Tucker Ellis LLP

CLIENT ALERT

THE IMPACT OF COVID-19 ON EMPLOYER-SPONSORED BENEFIT PROGRAMS

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Among the many ways that COVID-19 has affected Americans and U.S. businesses, employers are trying to figure out how to manage and administer their employee benefit programs in light of the pandemic. Tucker Ellis LLP has prepared the following questions and answers in response to what companies have been asking about how the virus is affecting their benefit programs.

Given how quickly the applicable law is changing and that many determinations must be made on a case-by-case basis, please contact one of the Tucker Ellis attorneys listed at the end of this Client Alert with specific questions. Remember that this Alert provides general information, but it is not intended to be, and should not be construed as or relied upon as, legal advice for any specific situation.

1. Can an employee take a withdrawal from our retirement plan to help pay costs associated with the virus?

The recently adopted Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") provides that the 10% early withdrawal penalty will be waived for any eligible individual who takes a "coronavirus-related distribution" (as defined) up to $100,000 from his or her qualified retirement accounts (including both employer-sponsored plans and individual IRAs) during 2020.

In addition, similar to the qualified disaster zone distribution provisions enacted under the SECURE Act in 2019, income attributable to a coronavirus-related distribution will be subject to income taxation over three years, and the individual may recontribute the funds to an eligible retirement plan within three years without regard to that year's cap on contributions. What the CARES Act does not address is whether an employer plan is required to allow an otherwise eligible employee to take a coronavirus-related distribution. If it is treated in the same manner as the qualified disaster zone distribution provisions, the employer plan may, but is not required to, allow the distributions.

Under the CARES Act, an individual is eligible for a coronavirus-related distribution if the individual: (i) or his or her spouse or dependent is diagnosed with COVID-19; and (ii) experiences adverse financial consequences due to COVID-19 as a result of being quarantined, being furloughed or laid off (or having his or her work hours reduced), being unable to work due to lack of child care, or as a result of the closing or reduction of hours of a business owned or operated by the individual, or other factors as will be determined by the Treasury Secretary.

2. Have there been similar enhancements to loan provisions applicable to retirement plans?

Yes. The CARES Act increases the loan dollar limit from $50,000 to $100,000 and the percentage limit from the greater of $10,000 or one-half of the participant's nonforfeitable accrued benefit to 100% of the participant's nonforfeitable accrued benefit for any eligible employee requesting a plan loan.

In addition, the due date for any existing plan loan originally scheduled to end between the date of enactment and December 31, 2020 will be delayed for one year, and the remaining payments will be adjusted to reflect the additional year, as well as any additional interest that would accrue over the year. Finally, the extended period will be disregarded for purposes of determining whether the loan was payable within five years.

To be eligible for these plan loan enhancements the employee must meet the same requirements that apply to employees seeking a coronavirus-related distribution. (See Question 1.)

3. Is our retirement plan required to process required minimum distributions this year?

The CARES Act waives the required minimum distribution ("RMD") rules for certain defined contribution plans (401(a) and (k) plans, 403(a) and (b) plans, and 457(b) governmental plans) and IRAs for the 2020 calendar year with respect to individuals whose required beginning date occurs in 2020 and who did not receive the distribution in 2019. To the extent this limited relief applies, RMDs will not be required; however, the Act does not affect defined benefit pension plans.

This provision provides some relief to employers who might otherwise have to scramble to make initial required minimum distributions to certain individuals by April 1. In addition, the provision provides relief to individuals who otherwise would be required to withdraw funds from such retirement accounts during a period when account balances could be adversely affected by the current economic slowdown. A similar, limited-time provision was adopted in response to the 2008 recession.

4. Does the CARES Act provide any relief with respect to funding our defined benefit pension plan?

Yes. The CARES Act gives employers with defined benefit pension plans additional time to meet their minimum funding obligations by delaying the due date of any contribution otherwise payable in 2020 to January 1, 2021, although any "late" payments will be due with interest. In addition, the plan sponsor may elect to treat the plan's adjusted funding target attainment percentage for the last plan year ending before January 1, 2020 as the applicable percentage for plan years including the 2020 calendar year.

5. Our retirement plan is subject to an impending deadline for an amendment and restatement to be adopted. Has the IRS deadline for this plan restatement been postponed?

On March 27, the IRS announced that it will issue guidance to extend impending deadlines for adopting certain plan restatements. Specifically, the March 31 deadline for adopting a 403(b) plan within the remedial amendment period will be extended to June 30, 2020. Furthermore, the April 30 deadline that applies to the adoption of pre-approved defined benefit pension plan documents will be extended to July 31, 2020. To the extent the adopter of a pre-approved defined benefit plan is eligible to submit a determination letter application, the filing deadline will also be extended to July 31, 2020. Finally, the beginning of the new remedial amendment periods for pre-approved 403(b) plans and defined benefit plans will be delayed until the day following the applicable extended date noted above.

6. If we have to furlough or lay off a significant portion of our workforce as a result of COVID-19, will our qualified retirement plan experience a partial termination?

Whether a plan experiences a partial termination is a question of facts and circumstances; however, the IRS has indicated that there is a rebuttable presumption that a partial termination will have occurred if at least 20% of an employer's workforce is severed from employment within the applicable period (typically the plan year). We are optimistic that any layoffs you may have to implement will be temporary and not trigger a partial termination. If your plan does experience a partial termination, affected participants immediately become 100% vested in their employer contribution accounts or pension benefits. Other participants are not affected by a partial termination.

The IRS has not issued any guidance at this time about whether an exception may be carved out for layoffs resulting from the COVID-19 situation; however, much of the guidance currently being considered by the IRS and other agencies is leaning toward protecting employees/participants.

7. **Can we get any economic relief for continuing to provide wages and medical coverage for furloughed or laid-off employees or employees on leave due to COVID-19 related issues?**

Pursuant to FFCRA, the IRS issued a News Release setting forth rules regarding reimbursement of small and mid-sized employers (generally under 500 employees with a possible exception for employers with fewer than 50 employees) for certain paid leaves (including provision of related medical coverage) related to the COVID-19 emergency. Unfortunately, the government has indicated that this reimbursement will be available only for leaves on or after April 1. The reimbursement is essentially immediate, being accomplished by an offset against payroll taxes. Excess amounts are to be paid promptly by check. Note that this is a limited program and not available for layoffs in general. Finally, certain insurers are voluntarily allowing deferral of premium payments for group health, disability, and life insurance plans. You should contact your broker for additional information.

The CARES Act, on the other hand, provides a refundable payroll tax credit for 50% of "qualified wages" paid by certain employers during the COVID-19 crisis period (defined as beginning March 13 and ending December 31, 2020). The credit is available to employers whose operations were fully or partly suspended due to a COVID-19 shutdown order or whose gross receipts declined by more than 50% when compared to the same quarter in the prior year. For employers with greater than 100 full-time employees, "qualified wages" are wages paid while the employee is not working due to one of the reasons stated above. For employers with 100 or fewer employees, all employee wages are qualified wages regardless of whether the employer was shut down. The qualified wages will not exceed $10,000 per employee. The calculation is complicated by, among other things, taking into account the FFCRA credits described above.

To the extent an employer has a payroll tax obligation (6.2% of covered wages), the employer may defer payment. One-half may be deferred until December 31, 2021, and one-half may be deferred until December 31, 2022.

8. **If we have to lay off any portion of our workforce as a result of COVID-19, when will their coverage end under our group health plan?**

In general, the timing for loss of coverage is dictated by your group health plan and typically is either the employee's date of separation or the last day of that month. As always, employees who lose coverage under their group health plan may be eligible for continuation coverage under federal COBRA laws or, typically for smaller employers (fewer than 20 employees), state laws to the extent they enhance or expand the scope of COBRA.

Notwithstanding the general rule, Ohio, for example, has issued guidance to require insurers to allow their insureds (employers) to continue to cover employees with drastically reduced hours regardless of what their policies may say. In fact, the guidance dictates that "actively at work" and similar clauses are to be disregarded, which arguably would allow employers to elect to continue coverage of individuals working zero hours, such as in the case of a layoff. You should contact your broker, carrier, or third-party administrator to be sure everyone is on the same page.

9. **Will our group health plan cover testing for and treatment of COVID-19?**

The recently enacted Families First Coronavirus Response Act ("FFCRA") makes it clear that, during the period of the current emergency, group health plans (including grandfathered plans) and health insurance issuers (including insurers in the individual market) must provide COVID-19 testing as well as related office, urgent care center, and emergency room visits without any cost-sharing (including deductibles, copayments, and coinsurance) or prior authorization or medical management requirements. Similar rules apply to Medicare, Medicaid, and other similar governmental and governmental sponsored plans.

The CARES Act clarifies and expands the types of testing that must be covered without cost-sharing. In addition, the CARES Act extends the no cost-sharing provision to any "qualifying coronavirus preventive service," such as an immunization or other item or service that meets certain requirements for recommendation and is performed or delivered within 15 business days of the recommendation for the preventive service.

10. We sponsor a High Deductible Health Plan (HDHP) and Health Savings Accounts (HSAs) for our employees. Are these plans affected by no cost-sharing requirements for certain COVID-19 coverage?

On March 11, the IRS issued guidance indicating that an HDHP will remain an HDHP even if it provides medical care services and items purchased related to testing for and treatment of COVID-19 before a participant has reached the applicable minimum deductible. As a result, an HDHP may provide such health benefits without a deductible, or with a deductible below the minimum deductible in the HDHP. Furthermore, an employee participating in the HDHP will not be disqualified from making contributions to an HSA merely as a result of these plan changes. The special rules apply only to COVID-19 and are in effect "until further guidance is issued."

The CARES Act applies the same principles to HDHPs and HSAs for telehealth services for patients who may have COVID-19 virus and for the protection of other patients from exposure to patients who may have COVID-19.

11. Can an employee who previously declined coverage in our group health plan change his or her election to opt in now?

There is currently legislation pending in Congress that would require private health insurers to allow individuals to enroll in group health plans mid-plan year if the individual is diagnosed with COVID-19.

Unless and until this measure is signed into law, employees who pay all or a portion of the premiums for coverage under the group health plan on a pre-tax basis (in conjunction with a Code Section 125 or "cafeteria" plan) generally are prohibited from electing group health plan coverage for themselves and their spouses and dependents any time other than when they become eligible for benefits and during open enrollment periods. If a "special enrollment event" occurs, the plan is required to allow an employee to enter the group health plan mid-year if the employee's election is consistent with the event.

For example, if your employee was covered under his or her spouse's group health plan and the spouse is laid off as a result of COVID-19 and is no longer eligible for benefits, or the cost of coverage increases substantially as a result of the layoff, the employee must be permitted to elect to be covered under your plan as long as the employee's election is consistent with the loss of the spouse's plan coverage. Unless and until legislative changes are made, your current plan documents should provide adequate guidance on this point.

12. Do the HIPAA privacy rules prevent our group health plan or its Business Associates from disclosing personal protected health information in connection with testing or treatment of COVID-19 without the individual's consent?

While the range of possible situations is too broad to give a blanket answer, the U.S. Office of Civil Rights made it clear that "the protections of the Privacy Rule are not set aside during an emergency." While the Secretary of HHS has waived sanctions and penalties against hospitals in certain circumstances, in general, group health plans and their Business Associates should be guided by the HIPAA rules in effect before the crisis and realize that they are at some risk if they take a more aggressive position.

As always, when a permissible disclosure is made by a group health plan or Business Associate, the amount of the disclosure should be only the "minimum necessary" required by the circumstance. One key rule to remember is that employers should not receive any protected health information about their employees or dependents from the group health plans that they sponsor. This can be very tempting in difficult times.

Note that while the CARES Act does contain limited provisions modifying HIPAA with respect to specified emergencies, those changes are to be fleshed out by regulations to be issued within 18 months of the date of enactment of the CARES Act. Employers should watch for those regulations. The CARES Act also makes various HIPAA changes with respect to substance abuse disorders, which are beyond the scope of this Client Alert.

13. If our benefit plans have to be modified to reflect required or discretionary changes relating to COVID-19, must the plan documents be amended and must summaries of material modifications (SMM) or other notices be distributed?

First off, there is almost an infinite variety of employee benefit plans. Given that, one cannot say authoritatively that a particular plan will need to be amended. It may have language broad enough to cover the legally required changes; however, if the plan cannot reasonably be read to cover the new rules, then the answers are yes and yes. If the terms of your plan have to be modified to reflect changes relating to COVID-19, your plan document should be modified accordingly and an SMM and any other appropriate notice must be distributed.

You should contact your broker, attorney, third-party administrator, or other document providers, as applicable, to determine what amendments, SMMs, and notices might be needed for each benefit plan. Be sure to ask about the timing and method of amendment and distribution.

14. Is there a way for us to assist employees with outstanding student loan debt?

Yes. The CARES Act enables employers to assist employees with their student loan debt in the same manner currently permitted for educational expenses under Code Section 127. Specifically, the employer may pay the lender directly or pay or reimburse the employee for payment of up to $5,250 to pay down the employee's qualified education loan debt (including payments of principal and interest). Payments by an employer are excludable from the employee's income and tax-deductible by the employer. The provision only applies to payments made before January 1, 2021.

15. Is additional federal or state legislation or other guidance expected to be issued that will affect employer-provided employee benefits?

The answer to that question is almost certainly yes. Although the CARES Act is immense in scope, there is already discussion of a "Phase 4" to "turbo charge the economy." At the current time, however, it is anticipated that Congress will proceed with its scheduled one-month recess now that the CARES Act has been adopted.

The uncertainty concerning what, if anything, will emerge from Congress is so great at this time that it would be pointless to speculate. Keep in mind that there are two different regimes in the health plan area. Self-insured plans are subject to regulation by Congress, the U.S. Department of Labor, the Internal Revenue Service, and other federal agencies, and, as a general rule, are not subject to regulation by state or local governments. On the other hand, while insured plans are subject to much of the same federal regulation, they also are subject to state regulation of insurance and may require that insurance companies doing business in the state include certain provisions in policies of insurance sold in the state.

For example, a recent Bulletin from the Ohio Department of Insurance requires all insurance companies subject to the Department's jurisdiction to allow their insureds to defer payment of premiums up to 60 days on an interest-free basis. Because the areas of authority are not 100% clear, you should remain vigilant concerning potential rule changes at different levels that may affect you and your employee benefit plans.

In light of how quickly developments change and new measures are implemented, we encourage you to contact one of the Tucker Ellis attorneys below with specific questions.

ADDITIONAL INFORMATION

For additional information, please contact one of the following Tucker Ellis attorneys:

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