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Employer-Sponsored Retirement and Health Plans: What You Need to Know for Year-End

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Who Needs to Know

U.S. Employers, particularly HR personnel; Retirement Plan Sponsors and Administrators.

Why It Matters

While year-end is ordinarily a busy time for companies, the number of COVID-19-related pieces of legislation and developments present additional items employers and plan sponsors must address in wrapping up 2021.

As we approach the 19th month of the pandemic, employers continue to face the daily challenges of adjusting their workplaces and personnel to accommodate the hardships associated with COVID-19. As part of such adjustments, employers and plan sponsors must take into consideration the impact of COVID-19-related legislation and guidance on their health and welfare plans and qualified retirement plans. In addition, employers and plan sponsors should be aware of other non-COVID-19-related legal developments within the health and welfare and retirement space as the year comes to a close.

This client alert provides insight to employers and plan sponsors on the impact and implications associated with new health and welfare and retirement benefits legislation and guidance, including the CARES Act, SECURE Act, ARPA COBRA tax credits, CAA No Surprises Act, required qualified retirement plan amendments, updates to the EPCRS, and more.

Qualified Retirement Plan Changes

Year-End Amendments. Over the past few years, several pieces of legislation have been enacted that require a number of amendments to employers' qualified retirement plans:

- **CARES Act:** The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), enacted on March 27, 2020, allowed employers to implement a number of temporary design changes benefitting participants in certain retirement plans. Specifically, under the CARES Act, employers could implement the following changes:
  - withdrawals of up to $100,000 from eligible retirement plans for qualified individuals as a "coronavirus-related" distribution;
  - for loans made to qualified individuals from March 27, 2020 to September 22, 2020, an increase of the maximum loan amount limits up to the lesser of (1) $100,000 (minus the participant's outstanding loans), or

(2) the participant's vested benefit under the plan;

- a suspension of plan loan repayments on amounts due from March 27, 2020 to December 31, 2020, for up to one year; and/or

- a waiver of required minimum distributions (RMDs) during 2020.

Employers who took advantage of any of the above must amend their retirement plans by the last day of the first plan year beginning on or after January 1, 2022 (*i.e.*, December 31, 2022 for calendar year plans).

- **SECURE Act:** The Setting Every Community Up for Retirement Enhancement Act (SECURE Act) was enacted in December 2019 to make it easier for individuals to save for retirement. Some of the changes set forth under the SECURE Act include:

  - an increase in the required beginning date age from age 70.5 to age 72, effective for RMDs for individuals turning age 70.5 after December 31, 2019;

  - at the plan sponsor's discretion, the addition of an in-service withdrawal option for birth or adoption expenses up to $5,000; and

  - a requirement that plan sponsors permit employees who work 500 hours per year over three years (*i.e.*, "long-term, part-time employees") to contribute to the company's 401(k) plan.

Amendments reflecting these changes must be made to qualified retirement plans by December 31, 2022.

- **Hardship Distribution Changes:** Under the IRS hardship distribution final rules, employers must amend their plans to (1) remove plan provisions that prohibit an employee from making elective deferrals to the plan (and all other plans) maintained by the employer for at least six months following receipt of a distribution, and (2) require an employee requesting a hardship distribution to make a representation that the employee has insufficient cash or liquid assets reasonably available to satisfy the employee's financial need. Plans must be amended to reflect the modifications under the final regulations by December 31, 2021. Additionally, under the Bipartisan Budget Act of 2018 (Bipartisan Budget Act), employers have the discretion to (i) permit hardship distribution for expenses or losses incurred by a participant (or the participant's family) as a result of a federally declared disaster, (ii) remove the requirement that participants first obtain all available nontaxable plan loans before obtaining a hardship withdrawal, and (iii) allow participants to take a hardship withdrawal on earnings from elective deferrals, qualified nonelective contributions, qualified matching contributions, and all related earnings. If an employer implemented one or more of these permissive modifications under the Bipartisan Budget Act, a plan amendment reflecting such changes is also required by December 31, 2021.

Lifetime Income Illustrations. Section 105 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), requires administrators of defined contribution plans to provide participants with periodic pension benefit

statements at least annually (or, at least quarterly for plans that permit participant-directed investments). The SECURE Act amended these disclosure rules to require that administrators of defined contribution plans provide participants with two new "lifetime income illustrations" — (1) a single life annuity (with payments over the participant's lifetime), and (2) a qualified joint and survivor annuity (with equal payments over the participant and spouse's lifetime). Under the interim final ruling, the lifetime income illustrations disclosure requirement took effect on September 18, 2021. Under the temporary implementing FAQs, released by the U.S. Department of Labor (DOL) on July 26, 2021, participant-directed individual account plans (such as 401(k) plans), which are required to furnish quarterly benefit statements to participants, must provide lifetime income illustrations on a benefit statement for a quarter ending within 12 months of the September 18, 2021 effective date. As such, those plans must include their first lifetime income illustrations in their first or second quarterly statement of 2022. Additionally, nonparticipant-directed plans must provide the lifetime income illustrations on the annual statement for the first plan year ending on or after September 19, 2021. Employers and plan sponsors must be aware of the upcoming deadlines and ensure that processes are in place to timely furnish the newly required lifetime income illustrations.[1]

Cybersecurity Guidance. In 2018, the DOL estimated that there were 34 million defined benefit plan participants in private pension plans and 106 million defined contribution plan participants with combined assets of $9.3 trillion.[2] Due to the high value of retirement plans and participant data, a surge of cybercrimes against plan assets has been observed over recent years. Plan sponsors and fiduciaries have a fiduciary duty to take precautions to mitigate risks posed by cybercriminals and protect plan assets. In response to the increased targets against plan assets and participant data, in April 2021, the DOL issued guidance on the best practices for cybersecurity. The agency set forth their guidance in three forms: (1) "Tips for Hiring a Service Provider," (2) "Cybersecurity Program Best Practices," and (3) "Online Security Tips." Employers, plan sponsors, and fiduciaries should not only implement such best practices provided for in the guidance, but they should also be proactive and train employees with cybersecurity tips for participants.[3]

Change to EPCRS. Employers and plan sponsors must abide by strict requirements under the Internal Revenue Code (Code) to reap the considerable tax-favored benefits available under retirement plans. In the event a plan fails to satisfy the requirements of the Code in form or operation, the plan will be in jeopardy of becoming disqualified. Fortunately for plan sponsor employers and participants alike, the Internal Revenue Service (IRS) allows plan sponsors to correct mistakes under the Employee Plans Compliance Resolution System (EPCRS). Under the EPCRS, three separate correction programs are available: (1) the Self-Correction Program (SCP), (2) the Voluntary Correction Program (VCP), and (3) the Audit Closing Agreement Program (Audit Cap). Prior to this year, the EPCRS was governed by Revenue Procedure 2019-19. However, in July 2021, the IRS issued Revenue Procedure 2021-30 (Rev. Proc. 2021-30), which modified the guidelines in a beneficial manner and expanded a plan sponsor's ability to correct their errors. Specifically, the new guidelines under Rev. Proc. 2021-30:

- expanded the guidance on the recoupment of overpayments;
- eliminated the anonymous submission procedure under VCP;
- added an anonymous, no fee, VCP pre-submission conference procedure;

- extended the end of the SCP correction period for significant failures from two to three years;

- expanded the ability of a plan sponsor to correct an operational failure under the SCP by retroactive plan amendment by removing the requirement that all participants benefit from the retroactive amendment;

- extended the sunset of the safe harbor correction method available for correcting missed elective deferrals of eligible employees in plans with automatic contribution features by three years; and

- increased the threshold for certain de minimis amounts for which a plan sponsor is not required to implement a correction from $100 to $250.

If an employer or plan sponsor is required to make a correction to their retirement plan, they should review the new guidelines to ensure they are correcting under the proper program and with the best method available.[4]

Health and Welfare

Extension of Deadlines During the "Outbreak Period." At the height of the pandemic, the DOL and the IRS jointly issued the "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak" (Joint Notice). Under the Joint Notice, various deadlines were extended for up to one year by the CARES Act, including the deadlines for exercising HIPAA special enrollment rights, filing ERISA claims and appeals, and making COBRA elections and premium payments.

Almost a year later, as the one-year anniversary of the Joint Notice drew near, many grew concerned about the expiration of the deadline extensions. To address such concerns, in February 2021, the DOL issued EBSA Disaster Relief Notice 2021-01 to clarify that the one-year extension set forth under the Joint Notice applied on an individual, case-by-case basis. Based on such guidance, the applicable deadlines at issue are tolled until the earlier of (i) one year from the date the individual was first eligible for the relief, or (ii) the end of the outbreak period (*i.e.,* 60 days after the announced end of the national emergency related to the COVID-19 pandemic). Thus, plan sponsors should continue to monitor the tolling period on an individual, case-by-case basis until the announced end of the national emergency related to the COVID-19 pandemic.

ARPA COBRA Tax Credits. Under the American Rescue Plan Act of 2021 (ARPA), employers were required to provide free COBRA coverage to assistance eligible individuals from April 1, 2021 to September 30, 2021.[5] Now that the COBRA subsidy period has concluded, employers should turn their focus to claiming the tax credit to recoup the cost of the subsidy. To claim the credit, employers must report the dollar amount of, and the number of individuals receiving, the COBRA premium subsidy on its federal employment tax return (*e.g.,* the employer's Form 941). Additionally, if the employer anticipates receiving a credit, it may (1) reduce its required deposit of federal employment taxes up to the amount of the expected credit, and (2) file a Form 7200 to request an advance for any amount of the credit that exceeds the federal employment tax deposits available for reduction. If an

employer needs any additional guidance on the tax credit, the IRS issued Notice 2021-31 this past May, which includes helpful examples on how to calculate and claim the credit.

Health and Dependent Care FSA Changes. In an effort to help accommodate changes in medical and caregiving circumstances for employees, the Consolidated Appropriations Act (CAA) provided a number of temporary changes to health flexible spending accounts (health FSAs) and dependent care flexible spending accounts (dependent care FSAs). This temporary relief included: unlimited carryovers from 2020 to 2021 and/or 2021 to 2022; extended grace periods for unused 2020 and/or 2021 amounts; an increase in the maximum exclusion amount for 2021 for employer-provided dependent care assistance, including dependent care FSA contributions; and more. Additionally, under Notice 2021-15, the IRS clarified that the temporary relief also applied to mid-year elections. As such, employers were permitted to allow employees to make prospective mid-year health coverage, dependent care FSA and health FSA election changes for 2020 and/or 2021, without a "qualifying event." If employers chose to take advantage of these changes, they will be required to adopt a plan amendment not later than the end of the calendar year beginning after the end of the plan year in which the amendment is effective (*i.e.,* 2020 plan amendments must be adopted on or before December 31, 2021), so long as the plan has been operated consistently according to the terms of the amendment, and employers notified eligible employees of the changes to the plan.

CAA No Surprises and Transparency Act. In December of 2020, President Trump signed the CAA into law. Of significance to employers, Division BB of the CAA set forth the "No Surprises Act" and related "Transparency" provisions. These provisions were enacted in an effort to protect consumers from unknowingly incurring sizable medical expenses, largely stemming from a practice known as "surprise billing." Surprise billing occurs when insured patients unknowingly receive care from providers outside their network (*e.g.,* when a patient receives emergency care from an out-of-network provider or facility, or when a patient goes to an in-network facility for nonemergency care but receives care from an out-of-network provider). Title I and Title II, which set forth the "No Surprises Act" and "Transparency" provisions, respectively, are set to go into effect on January 1, 2022. Agencies have started issuing interim final rulings implementing the new legislation; however, many of the provisions are still awaiting final regulations. While the rulemaking process remains ongoing, plan sponsors are still expected to implement most of the requirements set forth under the No Surprises Act and Transparency provisions "using a good faith, reasonable interpretation of the statute." Plan sponsors need to be prepared to review and negotiate third-party administrator contracts and make all necessary updates to any relevant plan documents to reflect the implementation of all of these new requirements.

Mental Health Parity and Addiction Equity Act Updates. The Mental Health Parity and Addiction Equity Act (MHPAEA), enacted in 2008, sought to prevent group health plans and health insurance issuers that provide mental health and substance use disorder (MH/SUD) benefits from imposing less favorable benefit limitations than those imposed on medical or surgical coverage. One of the categories of benefit limitations subject to scrutiny under the MHPAEA is known as "nonquantitative treatment limitations" or "NQTLs," which include limitations such as step-therapy, fail-first policies, pre-authorization requirements, etc. Under the CAA, group health plans now must complete a detailed comparative analysis of the design and application of all NQTLs imposed on mental health and substance use disorder benefits. Plan sponsors must be prepared to produce such an analysis upon request by state or federal agencies, such as the DOL or HHS. Thankfully for group health plans, the DOL offers a resource called the "Self-Compliance Tool for the Mental Health Parity and Addiction Equity Act," which can be used to guide the performance of such analyses. Plans that have prudently applied the guidance in the self-

compliance tool should be well-suited to submit their comparative analysis, when requested.

Conclusion

While employers are tasked with a number of requirements and obligations that must be satisfied prior to year-end, employee benefit matters must not be left to slip through the cracks. As 2022 gets closer, employers should be diligent in making required amendments, keeping track of new deadlines and processes, and staying alert for updates and guidance related to the considerable amount of COVID-19-related legislation. For assistance in evaluating how to manage your year-end to-do's, please contact a member of Troutman Pepper's Employee Benefits and Executive Compensation team.

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[1] For more information on the lifetime income illustrations, see our August 2021 client alert.

[2] *See* DOL news release, available at https://www.dol.gov/newsroom/releases/ebsa/ebsa20210414 (dated April 14, 2021).

[3] For more information on the DOL's cybersecurity guidance, see our April 2021 client alert.

[4] For more information on the new EPCRS guidelines, see our July 2021 client alert.

[5] Under Notice 2021-31, the IRS indicated that an "assistance eligible individual" includes eligible employees who lose health care coverage due to an involuntary termination of employment or a reduction in hours.

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