.
- CARES Act favorable tax treatment applies to distributions from any qualified, 403(b), or government 457(b) plan. However, the CARES Act only provides a special in-service distribution event for 401(k), 403(b), and 457(b) plans. Pension plans are not permitted to make CARES Act distributions to participants who are not otherwise distribution-eligible.
- CARES Act distributions must comply with spousal consent requirements (if otherwise applicable).

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Retirement Plans: Distributions and Loans

IRS FAQs Issued May 4, 2020 – CARES Act Distributions

- A CARES Act distribution may be repaid within three years after the date of the distribution.
- Repayment is made by means of a rollover to an IRA or eligible retirement plan that accepts rollovers. The FAQs suggest that a plan which otherwise accepts rollover contributions will need to accept CARES Act distribution repayments.
- If repayment occurs after a participant's tax return is filed for the year of the distribution, the participant may file an amended return to claim a refund of taxes paid due to the distribution.
- IRS will issue Form 8915-E, to be used by participants to report CARES Act distributions and repayments.

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Retirement Plans: Distributions and Loans

IRS FAQs Issued May 4, 2020 – CARES Act Loans

- The FAQs reference an analogous "safe harbor" provision in IRS Notice 2005-92 relating to the Hurricane Katrina loan expansion.
- The Hurricane Katrina statutory language was similar (i.e., the due date for each loan repayment may be delayed for up to one year). Given the administrative difficulty with administering this language as written, for Hurricane Katrina, the IRS provided a "safe harbor" approach, which was allowed (not mandatory) and would be deemed compliant.

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Retirement Plans: Distributions and Loans

IRS FAQs Issued May 4, 2020 – CARES Act Loans

- Applied by analogy to the CARES Act loan provisions, the "safe harbor" would apply if loan repayments due between March 27, 2020 and December 31, 2020 were suspended, and the loan re-amortized as of January 1, 2021 to include accrued interest and reflect the repayment suspension period.
- Presumably, the further guidance to be issued by the IRS will clarify application of the safe harbor concept to CARES Act loans.

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QUESTIONS

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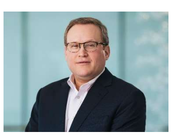
Your Presenters



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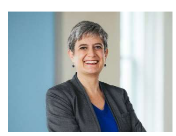

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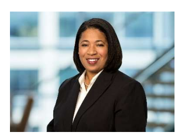

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