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Employee Benefits and Executive Compensation

New COBRA, Cafeteria Plan, and Plan Administration Guidance Issued by the DOL and IRS: What Employers Need to Know



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Overview

- EBSA Disaster Relief Notice 2020-01 (“EBSA Notice”)
- DOL and Department of Treasury Joint Notice (“Joint Notice”)
- Revised Model COBRA Notices
- IRS Cafeteria Plan Guidance



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EBSA Notice - Notice and Disclosure Requirements

- CARES Act authorized DOL to extend certain deadlines
- No violation of ERISA for a failure to timely furnish a notice, disclosure, or document otherwise required during period beginning March 1, 2020 and ending 60 days after the declared end of the COVID-19 National Emergency
 - Some of the notices, documents and disclosures covered by the EBSA Notice are:
 - SPDs, SMMs, and Summary Annual Reports
 - Benefit statements under ERISA Section 105
 - Annual funding notices under ERISA Section 101(f)
 - Participant-directed investment disclosures (e.g., plan fee info and blackout notices)
 - QDIA notices
 - Notices and disclosures relating to QDROs
 - Notices and disclosures in connection with benefit claim determinations and appeals



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EBSA Notice - Distributions and Loans

- Relief from procedural requirements associated with distributions and loans from retirement plans (no relief from distribution and plan loan verification procedures not within the DOL's authority)
- Failure to follow procedural requirement not treated as a failure if:
 - The failure is attributable solely to the COVID-19 outbreak;
 - The plan administrator makes a good-faith diligent effort under the circumstances to comply with those requirements; and
 - The plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively feasible



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EBSA Notice - CARES Act Loan Changes

- CARES Act increased the limit on plan loans for individuals affected by COVID-19 to the lesser of \$100,000 or 100% of the participant's account balance
- CARES Act also permits the delay of up to 1 year of repayments of plan loans made to a qualified individual that would have been due during the period from March 27, 2020 to December 31, 2020
- CARES Act did not amend the provisions of ERISA that apply to participant loans
- The DOL will not treat any person as violating the ERISA plan loan requirements solely because:
 - The person made a plan loan to a qualified individual during the loan relief period under the CARES Act; or
 - A qualified individual delayed making a plan loan repayment in compliance with the CARES Act



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EBSA Notice - Timely Remittance of Participant Contributions and Loan Repayments

- ERISA requires amounts withheld from an employee's wages for contributions to a retirement plan or repayment of a plan loan to be remitted to the plan on the earliest date on which such amounts can reasonably be segregated from the employer's general assets
- During the EBSA Relief Period, the DOL will not take enforcement action with respect to a temporary delay in forwarding such payments or contributions provided that the failure is attributable to the COVID-19 outbreak
 - Employers required to act reasonably, prudently and in the interests of employees to comply as soon as administratively practicable under the circumstances



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Joint Notice – Extended Deadlines

- Issued jointly by the DOL and Department of Treasury
- Provides employees and their beneficiaries, and employers with extended deadlines associated with several employee benefit plan actions, including:
 - The deadline (generally, 30 days) to request special enrollment under a group health plan
 - Claims deadlines
 - COBRA deadlines
- The period from March 1, 2020 until 60 days after the announced end of the COVID-19 National Emergency is disregarded



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Joint Notice – Extended Claims Deadlines

- The extension applies to the following Claims deadlines:
 - The deadline to file a claim for benefits under a plan's claims procedure;
 - The deadline by which a claimant may file an appeal of an adverse benefit determination under the plan's claims procedure;
 - The deadline by which a claimant may file a request for an external review of an adverse benefit determination or final adverse benefit determination;
 - The deadline by which a claimant may provide information to perfect a request for external review following a finding that the request was not complete



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Joint Notice – Extended COBRA Deadlines

- The extension applies to the following COBRA deadlines:
 - The deadline for a health plan participant or qualified beneficiary to notify the plan administrator of the occurrence of certain COBRA qualifying events;
 - The 60-day election period for COBRA continuation coverage;
 - The due date for making COBRA premium payments;
 - The date by which the COBRA election notice must be provided to a qualified beneficiary



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Joint Notice – Extended COBRA Deadlines

- Example
 - Assumes declared end of COVID-19 National Emergency is June 30, 2020 and end of Outbreak Period is August 29, 2020 (60 days later)
 - Employee terminates and loses health coverage. Employee is provided with COBRA election notice on April 1, 2020
 - Under normal rules, employee must elect COBRA by May 31, 2020 (60 days)
 - Outbreak Period disregarded, so deadline to elect COBRA is October 28, 2020 (60 days after end of Outbreak Period)



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Joint Notice – Extended COBRA Deadlines

- Example
 - Assumes declared end of COVID-19 National Emergency is June 30, 2020 and end of Outbreak Period is August 29, 2020 (60 days later)
 - On March 1, 2020, employee receiving COBRA continuation coverage
 - Monthly premium payments due first of the month
 - Employee made timely payment for February, but no payments made for March through August
 - Payments for all six months deemed timely if made by September 28, 2020 (30 days after end of Outbreak Period)
 - Coverage must be provided during this period if payments made by extended deadline.



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Revised Model COBRA Notices

- The DOL has issued revised model COBRA general and election notices
 - Now informs qualified beneficiaries of the relationship between COBRA and Medicare
 - Medicare special enrollment periods
 - Late enrollment penalties and gaps in coverage
 - Order in which Medicare and COBRA pay claims
- Revised COBRA notices do not reflect extension of COBRA election and premium payment deadlines
 - Employers should revised COBRA notices to inform qualified beneficiaries of the availability of extended deadlines
 - What about prior notices and/or terminations of COBRA due to nonpayment of premiums?



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Cafeteria Plans – Mid-Year Election Changes

- Code Section 125 cafeteria plan elections are generally irrevocable, with certain permitted exceptions
- IRS Notice 2020-29 provides temporary flexibility during calendar year 2020 for Code Section 125 cafeteria plans to permit certain prospective mid-year election changes (including an initial election) for employer-sponsored:
 - health coverage;
 - health FSAs; and
 - dependent care assistance programs



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Cafeteria Plans – Mid-Year Election Changes ctd.

- An employer may amend one or more of its Code Section 125 cafeteria plans to allow employees to:
 - Make a new election for employer-sponsored health coverage on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage;
 - Revoke an existing election for employer-sponsored health coverage and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis (including changing enrollment from self-only coverage to family coverage);
 - Revoke an existing election for employer-sponsored health coverage on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer;
 - Revoke an election, make a new election, or decrease or increase an existing election regarding a health FSA on a prospective basis; and
 - Revoke an election, make a new election, or decrease or increase an existing election regarding a dependent care assistance program on a prospective basis



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Cafeteria Plans – Mid-Year Election Changes

- Employers are not required to provide unlimited election changes
- Any permitted election changes are applied on a prospective basis only
- Changes must comply with the nondiscrimination rules applicable to Code Section 125 cafeteria plans
- With respect to health FSAs and dependent care assistance programs, employers are permitted to limit mid-year elections to amounts no less than amounts already reimbursed
- This relief may be applied retroactively to January 1, 2020



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Cafeteria Plans – Extended Claims Periods

- Guidance allows for an extended period to apply unused amounts remaining in a health FSA or dependent care assistance program to pay or reimburse medical care expenses or dependent care expenses
- An employer may amend one or more of its Code Section 125 cafeteria plans to permit employees to apply unused amounts remaining in a health FSA or a dependent care assistance program as of the end of a grace period ending in 2020, or a plan year ending in 2020, to pay or reimburse expenses incurred for the same qualified benefits through December 31, 2020



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Cafeteria Plans – Increase in Carryover Amounts

- Unused amounts remaining as of the end of a plan year in a health FSA may be carried over to pay or reimburse a participant for medical care expenses during the following plan year
 - The current carryover limit is \$500
- The guidance increases the carryover limit to \$550
- IRS Notice 2020-33



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Cafeteria Plans – Plan Amendments

- An employer that decides to amend one or more of its Code Section 125 cafeteria plans pursuant to the guidance must adopt a plan amendment
- Such an amendment for the 2020 plan year must be adopted on or before December 31, 2021, and may be effective retroactively to January 1, 2020, provided the plan is operated in accordance with the relief and the employer informs all eligible employees of the changes



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Questions?



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