

Benefits Counselor – April 2020

Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Impact on Employer-Sponsored Health and Retirement Plans

The last month saw a flurry of new laws, regulations and informal guidance in response to the coronavirus pandemic. Serving as the bases for most of this new guidance are the Family First Coronavirus Response Act ("FFCRA") and the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act").

President Trump signed FFCRA into law on March 18, 2020, which requires health plans and insurance companies to cover COVID 19 tests at no charge, expands Family and Medical Leave Act ("FMLA") leave and paid sick leave available to employees, and provides payroll tax credits on qualified wages paid by impacted businesses. FFCRA is generally effective as of April 1, 2020.

Then, on March 27, 2020, President Trump signed the CARES Act into law. The CARES Act contains several provisions that affect qualified retirement plans and health and welfare plans and is generally effective immediately.

Additional details on [FFCRA](#) and the [CARES Act](#) are available in the preceding links, but generally, these new laws impact employers and plan sponsors as follows:

Health and Welfare Plans

- **Mandatory Coverage.** Group health plans and insurers must cover diagnostic products that are either approved by the FDA, provided on an emergency basis, developed by states, or otherwise deemed appropriate by the Department of Health and Human Services ("HHS"). Plans and insurers must also cover related office visits (including telehealth visits), urgent care visits and emergency room visits to detect COVID 19. All of these services must be covered without cost-sharing, preauthorization or medical management requirements from both in-network and out of network providers. This mandatory coverage requirement is effective for the duration of the public health emergency crisis, as declared by the Secretary of HHS.
- **Coverage of COVID 19 Preventive Measures.** The CARES Act amends the Affordable Care Act's ("ACA") preventive services rules to require any item, service or immunization intended to prevent or mitigate COVID 19

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recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention or recommended by the U.S. Preventive Services Task Force with an A or B rating be covered with no cost-sharing, effective 15 days after the date such recommendation is issued.

- Telehealth Deductibles. Effective March 27, 2020, for plan years beginning on or before December 31, 2021, high deductible health plans (“HDHP”) may provide benefits for telehealth visits or remote care services before application of the deductible.
- Inclusion of Over-the-Counter Drugs and Menstrual Products as Qualifying Medical Expenses. Effective January 1, 2020, all over-the-counter drugs are reimbursable from a health savings account (“HSA”), flexible spending account or health reimbursement arrangement as qualifying medical expenses with no prescription needed. Similarly, all menstrual products, including tampons, pads, liners, menstrual cups or sponges, or any other product used in connection with menstruation are also deemed qualifying medical expenses and are therefore reimbursable.
- Prescription Drug Coverage Under Medicare Prescription Drug Plans. Due to the current state of public health emergency, Medicare prescription drug plans and Medicare Advantage Prescription Drug plans must allow individuals to receive a 90-day supply of any covered drug.
- Privacy Updates. The CARES Act includes provisions that align the privacy rules of the Federal Confidentiality of Alcohol and Drug Abuse Patient Records Act (the “Confidentiality Act”) with those of the Health Insurance Portability and Accountability Act (“HIPAA”), which permit the disclosure and redisclosure of covered records to the extent permitted by HIPAA after a patient’s initial written consent. The CARES Act also adds new anti-discrimination provisions on the basis of information disclosed under the Confidentiality Act, and instructs HHS to issue guidance on the sharing of private health information during the COVID 19 public health emergency.

Retirement Plans

- In Service Distributions. Qualified retirement plan sponsors may offer in service distributions of up to an aggregate of \$100,000 per individual to participants impacted by COVID 19. Specifically, a participant is eligible to take this distribution if either the participant, the participant’s spouse or the

participant's dependent is diagnosed with COVID-19. Further, a participant is eligible if he or she experiences adverse financial consequences as a result of being quarantined, furloughed or laid off, receives a reduction in work hours or is unable to work because of a lack of childcare due to COVID-19. Such in-service distributions are not subject to the Internal Revenue Code ("Code") section 72(t) 10 percent early withdrawal penalty. Participants are eligible to receive in-service distributions available from January 1, 2020 through December 31, 2020.

- **Plan Loan Relief.** The CARES Act increases the maximum participant loan amount permitted under Code section 72(p) for any loan requested from March 27, 2020 through September 23, 2020, by a participant impacted by COVID-19 to the lesser of (1) \$100,000; or (2) the participant's vested accrued benefit under the plan. Furthermore, any deadline to repay a plan loan occurring in 2020 for participants impacted by COVID-19 is automatically delayed for one year.
- **Required Minimum Distribution Waiver.** Any required minimum distribution payment due during calendar year 2020 is automatically waived for participants in defined contribution plans qualified under Code sections 401(a), 403(a), 403(b) and 457(b). Furthermore, with respect to payments after death to a nondesignated beneficiary, the applicable five-year period must be extended to six years if the applicable five-year period includes 2020.
- **Single Employer Defined Benefit Plan Funding Relief.** Single employer defined benefit plan sponsors may delay any required funding contributions until January 1, 2021, provided plan sponsors increase the delayed contribution for earnings using the plan's effective rate of return for the delay period.
- **Extension of Remedial Amendment Period.** The CARES Act extends the remedial amendment period for qualified retirement plans until the end of the 2022 plan year (2024 plan year for government-sponsored plans) to adopt any amendment under the CARES Act.

Expanded FMLA and Paid Sick Leave

- **Expanded FMLA.** FFCRA amends the FMLA to require covered employers (*i.e.*, employers with 500 or fewer employees) to provide paid emergency leave to qualifying employees through December 31, 2020. Impacted employers must provide emergency leave to employees (who have been employed at least 30 days) who are unable to work directly or remotely due to caring for a child

under age 18 because a school or place of care has closed, or a childcare provider is unavailable due to a COVID 19 related emergency declared by a federal, state or local authority. Although the first two weeks of leave are not required to be paid, employers must pay employees for additional leave, not to exceed \$200 per day, up to an aggregate amount of \$10,000.

- **Paid Sick Leave.** FFCRA also requires covered employers to provide paid sick leave to qualifying employees. Employees subject to a COVID 19 related quarantine or isolation order, or who are advised by a health care provider to self quarantine, or are experiencing COVID 19 symptoms or are seeking a diagnosis must be compensated at their regular rate, up to \$511 per day. Further, employees caring for an individual under quarantine, or an individual exhibiting symptoms or seeking a diagnosis, or employees caring for a child whose school or child care provider has closed, or are experiencing a substantially similar condition must be compensated at two thirds their regular rate, up to \$200 per day. Full time employees must be provided 80 hours of paid sick time, while part time employees are entitled to time equal to their average hours worked over a two week period. Paid sick leave under FFCRA must be offered in addition to any other paid leave employers already provide, and covered employers must post a notice to employees issued by the Department of Labor (“DOL”). The sick leave mandate expires December 31, 2020.

DOL Issues Frequently Asked Questions and Temporary Regulations Regarding FFCRA

The DOL subsequently issued FAQ guidance and temporary regulations interpreting FFCRA. Highlights include:

- The DOL has issued an FFCRA notice for employers to post in a conspicuous place on their workplace premises, along with any other required notices concerning FMLA or unemployment.
- The FAQs clarify that, when determining coverage under FFCRA, an employer's status as a covered employer (*i.e.*, has 500 or fewer employees) must be determined each time an employee's leave is taken. Employees on leave, temporary employees and day laborers must be counted, but employees who have been laid off or furloughed (and have not been reemployed) need not be counted.
- The FAQs provide that the DOL has adopted a nonenforcement policy for FFCRA

violations between March 18, 2020 and April 17, 2020. The DOL will not bring enforcement action against employers that have made reasonable, good faith efforts to comply with FFCRA during that period.

- The temporary regulations clarify that, for employees subject to the expanded FMLA leave or paid sick leave periods, covered employers must maintain employee group health plan coverage during the expanded FMLA leave or paid sick leave on the same terms as if the employees had been continuously employed during such period. Also, employees must pay the same premiums as were paid before taking leave, unless premiums under the plan are generally increased.
- The temporary regulations also clarify that employees subject to general shelter in place or stay at home orders generally do not qualify for paid sick leave unless the employer otherwise has work for the employee but the employee is prevented from working directly or remotely under the order.
- The temporary regulations also provide that employers with fewer than 50 employees may qualify for an exemption from the requirements to provide expanded FMLA or paid sick leave due to school or child care provider closures if the leave payments would jeopardize the viability of their business as a going concern. The temporary regulations set forth three scenarios under which a business's viability would be deemed jeopardized.

Additional detail on the DOL temporary regulations is [available here](#).

RETIREMENT PLAN DEVELOPMENTS

IRS Announces Extension of Remedial Amendment Cycle for Preapproved Defined Benefit Plans and the 403(b) Remedial Amendment Period

On March 27, 2020, the Internal Revenue Service ("IRS") announced that the deadlines for employers to adopt pre approved defined benefit plans and to submit a determination letter application (if eligible) under the second six year remedial amendment cycle will be extended from April 30, 2020 to July 31, 2020. Consequently, the commencement of the third six year remedial amendment cycle is delayed to August 1, 2020, but it will end on January 31, 2025, as previously scheduled.

The IRS also announced that the last day of the initial remedial amendment period for plans qualified under Code section 403(b) will be extended from March

31, 2020 to June 30, 2020. Under the remedial amendment period, 403(b) plan sponsors have the opportunity to amend or restate their plans to amend or correct form defects retroactively to January 1, 2010.

HEALTH AND WELFARE PLAN DEVELOPMENTS

IRS Issues FAQs Regarding Employer Tax Credits under FFCRA

The IRS has issued FAQ guidance regarding the payroll tax credits available to small and mid size employers that provide expanded FMLA leave or paid sick leave under FFCRA. Among other items, the FAQ guidance includes:

- An employer's available tax credit is increased by "qualified health plan expenses," which include expenses paid or incurred to provide group health plan coverage to employees on expanded FMLA leave or paid sick leave. The amount of expenses used to determine the tax credit generally includes any cost sharing portion paid by the employer, as well as the portion paid by the employee with pre tax contributions.
- HSA, Archer MSA and QSEHRA contributions are not qualified health plan expenses. However, HRA contributions and health FSA contributions are considered to be qualified health plan expenses.
- Employers sponsoring self insured group health plans may use any reasonable method of allocating qualified health plan expenses, including using the applicable COBRA premium for the employee or any other reasonable actuarial method to determine the estimated annual expenses of the plan.

HHS Issues FAQs Regarding COVID 19 Coverage under Essential Health Benefits Rules

On March 13, 2020, HHS issued FAQ guidance regarding coverage of various COVID 19 related items and services as essential health benefits ("EHB") under the ACA. Under the ACA, each state must adopt EHB benchmark plans that set forth coverage and cost sharing amounts for nongrandfathered plans within the ten required categories of EHB. The FAQs note that all 51 EHB benchmark plans adopted by the states and the District of Columbia provide coverage for the diagnosis and treatment of COVID 19, as well as medically necessary hospitalizations and medically necessary isolation and quarantine during a hospital admission.



UPCOMING COMPLIANCE DEADLINES AND REMINDERS

IRS Postpones Federal Income Tax Filing Deadline, and Issues Follow Up FAQ Guidance Affecting HSA Contributions and Retirement Plans

In IRS Notice 2020-18, the IRS postponed the April 15, 2020, deadline for filing federal income tax returns and payments to July 15, 2020. The IRS subsequently issued follow-up FAQ guidance clarifying that participants may continue to make HSA or Archer MSA contributions for 2019, any time up to the extended July 15, 2020, tax return filing deadline. The FAQ guidance also clarifies that the due date for paying the 10 percent early distribution penalty for distributions taken in 2019 and the employer grace period for making retroactive contributions to a qualified plan are also extended to July 15, 2020. However, the April 15, 2020, deadline for correcting 2019, excess deferrals is not affected by the extended relief period.

Upcoming Retirement Plan Compliance Deadlines and Reminders – Annual Funding Notice

While the CARES Act authorizes the DOL to extend any applicable 2020 notice and filing deadline, as of April 7, 2020, the DOL has not extended any annual notice or filing deadline for qualified plans. Accordingly, calendar-year defined benefit pension plans with more than 100 participants must provide the annual funding notice to required recipients by April 29, 2020 (*i.e.*, within 120 days of the end of the previous plan year). Defined benefit pension plans with 100 or fewer participants generally have until the Form 5500 filing deadline to provide the annual funding notice.

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