Benefits Counselor – Spring 2021

POSTED:

Apr 12, 2021

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Over the last couple of months, we have seen a flurry of guidance impacting employee benefit plans. This issue of *Benefits Counselor* highlights key legal developments for employers and plan sponsors.

GENERAL DEVELOPMENTS

President Biden Signs American Rescue Plan Act

On March 11, 2021, President Biden signed into law the latest COVID 19 stimulus package, titled the American Rescue Plan Act (ARPA). In addition to providing a third round of stimulus checks for individuals, ARPA provides significant funding relief for single employer and multiemployer pension plans, aims to generate additional tax revenue through elimination of certain deductions for executive compensation benefits and provides additional welfare benefit relief for eligible individuals. The key provisions of ARPA are summarized below:

- Impact of ARPA on Single Employer Pension Plan Funding. ARPA provides a "fresh start" for single employer sponsored pension plans by re amortizing unfunded liability over a 15 year period. This re amortization period also applies to any future changes in unfunded liability, which provides greater relief to plan sponsors than the current seven year amortization period. Plan sponsors may elect to apply the amortization extension beginning with the 2019, 2020 or 2021 plan year.

ARPA also extends the interest rate stabilization provisions that were set to expire this year. The new stabilization program provides a narrower interest rate corridor for the 25 year average interest rate and sets a 5 percent minimum for the 25 year average. The new stabilization program is effective for plan years beginning after December 31, 2019, but may be disregarded for years prior to the 2022 plan year.

- Impact of ARPA on Multiemployer Pension Plan Funding. ARPA permits multiemployer plan sponsors to make a one time election in its 2020, 2021 or 2022 plan year to maintain the same zone status that was certified for the preceding plan year. Plans in critical or endangered status may also elect to extend their funding improvement or rehabilitation plan by five years. These changes are intended to provide plans with additional time to offset losses

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incurred during the COVID 19 pandemic.

Multiemployer sponsored plans are permitted to amortize their investment losses that occurred in the 2020 and 2021 plan years over a 30 year period, rather than the traditional 15 year period. Plans are also permitted to change their asset valuation methods during this period as well to spread any losses over a 10 year period and use a smoothed actuarial value of assets that exceeds the fair market value by 30 percent. Plans electing this relief must adhere to certain solvency and benefit improvement restrictions.

- Special Assistance for Highly Distressed Multiemployer Pension Plans. ARPA also directs $86 billion in special financial assistance to certain highly distressed multiemployer pension plans. To be eligible for this relief, plans must satisfy one or more of the following:

  - Be in critical and declining status for any plan year from 2020 through 2022;
  - Have previously reduced benefits under the provisions of the Multiemployer Pension Reform Act of 2014 (MPRA);
  - Have a ratio of assets to liabilities of 40 percent or less;
  - Have a ratio of active to inactive participants of less than 2:3;
  - Become insolvent after December 14, 2014; or
  - Not be a terminated plan.

The special financial assistance is to be paid in a single lump sum and be equal to the amount determined to be required for the plan to remain solvent through the 2051 plan year. This lump sum is not subject to any repayment requirement. However, plans are required to invest the assistance in investment grade bonds. The assistance is to be funded by the Treasury and paid through the Pension Benefit Guaranty Corporation (PBGC) rather than through plan premiums.

ARPA authorizes the PBGC to prioritize applications from plans that are expected to become insolvent over the next five years, have unfunded liabilities subject to the PBGC guarantee that exceed $1 billion or have previously reduced participant

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benefits under MPRA.

The deadline to apply for financial assistance is December 31, 2025, with a one year extension available to plans submitting revised applications.

ARPA directs that the PBGC publish regulations implementing the financial assistance program within 120 days.

- Increase in PBGC Premiums for Multiemployer Pension Plans. ARPA increases the PBGC premium rate for multiemployer plans to $52 per participant for plan years beginning on or after January 1, 2031. The premium rate will be indexed for inflation for all subsequent years.

- Increase in Individuals Covered Under Code Section 162(m). Effective January 1, 2027, ARPA expands the number of employees deemed to be "covered" under Internal Revenue Code (the Code) section 162(m). Code section 162(m) prohibits publicly traded employers from taking a tax deduction for executive compensation exceeding $1 million that is paid to the chief executive officer, chief financial officer and the next three highest compensated employees. ARPA expands the covered employee list to include the next five highest paid employees. This new group of covered employees differs from the traditional group, however, as the next five covered employees are not subject to the "once covered, always covered" restriction included in Code section 162(m).

- Provision of COBRA Subsidies. ARPA includes a temporary 100 percent subsidy for qualified beneficiaries who qualify for Consolidated Omnibus Budget Reconciliation Act (COBRA) continuation coverage due to an involuntary termination of employment or a reduction in hours. The 100 percent subsidy is based on a COBRA premium that includes the additional 2 percent administrative fee. The subsidy is not provided to the COBRA eligible individual, but instead provided to employers through a refundable tax credit.

ARPA also provides additional COBRA enrollment options for individuals who had an involuntary termination of employment or a reduction of hours in the last 18 months and failed to timely elect COBRA or had COBRA coverage discontinued. These individuals are provided a new 60 day election period. This election period

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may also be available to COBRA covered individuals who want to change their coverage election.

- Extension of Tax Credit for Paid Sick and Family Leave. ARPA provides an extension of the availability of the tax credits for employers offering paid sick leave and family medical leave through September 30, 2021.

ARPA also expanded the availability of the credit to include paid leave offered in result of an employee receiving or awaiting the results of a COVID 19 test or diagnosis following an exposure to COVID 19, obtaining a COVID 19 vaccine or needed to recover from any injury, disability, illness or condition related to a COVID 19 vaccine.

- Increase in DCAP Limit for 2021. ARPA increases the dependent care flexible spending account limit from $5,000 to $10,500 for the 2021 taxable year. An employer may amend its cafeteria plan retroactive to January 1, 2021, provided the amendment is adopted by the end of the plan year and is administered consistently throughout the year.

For additional discussion regarding certain aspects of ARPA, please see our March 22 and March 26 alerts.

Tolled Deadlines During Outbreak Period Apply on Individualized Basis

At the beginning of the pandemic, the Departments of Labor, Health and Human Services, and the Treasury (collectively, the Departments) announced that certain deadlines applicable to participants and beneficiaries of benefit plans subject to the Employee Retirement Income Security Act (ERISA) would be tolled during the "outbreak period." The "outbreak period" would last from the March 1, 2020 through 60 days after the end of the COVID 19 national emergency. The COVID-19 national emergency is ongoing.

However, the Departments' outbreak period guidance did not address the statuary one year limit on agency action to toll deadlines under ERISA and the Internal Revenue Code (the Code). In response to questions on how to interpret the Departments' outbreak period guidance and the one year limit, on February 26, 2021, the U.S. Department of Labor (DOL) issued Employee Benefits Security Administration Disaster Relief Notice 2021 01, which clarifies that the one year extension of deadlines will apply on an individualized basis. Specifically,

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the designated plan deadlines will be tolled until the earlier of: (1) one year from the date the individual first became eligible for relief under the outbreak period guidance; or (2) 60 days after the announced end of the COVID 19 national emergency. As a result, each affected participant or beneficiary will have their own tolling period, which plan administrators will need to calculate.

RETIREMENT PLAN DEVELOPMENTS

DOL Announces Non-Enforcement of ESG and Proxy Voting Rules

As discussed in previous issues of the *Benefits Counselor*, in the final weeks of 2020, the DOL announced new regulations restricting fiduciary selection of investments based on economic, social and governance (ESG) factors (the ESG Rule) and restricting fiduciary consideration of ESG factors in voting proxies (the Proxy Voting Rule). Shortly after his inauguration, President Biden signed Executive Order 13990, which directed all government agencies to reconsider any policy from the previous Administration that appears to endanger public health or the environment.

In light of Executive Order 13990, the DOL announced an indefinite non enforcement policy on its 2020 ESG and proxy voting policies. In its announcement of its non enforcement policy, the DOL cited to comments received questioning whether the DOL considered how ESG factors may be appropriate considerations when making an investment decision. The DOL intends to issue further guidance related to the ESG Rule and the Proxy Voting Rule, but in the meantime plan fiduciaries will be held to general standards of prudence and loyalty.

Mandatory Arbitration Provisions Primed for Supreme Court Review

On March 4, 2021, the U.S. Court of Appeals for the Second Circuit invalidated a mandatory arbitration provision found in the employee handbook in *Cooper v. Ruane Cunniff & Goldfarb*. The provision required employees to arbitrate any claim against the company. When participants sued the plan's investment adviser, Ruane Cunniff & Goldfarb for mismanagement of assets held in the company sponsored 401(k) plan, the adviser attempted to invoke the arbitration provision. While the Court decided the case on other grounds, the Court noted that mandatory arbitration provisions "unacceptably undercut the viability and public purpose" of ERISA's access to the courts. Additionally, the Second Circuit noted that individual arbitration provisions do not allow broad access to a remedy that benefits each participant under the plan. While the Court's comments do not provide any specific legal authority, they do signal a potential departure from the

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Ninth Circuit's holding in *Dorman v. Charles Schwab Corporation*, which found that mandatory arbitration provisions are generally acceptable.

Additionally, the Second Circuit's comments could impact the Seventh Circuit's upcoming decision in *Smith v. Board of Directors of Triad Manufacturing, Inc.* Triad Manufacturing, Inc. is appealing the lower court's decision to invalidate a mandatory arbitration provision found in the company's retirement plan and permit participants to continue with a lawsuit alleging the sale of overpriced company shares to the company's retirement plan. Plan sponsors should continue to monitor developments related to mandatory arbitration provisions when determining how best to limit risk and liability.

HEALTH AND WELFARE PLAN DEVELOPMENTS

DOL Releases FAQs Addressing Its Requirements of the Comparative Analysis of Mental Health and Substance Use Disorder Benefits

On April 2, 2021, the Departments of Labor, Health and Human Services, and the Treasury (collectively, the Departments) jointly released a new set of FAQs intended to clarify the requirements of the comparative analysis of mental health and substance use disorder benefits required under the Consolidated Appropriations Act (CAA). As a reminder, the CAA directed all group health plans and health insurance providers that impose non quantitative treatment limitations on mental health and substance use disorder benefits to document their comparative analysis of those limitations against any limitations applicable to medical and surgical benefits.

The FAQs generally direct plan sponsors and health insurance providers to utilize the self compliance tool, but also include a robust list of requirements for the comparative analysis, such as:

- Identification of, and precise definitions for, any factors, standards, sources, strategies or processes considered in the design and application of the non quantitative treatment limitation, including whether any factors were given more weight than others and the reasons for doing so, including an evaluation of any specific data used in making such a determination;
- An explanation of whether there is any variation in the application of a guideline or standard used by the plan or issuer between the mental health and substance use disorder benefits and the medical/surgical benefits and, if so, what processes and factors were utilized in establishing that variation;

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and

- A reasoned discussion of the plan's or insurance provider's findings and conclusions as to the comparability of the processes, strategies, evidentiary standards, factors and sources identified within each affected classification and their relative stringency in application, including citations to any specific evidence considered.

The FAQs also include a list of "red flags" that would likely deem the analysis to be insufficient, including (1) production of a large number of documents without any explanation as to the relevance of the documents; (2) conclusory or generalized statements without any supporting evidence or explanation; (3) lack of explanation of application of any limitation or strategy; and (iv) outdated analysis.

While the analysis applies to all mental health and substance use disorder benefits, the FAQs note that the DOL intends to focus its enforcement efforts on:

- Prior authorization requirements for in network and out of network inpatient services;
- Concurrent review for in network and out of network inpatient and outpatient services;
- Standards for provider admission to participate in a network, including reimbursement rates; and
- Out of network reimbursement rates, including plan methods for determining usual, customary and reasonable charges.

The FAQs reiterate that the requirement to provide the comparative analysis to the DOL or state agency was effective on February 10, 2021.

Departments Issue FAQs on Coverage of COVID-19 Diagnostic Testing and Vaccines

On February 26, 2021, the Departments jointly issued FAQs Part 44, regarding the coverage of items and services related to diagnostic testing for COVID-19 and coverage of qualifying coronavirus preventive services, including recommended COVID-19 vaccines.

The FAQs clarify that plans and insurers cannot use medical screening criteria to

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deny or impose cost sharing on a claim for COVID-19 testing for an asymptomatic person who has no known or suspected exposure to COVID-19. However, the FAQs do not change prior guidance addressing coverage of testing for employment purposes or in other situations when the testing is not primarily intended for individualized diagnosis or treatment of COVID-19. In such situations, plans and insurers are not required to provide coverage of the testing or may impose cost-sharing. The FAQs confirm that plans and insurers must cover point-of-care COVID-19 tests and tests provided through state- or locality-administered testing sites, "drive-through" sites, and sites that do not require appointments.

With regard to COVID-19 vaccine coverage, plans and issuers must cover, without cost sharing, all COVID-19 vaccines that have received a recommendation that makes them a qualifying Coronavirus preventive service with respect to the individual involved, and their administration. Additionally, plans and insurers must cover the vaccine administration fee when the plan or insurer is not billed for the vaccine.

The FAQs also confirm that an employee assistance program and onsite medical clinics that constitute excepted benefits may cover COVID-19 vaccines and their administration, including when offered in combination with COVID-19 testing benefits, without causing them to lose their excepted benefit status.

IRS Notice 2021-15: Additional COVID-19 Relief for Cafeteria Plans

The Internal Revenue Service (IRS) recently clarified the application of temporary special rules for health flexible spending arrangements and dependent care assistance programs (health FSAs and DCAPs) enacted as part of the Consolidated Appropriations Act, 2021 (CAA), which became law in the final days of 2020.

In IRS Notice 2021-15 ("the Notice), the IRS clarified application of the expanded carryovers and grace periods allowed under the CAA for health FSAs and DCAPs; the extension of post termination reimbursements from health FSAs; and the special carry forward rule for DCAPs when the dependent aged out during the pandemic. The Notice also confirmed the mid-year election changes that are permitted without a status change.

The Notice further detailed the interaction of the health FSA carryover, extended grace period and post termination reimbursement rules with COBRA; and the effect on health savings account eligibility when a participant changes between limited purpose and general purpose health FSAs mid year, and when a health FSA adds a CAA carryover or expanded grace period.

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IRS Deems PPE to Be a Qualified Medical Expense

In Announcement 2021 7, the IRS expanded the list of expenses eligible for deduction under Code section 213(d) to include personal protective equipment (PPE) used to prevent the spread of COVID 19, including masks, sanitizing wipes and hand sanitizer.

UPCOMING COMPLIANCE DEADLINES AND REMINDERS

Retirement Plan Deadlines

<u>Required Minimum Distributions</u>. Plans must begin to pay initial required minimum distribution payments by April 1, 2021.

<u>Corrective Distributions for Excess Elective Deferrals</u>. The deadline for processing corrective distributions for elective deferrals in excess of the Code section 402(g) limit is April 15, 2021. The elective deferral limit for 2020 was $19,500 ($26,000 with catch up contributions).

<u>Annual Funding Notice</u>. Calendar year defined benefit plans with more than 100 participants must provide the Annual Funding Notice by April 30, 2021.

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