

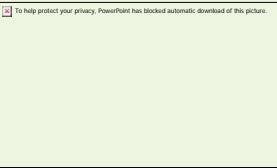


# Interesting and Important COVID-19 Developments for Employee Benefits

Dallas Fort Worth Chapter, ISCEBS  
June 11, 2020

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- Leadership Dallas
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- Married to Sheila



# Introduction

- WFH—March 16
- 12 weeks (and counting) of Social Distancing and Work From Home
- All branches of the Federal and state governments jumped into action
- Implementing legislative & regulatory solutions to soften the landing and provide a basis for re-opening
- Broad coverage—narrow to employee benefits professionals and their clients



# Federal Legislation

- Families First Coronavirus Response Act (FFCRA)
  - Paid sick leave
  - Expanded FMLA
  - Effective April 1, 2020 to December 31, 2020
  - Employers with fewer than 500 employees



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# Coronavirus Aid, Relief and Economic Security (CARES Act)

- Enacted on March 27, 2020
- Economic Impact Payments
- Coronavirus Related Distributions
- Plan Loans
- Waiver of Required Minimum Distributions
- Student Loan Repayment Assistance
- DB Funding for 2020
- Paycheck Protection Program
- Payroll Tax Delay



# Paycheck Protection Program (PPP) Flexibility Act of 2020

- Enacted on June 5, 2020
- Allows PPP participants to defer payroll taxes
- Reduces amount required to be spent on payroll from 75% to 60%
- Allows 24 weeks instead of 8 weeks to use PPP loan funds
- Delays rehiring date from June 30 to December 31, 2020
- Provides additional exceptions to the rehiring requirement
- 5 year repayment period for PPP loans that are not forgiven



- Categories of Relief
  - Benefit Plan Coverage
  - Paid Time Off
  - More Money
  - More Time
  - Flexibility
- Compliance Issues
- Other Considerations
- New Developments





# Benefit Plan Coverage

- FFCRA
  - Group health plans required to cover COVID-19 tests and related items and services without cost sharing; expanded by CARES Act to include immunizations
- IRS Notice 2020-15
  - HDHPs may cover services and items related to COVID-19 testing and treatment before deductible met
- IRS Notice 2020-29
  - Expand Notice 2020-15 to add effective date and meet coverage requirements of FFCRA and CARES Act
  - Permissively expand telemedicine from March 27 to plan years beginning before December 31, 2021



# Paid Time Off

- Employers with fewer than 500 employees
- April 1, 2020 through December 31, 2020
- Type of Leave
  - Paid Sick Leave—requiring up to 80 hours of paid sick time for employees who are unable to work because they have COVID-19 or are quarantined
  - Expanded FMLA—requiring paid FMLA for 10 weeks when caring for a relative who has COVID-19 or a child who is not in school or day care
- DOL FAQs
- Is this new Federal paid sick leave “compensation” for 401(k) and other benefit plan purposes? Maybe



## Paid Time Off

- Tax credits apply against employer's share of FICA and Medicare taxes to provide for the cost of these benefits
- Prohibition on double dipping—not eligible for employer payroll deferral, employee retention credit, paid sick and family and medical leave credit



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# More Money

- CARES Act
  - IRS FAQs and Notice 2005-92
- Leave Donation/Leave Sharing Programs
- Section 139--Disaster Relief



# Coronavirus-Affected Individual (“CAI”)

- Requirements to be a coronavirus-affected individual:
  - Employee is diagnosed with the virus
  - Employee’s spouse or dependent is diagnosed with the virus
  - Employee is an individual who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by such individual due to such virus or disease, or other factors as determined by the Secretary of the Treasury.
- Issue: Does 3<sup>rd</sup> bullet apply only to the employee or does it include the employee’s spouse?
- Self-certification by employee



# Coronavirus-Related Distributions

- Eligible plans
  - 403(b), 401(k) and Governmental 457(b) Plans—may be in service without regard to age
  - Money purchase and defined benefit—may be in service but only if over age 59-1/2
- CAI only
- Participants may take entire balance up to \$100,000
- No 10% early withdrawal penalty tax
- Income spread over 3 years
- May be repaid within 3 years and treated as a tax-free rollover
- Not subject to 20% mandatory withholding; 10% withholding
- Applies in 2020 only



# Plan Loan Enhancements

- CAI only
- Permits new loans from March 27, 2020 to September 23, 2020
- Loans permitted up to the lesser of \$100,000 or the participant's entire vested account balance
- Reduced by existing loan balance



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# Plan Loan Repayments

- CAI only
- Delays loans payments due after March 27, 2020 and before December 31, 2020 by 1 year
- Extends 5 year loan repayment period by 1 year
- Interest accrues during delay period





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# Elimination of RMD for 2020

- All participants; not limited to CAI
- DC only; not DB



# Student Loan Repayments

- Employers may make tax free payments or reimbursements on qualified educational loans for employees
  - Excludes spouse, children, dependents and grandchildren
- 2020 only
- Up to \$5,250 per employee; like existing Code Section 127
- Cannot be limited to HCEs



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# DB Funding for 2020

- Delays due date for DB contributions required in 2020 to 2021



# Plan Amendments

- Generally, December 31, 2022 for calendar year plans
- Caution regarding default amendments, operational amendments and compliance with plan governance



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# Cafeteria Plans

- Health FSAs
  - Expand to permit use of FSA funds for over-the-counter medical products
  - Intended to promote COVID-19 testing



# Payroll Tax Delay

- Applies to employer portion of FICA taxes due from March 27, 2020 to December 31, 2020
- ½ due December 31, 2021; other half due December 31, 2022
- No need-based eligibility requirement



# More Money--Leave Sharing and Leave Donation

- Medical leave-sharing plans
  - IRS Revenue Ruling 90-29.
  - Prolonged absence from work
  - Loss of Income
  - Due to a medical emergency
- Major disaster leave-sharing plans
  - IRS Notice 2006-59.
  - Assist employees affected by a major disaster causing a severe hardship requiring the employee to be absent from work
  - Major disaster or emergency as declared by the President



## More Money--Section 139 Disaster Relief

- March 13, 2020 Presidential disaster declaration
- Qualified disaster relief payments include payments to relieve reasonable and necessary personal, family funeral expenses incurred as a result of a qualified disaster
- Income replacement does not count
- EMPLOYEE: Payments are not included in an employee's income; no W-2
- EMPLOYER: Payments are deductible





## More Time—DOL Relief

- EBSA Disaster Relief Notice 2020-01—Provides relief during the “Outbreak Period” for various plan actions, including:
  - Late employee contributions and loan repayments
- Outbreak Period starts March 1, 2020 and ends on the 60<sup>th</sup> day after the announced end of the National Emergency



# More Time—DOL & IRS Joint Final Regulations

- Issued April 28, 2020
- Outbreak Period from March 1, 2020 to 60 days after the end of the National Emergency
- Deadlines extended include:
  - Claims & Appeals
  - HIPAA Special Enrollments
  - COBRA
    - Notices, Elections & Premium Payments
  - External Review



## More Time—IRS Notices

- Notice 2020-18--postponing the due date for filing federal income tax returns and for making federal income tax payments from April 15, 2020, until July 15, 2020
- Notice 2020-23—providing deadline relief with respect to Time Sensitive Actions on or after April 1, 2020, and before July 15, 2020
- Notice 2020-35—extends Notice 2020-23 to excise tax returns, EPCRS deadlines and IRAs (Form 5498)



# More Time--Form 5500 Filing Extension

- Form 5500s due on or after April 1 and before July 15, 2020 are due July 15, 2020
- This extension is automatic; no filing is necessary
- Covers plan years ending last day of September, October and November of 2019
- Also covers 5500s for plans that had an extended deadline due date from April 1 and before July 15, 2020
- Form 5558 extension is still available
- **Does not cover 2019 calendar year plans**
- **SECURE Act raised IRS 5500 filing penalties by 10X**



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# Flexibility

- Cafeteria Plans
- Notarized spousal consents
- Elimination of Match
- QDROs



# Flexibility--Cafeteria Plans

- IRS Notice 2020-29
  - Permit mid year election changes for FSA and DCAP
    - Revoke, new, increase or decrease
  - Provide additional time in which unused amounts may be used through December 31, 2020
- IRS Notice 2020-33
  - Permissively index the carryover amount to 20% of the FSA election amount
  - \$550
- Amendments
  - Due by December 31, 2021 but can apply retroactively to any date in 2020



# Flexibility—Notarized spousal consents

- Remote Ink-Signed Notarization
- Remote Online Notarization
- Tex. Gov. Code Ch 46 and Executive Order dated April 9, 2020
- Per IRS regulations, spousal consents must be signed in the physical presence of a notary public or plan representative
- IRS Notice 2020-42 provides permits RIN/RON and electronic witnessing
  - Only applies in 2020



# Flexibility—Reduce Contributions

- Elimination of Match
  - Fixed, Discretionary
  - Safe Harbor
    - Must be permitted by wording in the safe harbor notice or the employer is operating at an economic loss
    - Employer must send supplemental safe harbor notice
    - Plan must be amended
    - 30 day advance notice before amendment is effective
    - Current year testing for full year
    - Mid year true up
    - Pro rate compensation limit





# Flexibility--QDROs

- QDROs
  - Declining values due to market
  - Delay due to closed courts
  - Can't be in front of a judge
  - Can't get a certified copy of the order
  - Split based on percentage vs. fixed dollars
  - Account balance diminished by coronavirus related distributions & loans



# Compliance

- Compensation Definition
  - What kind of leave payments are included in the definition of “plan” compensation?
- Partial Termination
  - Revenue Ruling 2007-43
- Distributions
  - Are furloughed employees eligible for distribution?
  - Is a furlough a termination? It depends



# Other Considerations

- Plan Financial Statement Audits
  - How will the auditor manage the field work?
  - Is the employee who handles the 401(k) audit still employed?
  - Has there been an increase in distributions?
  - Repeal of limited scope exemption
  - SAS 136



## Other Considerations

- ESOPs—Consider interim or special valuation date other than last day of plan year before the shutdown and declined in the market
- Impact of COVID motivated actions on ADP/ACP Testing
  - Furloughs, layoffs, lower compensation & bonuses, reduced matching
- Impact on Health Care Claims
  - Decline in nonemergency medical care, including routine office visits and elective procedures, may reduce health care costs by as much as 4% according to Willis Towers Watson. Also, social distancing may reduce exposure to other communicable diseases and reduce injury rates.



# New Developments--PCORI

- Sunset date extended by the Bipartisan Budget Act of 2019
- Extended 10 years--through 2029
- IRS Form 720 due by July 31
- \$2.45 per person
- IRS Notice 2020-44



# New Developments—E-Delivery

- New disclosure safe harbor; optional
- Applies only to retirement plan disclosures
  - SPD, SAR, SMM, 408(b)(2), benefit statements
  - Not safe harbor notice
- Permits disclosure on-line or by email
- Notice of Internet Availability (NOIA) must be mailed
- Email bounced backs
- Effective July 20--early adoption is permitted



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# New Developments—DC Pre-Approved Plans

- IRS Announcement 2020-07
- IRS will release approval letters on June 30, 2020
- Plan adoption deadline July 31, 2022



# New Developments—2021 HSA Limits

- IRS Revenue Procedure 2020-32
- Contributions
  - Self \$3,600
  - Family \$7,200
- Minimum Deductible for HDHP
  - Self \$1,400
  - Family \$2,800
- Out of Pocket Maximum for HDHP
  - Self \$7,000
  - Family \$14,000





# New Developments--Others

- You might get an email from DOL about removing Form 8955-SSA from your latest 5500.
- COBRA Lawsuits About Form of COBRA Notice (especially in Florida)
- New 401(k) Cases
  - Plan Compensation—Host International—Unreported tip income
  - Fee Refunds—Trader Joes
  - Mutual Fund Windows and Investment Advice Services—Shell Oil
- Supreme Court Cases
  - Actual knowledge required for ERISA statute of limitations, Intel v. Sulyma
  - Participants in fully funded DB plan can't sue for investment losses, Thole v. U.S. Bank.



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# Let's Connect



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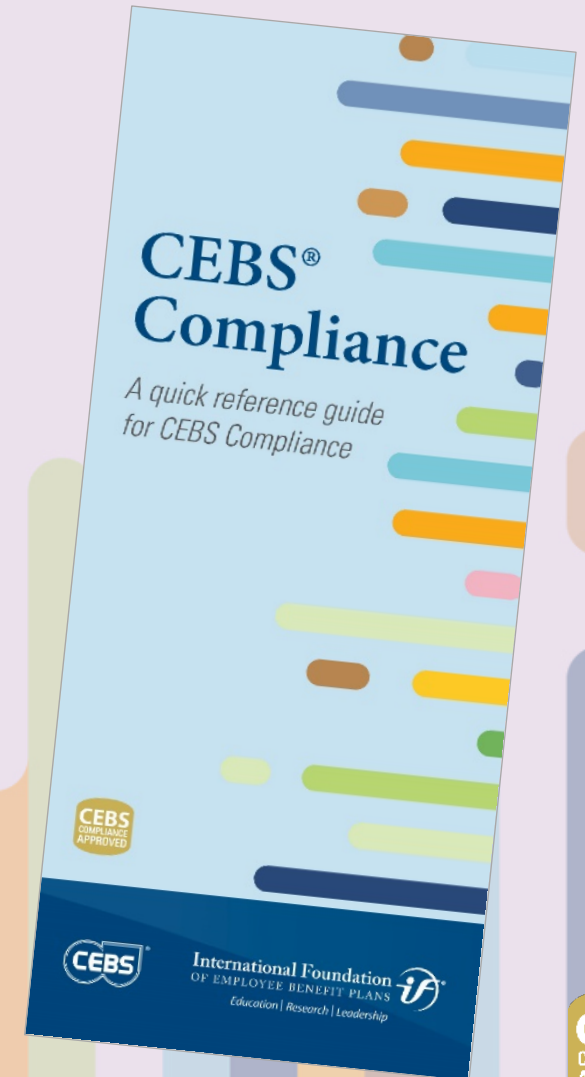
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**THANK YOU!**

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