

# Employee Benefit Considerations in the COVID-19 Era – What You Need to Know for 2021

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# Qualified Retirement Plans

## Presenters



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# Qualified Plans – Road Map

- **SECURE Act & CARES Act Changes**
  - Administrative
  - Compliance
  - Plan Design
- **Lifetime Income Stream Benefit Illustrations**
- **E-Delivery of ERISA Notices**

# 402(f) Special Tax Notice

- **Updated IRS Model Notice**
  - Exception for qualified birth and adoption distributions
  - Increased RMD age from 70½ to 72
  - What about Coronavirus-related distributions ?



# SECURE Act Changes

- **Automatic enrollment ADP safe harbor (QACA)**
  - Increases contribution maximum to 15%
  - *Does not require plans to provide lifetime income or annuity form of benefit*
  - Effective for plan years beginning after December 31, 2019
- **Eligibility requirements for long-term part-time employees**
  - Elective deferral contribution eligibility
  - At least 500 hours of service in 3 consecutive 12-month computation periods
  - Effective for service in plan years beginning after December 31, 2020
- **RMD rules for defined contribution plan death benefits**
  - 5-year payout to beneficiaries who are not individuals
  - 10-year payout to beneficiaries who are individuals but are not an “Eligible Designated Beneficiary”
  - Payout over life expectancy to Eligible Designated Beneficiaries
  - Effective generally for participant deaths after December 31, 2019

# SECURE Act Changes (continued)

- **Required lifetime income stream benefit illustrations**
  - New disclosure requirement for defined contribution plans
  - Effective for benefit statements issued after September 18, 2021
- **Penalty increases for filing and notice failures**
  - Failure to file Form 5500 \$250 per day, up to \$150,000
  - Failure to file deferred vested benefit registration statement \$10 per participant per day, up to \$50,000
  - Failure to notify participants of the right to elect no withholding \$100 per failure, up to \$50,000 for all failures in a plan year
  - Effective for forms and notices required or issued after December 31, 2019

# IRS Guidance on Coronavirus-related distributions

- **Clarification on CARES Act Coronavirus-related distributions:**
  - More on recontribution within 3 years
  - Expanded definition of “qualified individuals”
  - Not subject to 20% mandatory withholding
  - IRS sample self-certification statement
  - Plan tax reporting on Form 1099-R
  - Participant tax reporting on Form 8915-E

# Lifetime Income Illustrations

- **Required statement at least every 12 months**
  - Effective September 18, 2021
- **Detailed illustration of defined contribution plan benefit converted to a single life annuity and a QJSA based on current account balance**
- **August 18, 2020 Department of Labor Interim Final Rule - assumptions and model language**





# Electronic Delivery of ERISA Notices

- **Department of Labor final regulation safe harbor methods:**
  - Email notice of internet availability of documents (NOIA)
  - Email delivery of documents
- **Applies to all pension/401(k) plan information and documents required to be furnished under Title I of ERISA**
- **Permits plan use of confirmed participant email addresses**
- **Participants can opt out of electronic delivery**
- **Effective July 27, 2020**



# Health and Welfare Plans

## Presenters



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# Legal Developments- CARES Act and Related Guidance

- **Families First Coronavirus Response Act (FFCRA) as amended by the Coronavirus Aid, Relief and Economic Security Act (CARES Act)**
  - COVID-19 testing and vaccine coverage mandate
  - HDHP coverage of telehealth services
  - Permissibility of reimbursement for OTC medical products without a prescription
- **IRS Notice 2020-15**
  - Allows COVID-19 testing and treatment coverage under HDHP before deductible is met
- **IRS Notice 2020-29**
  - Allows extended FSA coverage periods and additional midyear election changes
- **May 4, 2020 Notice of relief; extension of timeframes**
  - Extension of COBRA election window and premium payment deadlines
  - Extension of HIPAA special enrollment deadline
  - Extension of claims and appeals procedures deadlines

# Legal Developments- CARES Act and Related Guidance

## For each change:

- Was the change required or permissive?
- If permissive, did we adopt the provision?
- Based on our plan language, is an amendment needed?
- Based on our SPD language and prior communications, is an updated SPD or SMM needed?

Legal Change	Required or Permissive	Adopted? (Y/N)	Plan Amendment Needed? (Y/N)	Updated SPD/SMM Needed? (Y/N)
Extension of COBRA Election Window	Required	Y	N	N
Extension of Enrollment Deadline for HIPAA Special Enrollment Allowable Changes	Required	Y	N	Y
Extended FSA Coverage Periods	Permissive	Y	Y	Y
Allow Prospective Mid-Year Health Care Spending Account Changes	Permissive	N	N	N

# COBRA Notice Litigation

- **Recent increase in cases brought by employees and former employees regarding deficient COBRA notices**
- **\$110 per day per qualified beneficiary penalty**
- **Next Steps**
  - Confirm that COBRA notices satisfy all applicable legal requirements
  - If COBRA notices do not track the DOL model notices (most recently updated on May 1, 2020), consider whether using the model may be prudent
  - Ensure that compliant COBRA notices are being timely provided to qualified beneficiaries

# ***Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)**

- **Title VII of the Civil Rights Act**
  - “It shall be an unlawful employment practice for an employer. . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin”
- **In *Bostock*, the Supreme Court held that discrimination based on “sex” includes gender identity and sexual orientation**
- **Next Steps:**
  - Review group health plan coverage for same-sex spouses and domestic partners
  - Review covered services related to gender dysphoria and gender-affirmation surgeries
  - Review gender-assignment requirements that are part of benefit administration, disability plan coverage for gender-affirmation surgeries and family-planning benefits

# Executive Compensation During a Pandemic

## Presenters



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# Backdrop

## How has the pandemic impacted:

- The company
- General employee population
- Retention of executives



# Compensation Elements

- **Base Salary**
- **Annual Bonus**
- **Long-Term Incentives**
  - Existing Awards
  - New Awards

# Considerations

- Institutional Shareholders & Proxy Advisory Firms
- Disclosure
- Tax Law (409A)
- Securities Law
- Contractual
- CARES Act Limitations
- Accounting Expense

# Fiduciary Considerations

## Presenters



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# Fiduciary Considerations – Road Map

- Revisiting the “New” Fiduciary Rule
- Proposed Rules on Proxy Voting
- ESG Investment
- Private Equity Investments



# Who is a Fiduciary

- A person who exercises discretionary authority or control over the management of a plan or IRA or with respect to the management or disposition of its assets;
- A person who has discretionary authority or responsibility in the administration of a plan or IRA; or
- A person who renders “*investment advice*” for a fee or other compensation, direct or indirect, or has the authority or responsibility to do so.

# Investment Advice Fiduciary

## Determined based on 5-part test

1. renders advice as to the value of securities or other property, or makes recommendations as to investing in, purchasing or selling securities or other property,
2. on a regular basis,
3. pursuant to a mutual agreement, arrangement, or understanding with the plan, the plan fiduciary or IRA owner that,
4. the advice will serve as a primary basis for investment decisions with respect to plan or IRA assets, and
5. the advice will be individualized based on the particular needs of the plan or IRA.

**Is a financial advisor who recommends that a participant roll over a 401(k) into an IRA considered a fiduciary?**

# Fiduciary Status Dependent on 5-part Test

## 5-part Test

- Renders advice as to the value of securities or other property, or makes recommendations as to investing in, purchasing or selling securities or other property,
- On a regular basis,
- Pursuant to a mutual agreement, arrangement, or understanding with the plan, the plan fiduciary or IRA owner that,
- The advice will serve as a primary basis for investment decisions with respect to plan or IRA assets,
- The advice will be individualized based on the particular needs of the plan or IRA, and
- Receives a fee or other compensation.

## Analysis

- Advice provided by an advisor that has a pre-existing advice relationship with the Participant?
- Participant rolling over into an IRA product of the advisor?
- One-time sales transaction?
- Participant disclaimed in writing that the advice is provided pursuant to a mutual agreement or understanding?
- Participant disclaimed in writing its reliance on the advice as a primary basis for its decision?
- Receipt of fees or other compensation?



# Fiduciary Must Act

- Solely in the interest of plan participants and their beneficiaries;
- For the exclusive purpose of providing plan benefits, or for defraying reasonable expenses of plan administration;
- With the care, skill, prudence and diligence that a prudent person in similar circumstances would use;
- By diversifying the plan's investments to minimize the risk of large losses; and
- In accordance with the plan's documents (unless inconsistent with ERISA).

# Prohibited Transaction Rules

## Party-in-interest transactions

- Sale or exchange between a plan and a party in interest
- Any loan or extension of credit between a plan and a party in interest
- Any transfer of assets from the plan
- Use of plan assets by or the benefit of a party in interest

## Examples:

- *The plan sells an investment that it owns to the plan sponsor*
- *The plan sponsor guarantees a loan to the plan*

# Prohibited Transaction Rules

## Self-dealing transactions

- Using assets for his or her own interest for his or her own account
- Representing an adverse party in a transaction involving a plan (can't represent both sides of a transaction)
- Receiving consideration for a personal account from any party dealing with a plan transaction involving plan assets

## Examples:

- *A fiduciary invests in a fund that will pay fees to an affiliate of the fiduciary*
- *A fiduciary hires his son to provide services to a plan*

# Prohibited Transaction Exemptions

- Statutory Exemptions
- Administrative Class Exemptions
- Administrative Individual Exemptions
- Other Guidance

# Proposed DOL Exemption – Investment Advice Fiduciaries

## Applicable to

- registered investment advisers,
- broker-dealers,
- banks,
- insurance companies, and
- their employee agents and representatives

## Permits

- receipt of compensation
- sale or purchase of securities and other investments from own inventories to or from Plans and IRAs

# Compliance with Proposed – DOL Exemption

## Comply with Impartial Conduct Standards

- Best Interest Standard
  - Prudence
  - Loyalty
- Reasonable Compensation Standard
- Best Execution
- No Materially Misleading Statements

## Disclosure

- Written disclosure of fiduciary status
- Written description of scope of services and material conflicts of interest

## Policies and procedures requiring mitigation of conflicts of interest

## Annual retrospective compliance review

## Recordkeeping

# DOL's Proposed Rules on Proxy Voting and ESG Investment



**Both proposals focus on limiting ERISA fiduciaries to act solely for the economic benefit of plan participants and beneficiaries when managing plan assets.**

# ESG Investment Considerations

- DOL's position on ESG correlates with politics of administration in power
- "All things being equal" Test
- "Core" proposed additions to the regulation
  - Economic returns = primary consideration
  - Cannot subordinate the interests of plan participants to non-pecuniary goals
  - Consideration of "other available investments"
  - What would qualified investment professionals do?
  - QDIAs



# ERISA Fiduciaries and Proxy Voting

- **ERISA Fiduciary duties of loyalty and prudence**
  - Include voting of proxies on securities held in employee benefit plan investments and other shareholder rights
- **To Vote or Not to Vote**
  - Additional diligence burden for fiduciaries
  - Heightened scrutiny of proxy advisory firms
- **Strong Industry Reaction**
  - Concerns about costly and burdensome obligations



# DOL's Proposed Rules on Proxy Voting and ESG Investment

## Action Items for Plan Sponsors

- Agenda items for benefit/investment committees
- Synergize with internal corporate/securities team
- New investment analysis
- Review QDIA investments
- COVID-19 considerations + ESG issues + Proxy Voting
- 2021 Proxy Season
- Whatever you do, write it down!



# Private Equity Investments in Defined Contribution Plans

## Issues to consider when evaluating a particular investment alternative:

- Does it provide participants with a more diversified set of investment options?
- Oversight by plan fiduciaries or managed by investment professionals?
- Has the fund limited the allocation of investments to private equity in a way that addresses potential issues of cost structures, complexity, disclosure obligations and liquidity?
- What are the fees, liquidity, and valuation of the fund?
- Does the asset allocation of the fund align with of plan's features and participant profile (e.g., participant ages, normal retirement age, anticipated employee turnover, and contribution and withdrawal patterns)?
- Whether the investment alternative continues to be prudent and in the best interests of plan participants on a periodic basis.
- What are disclosure obligations for plan participants?

# Payroll Tax and Tax Credit Programs

## Presenters



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# Payroll-Related Guidance

- Families First Coronavirus Response Act (FFCRA), enacted March 18, 2020
- Coronavirus Aid, Relief, and Economic Security (CARES) Act, enacted March 27, 2020
- Presidential Memorandum, issued August 8, 2020 - <https://www.federalregister.gov/d/2020-17899>
- IRS Notices, Regulations and Revenue Procedures - <https://www.irs.gov/coronavirus/coronavirus-and-economic-impact-payments-resources-and-guidance>
- DOL Guidance - <https://www.dol.gov/agencies/whd/pandemic>

# FFCRA Paid Leave Types

**FFCRA requires private-sector employers with fewer than 500 employees and all public-sector employers to provide the following forms of paid leave to assist employees impacted by COVID-19.**

- Emergency Paid Sick Leave (Qualified Sick Leave)
- Emergency Family and Medical Leave (Qualified Family Leave)

# FFCRA Qualified Sick Leave – Qualifying Employee

**An employee is entitled to Qualified Family Leave if he/she is unable to work or telework due to specific qualifying, COVID-19-related reasons.**

Reason 1: Employee under quarantine or isolation order,

Reason 2: Employee advised to self-isolate by health-care provider,

Reason 3: Employee experiences COVID-19 symptoms and seeking diagnosis,

Reason 4: Employee caring for an individual who has been advised to self-isolate by health-care provider,

Reason 5: Employee caring for employee's child with closed school or daycare, or

Reason 6: Employee is experiencing any other substantially-similar conditions.

# FFCRA Qualified Sick Leave - Payment Limits

**If the employee has a qualified leave based on Reasons 1-3, the employee is due 100% of the required rate of pay for leave hours taken.**

- The total pay is capped at \$511 per day or \$5,110 total

**If the employee has a qualified leave based on Reasons 4-6, the employee is due two-thirds of the required rate of pay for leave hours taken.**

- The total pay is capped at \$200 per day or \$2,000 total



# FFCRA Qualified Sick Leave – Duration and Term

## Duration of Leave

- Full-time employee may take up to 80 hours
- Part-time employee may take up to the average number of hours worked over a 2-week period

## Term of Leave

- Must be provided from April 1, 2020, to Dec. 31, 2020, to qualifying employees\*

*Note: Unused Qualified Sick Leave hours cannot be carried over into 2021.*

*\*Qualifying employees are those employees who are unable to work or telework AND who meet one of the six qualifying reasons related to COVID-19*

# FFCRA Qualified Family Leave - Requirements

## Qualifying Employee

- A qualifying employee is an employee who has been employed by a qualifying employer for at least 30 calendar days and cannot work in person or telework because **the employee needs to care for his or her child because of the closure of the child's school or childcare facility, or the unavailability of a childcare provider, because of COVID-19 considerations.**

## Term

- Must be provided from **April 1, 2020 to Dec. 31, 2020**

# FFCRA Qualified Family Leave - Payment Limits

## Payment Amount

- First 10 days (2 work weeks) are unpaid leave and up to 10 work weeks of paid leave at two-thirds of the employee's regular rate of pay
- Employees can substitute days of accrued paid leave for the period of unpaid Qualified Family Leave

*Note: An employee who has already used 12 weeks of leave under FMLA cannot take Qualified Family Leave under EFMLA*

## Payment Limits

- The maximum amount payable per day to an employee is \$200, and the total amount payable cannot exceed \$10,000

# FFCRA Reporting

- ❖ FFCRA qualified leave wages are “wages” included in the employee’s gross income and reported on Form W-2
- ❖ FFCRA qualified leave wages are NOT subject to the employer portion of Social Security tax
- ❖ FFCRA qualified leave wages ARE subject to the employee portion of Social Security tax

*Note: Reporting requirements apply to both Qualified Sick Leave and Qualified Family Leave*

# FFCRA Tax Credits For Qualified Leave

**The FFCRA established refundable payroll tax credits for (i) qualified sick leave wages and (ii) qualified family leave wages**

## Eligibility

- Credits are available only to employers with fewer than 500 employees (does not apply to federal, state or local government employers)

## Amount of Credit

- The credits may be directly applied against employer and employee portions of Social Security and Medicare taxes and the amount of federal income tax withheld
- Credits are calculated on a quarter-by-quarter basis and reported on Form 941

## Duration

- These credits are available based on qualified leave wages paid from April 1 to Dec. 31, 2020.

# Employee Retention Tax Credit (ERTC)

The CARES Act established a refundable payroll tax credit for retaining employees and continuing to pay compensation to them

## Eligibility

- An employer is eligible for the ERTC for a quarter if the employer is carrying on a trade or business in 2020 and, in that quarter, the employer fulfilled the **business suspension condition** or the **gross receipts condition**

## Duration

- ERTC is based on qualified wages\* paid from **March 13 to Dec. 31, 2020**

## Amount of Credit

- The maximum ERTC per employee for 2020 is \$5,000

*\*Qualified wages do not include FFCRA qualified leave wages*

# FORM 7200

- Employers can file Form 7200, Advance Payment of Employer Credits Due to COVID-19, to request the advance payment from the IRS of the excess credits to the extent the eligible tax credits for a quarter are greater than the amount of employment tax deposits that would otherwise be due by the employer during the quarter
- Alternatively, employers can forego advances of excess credit amounts and instead claim the refundable portions using Form 941

# Deferral of Employer Portion of Social Security Tax

The CARES Act provides extended deadlines to remit the employer portion of Social Security tax on wages paid during March 27 to December 31, 2020

## Payroll Tax Deferral Period

- Any 2020 deferred payroll tax amounts would be due to the government in two installments:
  - One-half by the end of 2021
  - The remaining one-half by the end of 2022

## How to Defer

- An employer defers the employer's share of Social Security tax by reducing required deposits or payments for a calendar quarter by an amount up to the maximum amount of the employer's share of Social Security tax for the return period to the extent the return period falls within the payroll tax deferral period

## Deferral Limits

- Employers may defer only the employer's share of Social Security tax that is equal to or less than its liability for the employer's share of Social Security tax that was due to be deposited during the payroll tax deferral period or was for payment due on wages paid during the payroll tax deferral period

## Payroll Tax Credits

- Employers may also be entitled to credits against the employer's share of Social Security tax, including refundable tax credits for paid leave under FFCRA or for qualified wages under the employee retention credit



# Deferral of Employee Portion of Social Security Tax

Under the Presidential Memorandum and IRS Notice 2020-65, employers may defer the employee portion of Social Security taxes on wages paid during the period beginning September 1, 2020 and ending December 31, 2020

## Payroll Tax Deferral Period

- Any amounts that the employer did not withhold, deposit, and pay based on qualifying compensation paid during 2020, must, be withheld, deposited, and paid during the period from January 1 to April 30, 2021

## Deferral Limits

- Employers may defer the employee portion of Social Security tax with respect to compensation paid to employees whose biweekly pre-tax compensation is less than \$4,000

*Note: Employer is liable for any unpaid taxes owed.*

# Leave Donation to Assist With Covid-19 Response

Under Notice 2020-46, Employers may implement a leave-based donation program in which employees may forego vacation, sick, or personal leave in exchange for donations of cash payments that employers make to 170(c) charitable organizations providing assistance to victims of the coronavirus pandemic without such donation included in the employees' income

## Timing of Donation

- The donations must be paid to qualifying charitable organizations by December 31, 2020 to be excludable from the employees' wages and gross income. Employees cannot claim a charitable deduction for the donation.

## Reporting Obligations

- The qualified cash payments are not included in Boxes 1, 3, or 5 of Forms W-2
- Employers may be entitled to deduct such payments as trade or business expenses or charitable contributions and gifts

# Paycheck Protection Program (PPP) Loan Forgiveness

- Employers who obtained a PPP loan and want to seek loan forgiveness must timely submit to the lender a SBA Form 3508, Loan Forgiveness Application, within 10 months of the last day of the loan's covered period
- SBA Form 3508EZ can be used if the employer-borrower meets certain requirements (e.g., limited to no compensation reductions, etc.)

*Note: Applications are no longer being accepted for a PPP loan*

# Revised Form 941 and Form 941-X

**Revised Form 941 and Form 941-X issued for the 3<sup>rd</sup> and 4<sup>th</sup> quarter 2020 include significant changes to report the payroll tax credits under the FFCRA and CARES Act, as well as advance payments of such credits using Form 7200.**

- **Reminder - 3<sup>rd</sup> quarter filing deadline is November 2, 2020**

# Thank you!

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