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Employee Benefits Webinar

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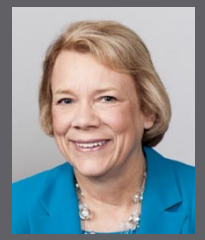

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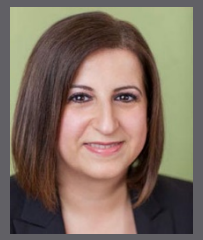

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Private Sector Employers

February 13, 2020

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Webinar Agenda – Private Sector

1. Health and Welfare Plan Updates
   - Affordable Care Act Updates
   - California Individual Mandate
   - Proposed IRS Cost-Sharing Transparency Rules
   - Final DOL “Regular Rate” Regulations
   - Final ICHRA and Affordability Regulations
   - AB 1554 Flexible Spending Account Notices
   - 2020 Health and Welfare Plan Limits
2. Qualified Plan Updates
   - SECURE Act
   - Bipartisan Miners Act of 2019
   - Taxpayer Certainty and Disaster Tax Relief Act of 2019
   - Hardship Distribution Changes
   - 403(b) Plan Remedial Amendment Period
   - IRS Guidance on Uncashed Distribution Checks
   - New EPCRS Rules for Self-Correction
   - Proposed DOL Electronic Disclosure Regulations
   - Ninth Circuit — ERISA Pension Plan Must Pay Survivor Benefits to Registered Domestic Partner
   - Cash Balance Plan Determination Letters
   - Official Launch of CalSavers State-Sponsored Retirement Plan
   - Third Six-Year Remedial Amendment Period for Preapproved Defined Benefit Plans
   - 2020 Qualified Plan Limits
3. Executive Compensation Updates
   - Proposed IRC ¸ 162(m) Regulations
4. Other Topics
   - California Consumer Privacy Act (CCPA)
   - AB 5 and Impact on Benefit Plans

Health and Welfare Plan Updates

Affordable Care Act Updates

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Cadillac Tax Repealed

- As part of a large package of legislation signed into law on 12/20/19, Congress repealed the Cadillac Tax
  - The Affordable Care Act's (ACA) so-called "Cadillac tax" would have imposed a 40% excise tax on high-cost employer-provided health care coverage
  - Originally scheduled to take effect in 2018, implementation of the tax was repeatedly delayed
  - Effective for taxable years beginning after December 31, 2019, there is a complete repeal of the tax
  - May want to review bargaining agreements for references

ACA Litigation Update

- Update on Litigation Challenges to the ACA
  - On 12/18/19 Fifth Circuit Court of Appeals issued decision on constitutionality of ACA's individual mandate in *Texas v. U.S.*
  - Court found individual mandate to be unconstitutional after Congress set the penalty to $0 in 2017 Tax Cuts and Jobs Act. But Court did not determine what this meant for the rest of the ACA provisions—instead sent the case back down to the District Court for additional analysis on the issue of severability.
  - On January 3, 2020, the Democratic attorneys general (17 states), led by California, and the House of Representatives asked the Supreme Court to review the case. If the Supreme Court grants review case will be known as *California v. Texas.*

ACA Litigation Update (Continued)

- Update on Litigation Challenges to the ACA (Continued)
  - Supreme Court has signaled that it will use its 2/21 private conference to discuss whether to consider the fate of the ACA on a fast-track schedule that would produce a decision by June 2020
  - Democrats are urging Supreme Court to hold arguments the last week of April — the final week to hear cases — or to schedule a highly unusual special sitting in May
  - Stay tuned — we should know soon if we will have any further review before the 2020 election or not

ACA Litigation Update (Continued)

- Update on Litigation Challenges to the ACA (Continued)
  - In the meantime, the ACA remains in effect (to the extent not amended by other legislation)
  - If all or most of the law were to be struck down, could have complex and far-reaching consequences for the country's health care system — would affect almost everyone in some way
  - Trump Administration has indicated that it intends to continue enforcing the ACA while the appeal is pending

ACA Information Reporting Update

- Employer Mandate is still in place
- IRS enforcement of ACA compliance in reporting and ESRPs
- Increase in information return penalties
  - For information returns due to be filed/furnished during 2020:
    - Ranging from $50 per return (30 days or fewer) to $550 per return for intentional disregard
- IRS notices for filing non-compliance and assessment of related penalties
- Penalty relief under “reasonable cause” or first time abatement

ACA Information Reporting Update (Continued)

- ACA information reporting to IRS for “applicable large employers”
- Notice 2019-63 extended deadline for furnishing IRS Forms 1095-C to employees
  - Due to employees March 2, 2020 (extended from January 31, 2020)
- No extension for filing IRS Forms 1095-C and transmittal IRS Form 1094-C
  - Due to IRS March 31, 2020 — if filing electronically
  - Due to IRS February 28, 2020 — if filing in paper
  - Extension available under IRS Form 8809
- Notice 2019-63 extends transitional penalty relief
  - Incomplete or incorrect IRS Forms 1095-C
  - Requires good faith effort and timely reporting compliance

ACA Penalty Enforcement Update

- Employer Shared Responsibility Payments (ESRPs) still apply
  - As noted earlier, the Trump Administration has indicated they will continue to enforce the ACA during the litigation appeal process
  - This means the IRS continues to enforce ESRPs
  - IRS Letter 226J — *preliminary* ESRP assessment. IRS website provides information on how to respond to receipt of a Letter 226J — https://www.irs.gov/individuals/understanding-your-letter-226-j
  - Alert your staff — must review and respond (30-day deadline)
  - Complete and file Form 14764 with any required attachments
  - Request extension if needed
  - IRS Letter 227 — IRS response to Form 14764; IRS Notice CP 220J — notice of assessment

New ACA Affordability Standard Changed for 2020

- LC s*elf-only* coverage unaffordable if EE contribution > 9.5% of household income
- Safe harbor alternatives: Form W-2, Box 1, rate of pay, or federal poverty level
- IRS inflation-adjusted threshold lowered from 9.86% for 2019 to 9.78% for 2020
- Some ALEs may have to contribute more in 2020 if premium remains the same
- Failure to comply with the new affordability standard could trigger Penalty B
- Penalty B applies if ALE offers MEC to e 95% of FT EEs + dependents BUT:
  - The coverage is unaffordable or does not provide MV, AND
  - At least one EE purchases coverage on the Exchange and receives a PTC
- For 2020, $321.67 ($3,860/12) x #FT EEs who receive a PTC for a month
- ALEs should evaluate impact of change on affordability of LC self-only coverage

New SBC Forms for 2021

- ACA: Group Health Plans (GHPs) must provide Summary of Benefits and Coverage (SBC) to participants and beneficiaries
- The SBC must accurately describe the benefits and coverage under the plan
- The DOL and HHS recently published new SBC template and related documents
- Must use new template beginning with 2020 open enrollment 2021 plan year
- Few changes from the template in use since 2017:
  - Revisions to reflect the elimination of the individual mandate
  - MV entry: now includes “not applicable,” in addition to “yes” or “no” for individual coverage
  - Changes to instructions for completing the coverage examples
- New DOL and HHS FAQs:
  - GHPs must use the 2021 SBC, Instructions, and Guide and Narratives beginning on 1st open enrollment period for plan years beginning on or after 1/1/2021
  - GHPs are not required to use the HHS-developed calculator to generate coverage examples, but may continue to use it even if a more accurate method could be developed

PCORI Fee Extended

- Patient-Centered Outcome Research Institute (PCORI) Fees Extended to 2029
  - The ACA created PCORI to help patients, clinicians, health plan payers/insurers, and the public make informed health decisions by advancing comparative effectiveness research
  - PCORI is funded, in part, by PCORI fees paid by health insurance issuers and sponsors of self-insured health plans
  - As a result of legislation passed in December 2019, these fees have been extended to plan years ending before October 1, 2029
  - The current amount of the fee, which is adjusted annually, is $2.45 per enrollee for policy or plan years ending before October 1, 2019

California Individual Mandate

- Minimum Essential Coverage Individual Mandate (2019 Ch. 38, SB 78) passed in June 2019
  - Beginning 1/1/20, California residents who fail to maintain minimum essential coverage (MEC) for themselves and their dependents could owe a state tax penalty, unless they qualify for an exemption
  - Coverage that qualifies as MEC:
    - Most employer-sponsored group health plans
    - Individual health policies that meet the ACA's market requirements
    - Certain government-sponsored programs
    - University of California health coverage for students
  - Coverage that does not qualify as MEC:
    - Employer-sponsored group health plans that provide only hospital, fixed indemnity, or specific disease coverage

California Individual Mandate (Continued)

  - Accident or disability income insurance
  - Other “excepted benefits”
- Employer Reporting Requirements
  - Applies to entities that provide MEC to CA residents, including employers with self-insured health plans
  - Must annually report to California Franchise Tax Board (FTB) information about employees covered by the plan in the prior year
  - Requirement may be met by filing copies of IRS Form 1095-C or 1095-B with FTB
  - Penalty of $50/covered individual for failure to comply
  - Effective for coverage provided in 2020, deadline to file forms with FTB — March 31, 2021

California Individual Mandate (Continued)

- Individual penalty for failure to maintain MEC every month of tax year:
  - Standard penalty
    - Equal to the greater of:
      - 2.5% of the taxpayer's household income above the state income tax filing threshold, or
      - $695/adult and $347.50/child (up to a maximum of $2,085)
    - Increased annually for inflation
  - If less than the standard penalty, the penalty is equal to the average premium for a "bronze" level health plan purchased at Covered California
- Exemptions
  - Penalty will not apply during months of tax year that exemption applies
  - Include:
    - Financial hardship or religious conscience, as determined by Covered California
    - Income below the state tax return filing threshold

California Individual Mandate (Continued)

- If premium contributions for health coverage exceed 8.3% of taxpayer's household income for taxable year
- For short coverage gaps of three consecutive months or less
- General hardships, e.g., homelessness, death of family member, domestic violence
- For members of health care sharing ministries
- Members of an Indian tribe
- Non-residents
- Incarcerated individuals

Proposed IRS Cost-Sharing Transparency Rules

- Proposed rules issued November 2019; response to June 24, 2019 Executive Order
- Group health plans must:
  - Upon request, provide participants, beneficiaries, and enrollees (internet-based, self-service tool or paper):
    - A cost-sharing estimate for a requested covered item or service;
    - Accumulated amounts incurred to date;
    - Negotiated rate for an in-network provided for the requested covered item or service;
    - Out-of-network allowed amount for the requested covered item or service, if applicable;
    - A list of items or services for which cost-sharing information is disclosed, if bundled payment; and
    - Any prerequisite for the covered item or service
  - Make available (public internet website, updated monthly) in two machine-readable files:
    - Negotiated rates with in-network providers, and
    - Historical allowed amounts for covered items or services furnished by out-of-network providers
- Proposed effective for plan years beginning on or after one year after final rule effective

Final DOL “Regular Rate” Regulations

- On December 16, 2019, the DOL issued final OT regulations
- FLSA: ERs must pay non-exempt EEs OT (>40 hours) at 1.5x their “regular rate”
- “Regular rate” generally includes all amounts paid by the ER for services performed
- Except irrevocable ER contributions to a trustee or 3rd person under a “bona fide plan” providing old-age, retirement, life, accident, health insurance, or similar benefits
- “Bona fide plan”: employees cannot receive ER contributions in cash, unless “incidental”
- Key issue: when are cash-in-lieu payments under a cafeteria plan incidental?
- 2003 DOL Op. Ltr: incidental = cash-in-lieu payments d 20% of ttl ER contributions
- *Flores v. City of San Gabriel*, Ninth Circuit (2016): Cash-in-lieu payments e 40% of health plan contributions under a flexible benefits plan not incidental
  - Cash-in-lieu payments AND direct payments to the insurer included in regular rate
  - Declined to adopt DOL 20% threshold

Final DOL “Regular Rate” Regulations (Continued)

- Final regulations:
  - Cash-in-lieu payments not excluded under “bona fide plan” or “other similar payments”
  - Didn’t revisit 20% threshold in response to *Flores*
  - Add ER wellness program cost to list of miscellaneous excludable expenses
  - ER contributions to an HSA or trusteed HRA (but not a self-funded HRA) are excludable
  - Expand qualified retirement plan contribution presumption to 403(a) and 403(b) plans; eliminate determination letter requirement
  - Add accident, unemployment, and legal services to “bona fide plan” exclusion examples
  - Clarify payments for foregoing holidays, vacation, or sick leave excluded
  - Eliminate requirement that excludable reimbursements be “solely” for the employer’s convenience; adds cell phone plans, exam fees, and membership dues to excludable reimbursements list
  - Clarify parking benefits, gym access and memberships, onsite specialist treatment, fitness classes, retail goods and services discounts, tuition benefits, adoption assistance, and “gifts” are excluded

Final ICHRA and Affordability Regulations

- In June 2019, the DOL, Treasury, and HHS jointly issued a final rule to expand the flexibility and use of HRAs, applicable to plan years beginning on or after 1/1/20
- Two new types of HRAs were created: the individual coverage HRA (ICHRA) and the excepted benefit HRA
- All other existing types of HRAs were left intact
- ICHRA is similar to the pre-ACA non-integrated HRA design and offers employers a true defined contribution option: Employers can contribute $'s to the ICHRA to subsidize premiums for individual health coverage purchased by employee and/or reimburse qualified medical expenses (i.e., Code ¸ 213(d) expenses) (but if first-dollar cost sharing would not be compatible with an HSA under existing rules)

Final ICHRA and Affordability Regulations (Continued)

- ICHRA Requirements
  - Individual coverage = coverage under the ACA or private exchanges, student health insurance, and in some cases Medicare coverage. Must meet ACA mandates banning annual limits on essential coverage and requiring preventative care without cost sharing.
  - Individual coverage must be validated
  - Cannot offer a choice of employer group health plan or an ICHRA
  - Can be offered to limited class of employees; no separate class for retirees
  - No limit on amount (but amount for oldest may not be more than 3x amount for youngest)

Final ICHRA and Affordability Regulations (Continued)

- ICHRA and ACA Considerations
  - Must satisfy ACA affordability and minimum value for group health plans (including an ICHRA) or pay the resulting ACA ESRP
  - ICHRA participant is NOT eligible for premium subsidy (which would only be available if ICHRA does not meet affordability or minimum value)
  - ICHRA participant must have option to opt out at least once a year in advance
  - Newly eligible ICHRA participant triggers 60-day special enrollment period for ACA exchange coverage
  - Notice Requirements: At least 90 days prior to plan year. DOL has published ICHRA model notice
  - All applicable ERISA, ACA, and other reporting and disclosure requirements apply

Final ICHRA and Affordability Regulations (Continued)

- ICHRA and ACA Affordability
  - Final rules on ICHRA affordability safe harbors were issued in November 2019 which largely track earlier Notice 2018-88
  - Still cautions on Code section 105(h) compliance related to varying contribution rates
  - ***ICHRA affordability safe harbors***
    - Affordability using the W-2, rate of pay and Federal Poverty Line safe harbors can be determined based on applying newly proposed affordability safe harbors:
      - ***Look-back month safe harbor*** Final rules adopt Notice 2018-88, with some modifications. For calendar year plan, can use the monthly premium for the applicable lowest cost silver plan for January of the prior calendar year. For a non-calendar year plan, can use the monthly premium for the applicable lowest cost silver plan for January of the current calendar year. In general, can use the applicable lowest cost silver plan for the applicable look-back month for all calendar months of the plan year.

Final ICHRA and Affordability Regulations (Continued)

- ICHRA and ACA Affordability
  - ***ICHRA affordability safe harbors-continued***
    - ***The location safe harbor*** Again, with some modifications, follows Notice 2018-88. Under the general rule, can determine required HRA contribution for a calendar month based on cost of applicable lowest cost silver plan for the location of the employee's *primary site of employment*. Special rule for "remote workers" (those who regularly perform services from home or another location not on the employer's premises) but have an assigned place on premises where could be required to report — can use that employer site as the primary site of employment. If employee has no assigned employer premises, employee's residence is the primary site of employment.

AB 1554 Flexible Spending Account Notices

- Effective 1/1/20, California employers must provide two different forms of notice to employees who participate in a flexible spending account of any deadline to withdraw funds before the end of the plan year
- Forms of notice may include but are not limited to:
  - Email
  - Telephone
  - Text message
  - Mail
  - In-person notification
- Employers should retain record of each notice sent to confirm compliance

2020 Health and Welfare Plan Limits

	2020	2019
Health FSA Contribution Limit	**$2,750**	$2,700
Dependent Care FSA Contribution Limit (single)	$2,500	$2,500
Dependent Care FSA Contribution Limit (married, filing jointly)	$5,000	$5,000
HSA Contribution Limit (individual)	**$3,550**	$3,500
HSA Contribution Limit (family)	**$7,100**	$7,000
HSA Catch-up Contribution Limit	$1,000	$1,000
Qualified Small Employer HRA Contribution Limit (individual)	**$5,250**	$5,150
Qualified Small Employer HRA Contribution Limit (family)	**$10,600**	$10,450

Qualified Plan Updates

SECURE Act

- Setting Every Community Up for Retirement Enhancement Act (SECURE Act) was signed into law on December 20, 2019
- Increase in Age for Required Beginning Date for Required Minimum Distributions ("RMDs")
  - Age increased from 70½ to 72
  - New required beginning date age only applies to individuals who attain age 70½ after December 31, 2019
  - Individuals who attained age 70½ on or before December 31, 2019 must begin to take (or continue to take) required minimum distributions

SECURE Act (Continued)

- Modification of Required Minimum Distribution Rules for Designated Beneficiaries – Acceleration of Post-Death Distributions (DC Plans Only)
  - "Designated Beneficiaries" must receive distributions of entire inherited benefit within 10-years of participant's death
    - Exception for "eligible designated beneficiaries." Eligible designated beneficiaries may still take distributions over their life expectancies
      - An "eligible designated beneficiary" means a designated beneficiary who is a surviving spouse, disabled or chronically ill individual, an individual not more than 10-years younger than participant, or a minor child (until the age of majority)
    - Other exceptions may apply (e.g., qualified annuity)
  - Effective for distributions with respect to employees who die after 12/31/2019 (for collectively bargained plans, the earlier of (i) later of the date the last CBA terminates without regard to extensions agreed to on or after the SECURE Act is enacted or 12/31/2019, or (ii) 12/31/2021)

SECURE Act (Continued)

- Distributions for Expenses Related to a “Qualified Birth or Adoption” of a Child
  - Up to $5,000 can be treated as a qualified birth or adoption withdrawal
  - Exempt from the 10% tax on distributions taken prior to attaining age 59½
  - Plan can allow participants to repay the qualified birth or adoption distribution
  - Can be offered by 401(k) plans, 403(b) plans, and governmental 457(b) plans
  - Effective for plan years beginning after December 31, 2019
  - Optional benefit feature

SECURE Act (Continued)

- Difficulty of Care Payments
  - Difficulty of care payments made to home care workers can be treated as compensation for purposes of making contributions to a defined contribution plan (even though these payments are excluded from federal income tax)
  - Effective for plan years beginning after January 31, 2015
- Loans
  - Qualified plans are prohibited from making plan loan through credit cards
  - Effective for loans made after December 31, 2019

SECURE Act (Continued)

- Increased Penalties for Failure to File or Failure to Timely File
- Penalties under IRC 6651
  - Failure to File Returns: Lesser of $400 or 100% of the tax required to be shown on the return
- Penalties under IRC 6652
  - Failure to Provide Withholding Notice: $100 per failure up to $50,000
  - Failure to File Form 5500: $250 per day the failure continues up to $150,000
  - Failure to File Form 8955-SSA: $10 per person per day up to $50,000
  - Notification of Change in Registration Status: $10 per day the failure continues up to $10,000
- The changes to the penalty provisions apply to any return, statement, or notice required to be filed or provided after December 31, 2019

SECURE Act (Continued)

- Expanded Access to MEPs
  - Over past 6 months, Congress and DOL have created new ways to structure retirement benefits: pooled employer plans (PEPs) and association retirement plans (ARPs). Both structures build off of years of discussion regarding multiple employer plans (MEPs).
  - The SECURE Act creates PEPs. Wholly-unrelated employers will be permitted to join a PEP, which will be considered one plan for ERISA purposes effective for plan years beginning after 12/31/20
    - PEPs would be administered by a “pooled plan provider” registered with the DOL and IRS (and can be financial services industry providers)
    - Treasury is directed to issue guidance ending the “one bad apple rule” — failure of one participating employer to meet qualification rules does not taint entire plan — unless the pooled plan provider does not perform its duties
    - PEPs shift significant fiduciary and administrative responsibility from employer to the pooled plan provider — except for monitoring the pooled plan provider and investment selection

SECURE Act (Continued)

- Expanded Access to MEPs (Continued)
  - ARPs were created in summer of 2019 by DOL regulations
  - New ARP rules were effective 9/30/19 — ARP rules still in effect
    - Under an ARP, employers must be in the same trade, industry, line of business, or professions or be located in the same state or metropolitan area
    - Alternatively, the ARP may be sponsored by a professional employer organization (PEO) that performs “substantial employment functions” on behalf of its clients who adopt the ARP
    - Unlike PEPs, an ARP must be administered by a PEO or a group or association controlled by the employers that participate in the ARP (cannot be a financial services industry provider)
    - Similar shift of fiduciary responsibilities as PEP

SECURE Act (Continued)

- Increased Incentives for Small Employer Retirement Plans
  - SECURE Act includes increase in income tax credit for costs paid or incurred by small employers establishing a retirement plan
    - For tax years beginning after 12/31/19, maximum annual start-up credit increased from $500 to $5000, available over first 3 years for small employers that adopt a new retirement plan
      - Small Employer = no more than 100 employees who were paid at least $5,000 in the year before plan established. Employees who were paid less than $5,000 don't count toward the total.
      - Must not have had a retirement plan in place in the prior 3 years covering substantially the same employees.
      - Credit for up to 50% of start-up costs including administrative and communication costs to educate employees about the plan.
    - Claim tax credit on Form 8881

SECURE Act (Continued)

- Increased Incentives for Small Employer Retirement Plans (Continued)
  - SECURE Act also includes a new income tax credit of $500 per year — for up to 3 years — for small employers that add auto-enrollment to their retirement plans
    - Applies for tax years beginning after 12/31/19
    - Available to small employers that start a plan or add auto-enrollment to an existing plan
    - Small Employer = Same Definition as for Start-Up Credit

SECURE Act (Continued)

- Closed Defined Benefit Plan Nondiscrimination Relief
  - Soft Freeze – ER limits participation to participants on the freeze date
  - Due to attrition, closed class shrinks and becomes disproportionately highly compensated over time causing nondiscrimination and minimum participation issues
  - SECURE addresses four issues:
    - Closed DB plan must be aggregated with DC plan and tested on a benefits basis to pass nondiscrimination, but no longer satisfies minimum gateway allocation
    - Traditional DB plan converted to CB plan, current participants grandfathered under DB, and BRFs available to DB participants unavailable to CB participants
    - Make-whole contributions to DC plan required to correct DB plan nondiscrimination failure cause the DC plan to fail nondiscrimination
    - Minimum participation (plan must generally benefit e 50 employees)

SECURE Act (Continued)

- Closed Defined Benefit Plan Nondiscrimination Relief (Continued)
  - Special Rule #1: a closed DB plan can be aggregated with a DC plan and tested on a benefits basis if:
    - The plan satisfies the minimum coverage and nondiscrimination tests for the plan year in which the class closes and the 2 subsequent plan years;
    - No plan amendment after the class closes significantly discriminates in favor of HCEs; and
    - Either:
      - the class was closed before 4/5/17, or
      - the plan has been in effect for at least five years before the class is closed, and neither coverage nor benefits is increased more than 50% during those five years

SECURE Act (Continued)

- Closed DB Plan Nondiscrimination Testing Relief (Continued)
  - Special Rule #2: a BRF is deemed to comply if a special rule similar to Special Rule #1 is satisfied
  - Special Rule #3: a DC plan, to which make-whole contributions are made, can be tested on an equivalent benefits basis if a special rule similar to Special Rule #1 is satisfied
  - Special Rule #4: a closed DB plan is deemed to satisfy the minimum participation test under IRC ¸ 401(a)(26) if a special rule similar to Special Rule #1 is satisfied
- Effective on December 20, 2019 (date of enactment), subject to plan sponsor election to apply to plan years beginning after 2013

SECURE Act (Continued)

- 401(k) Eligibility for Long-Term, Part-Time Employees
  - Current law: 401(k) plans can require completion of 1,000 hours of service in a year to participate
  - SECURE: 401(k) plans must provide that employees can, alternatively, participate after completing 500 hours of service in three consecutive years if age 21 or older
  - Special rules for employees required to participate under this rule:
    - Employer contributions not required
    - Excludable from nondiscrimination tests and safe harbors
    - Minimum top-heavy allocations and vesting not required
    - Vesting service must be defined as 500 hours of service in a year
    - Above rules (except vesting) cease to apply after completion of 1,000 hours in a year
  - N/A to union employees whose benefits were the subject of good faith bargaining
  - Effective for plan years beginning after 2020, but service in years beginning before 2021 disregarded

SECURE Act (Continued)

- Safe Harbor for Auto-Enrollment Plans
  - For plans qualified under the auto-enrollment safe harbor:
    - Auto-escalation cap increases from 10% to 15% for years after the first plan year in which employee is auto-enrolled
    - Default contribution rate still cannot exceed 10% in first plan year
  - Effective for plan years beginning after 12/31/19

SECURE Act (Continued)

- Safe Harbor 401(k) Plans
  - Notice requirement eliminated for 401(k) plans satisfying the safe harbor with nonelective contributions
  - 401(k) plan may be amended mid-year to become a nonelective safe harbor plan:
    - any time before the 30th day, before the close of the plan year, or
    - on or after the 30th day, before the end of the year, if
      - the amendment is made by the close of the following plan year, and
      - the nonelective contribution is at least 4%
    - This rule does not apply to any plan year if the plan provided for a safe harbor matching contributions at any time during the plan year
  - Effective for plan years beginning after 12/31/19

SECURE Act (Continued)

- Lifetime Income Stream Disclosure
  - Lifetime income disclosures required for defined contribution plan benefit statements
    - If benefit statements must be provided at least quarterly, disclosure must be included in one statement during any 12-month period
  - Shows the amount of monthly payments participant would receive if total accrued benefits were used to provide lifetime income through
    - Qualified joint and survivor annuity, and
    - Single life annuity
  - DOL to provide permissible assumptions, model disclosure, and interim final rules
  - Effective for pension benefits statements furnished more than 12 months after the latest of the DOL's issuance of (A) interim final rules, (B) the model disclosure, or (C) assumptions for determining lifetime income stream equivalents

SECURE Act (Continued)

- Annuity Provider Selection Safe Harbor
  - Safe harbor for fiduciaries when selecting annuity providers
  - Reliance on written representations from insurers regarding status under state insurance law for considering insurers' financial capabilities
  - No requirement to select the lowest cost contract, but may also consider value provided by other features and benefits of the insurer
  - No requirement to review the appropriateness of a selection after the purchase of a contract for a participant or beneficiary
  - Periodic review deemed to be conducted if certain written representations from insurer on an annual basis
  - The safe harbor provides relief only from the requirement to analyze the insurer's financial strength, not the requirement to analyze and determine that the annuity features, etc. are appropriate for the workforce

SECURE Act (Continued)

- Consolidated Form 5500 Reporting
  - A single consolidated Form 5500 permitted for a group of similar plans if:
    - All plans are individual account plans or defined contribution plans;
    - All plans have the same trustee, named fiduciaries, and administrator;
    - All plans use the same plan year; and
    - All plans provide the same investments or investment options

SECURE Act (Continued)

- Portability of Lifetime Income
  - Where a lifetime income investment is removed from a defined contribution plan's (401(k) or 403(b), or Governmental 457(b) Plan) investment lineup, the plan can allow participant to take a distribution of his or her lifetime income investment
  - Distributions must be made through direct trustee-to-trustee transfer to another eligible retirement plan or as a qualified plan distribution annuity contract distributed directly to the participant
  - This exception to the in-service distribution rules only applies to lifetime income investments distributed from a plan no earlier than 90-days prior to the date the lifetime income investment option is no longer an authorized investment option under the plan
  - Effective for plan years beginning after December 31, 2019

SECURE Act (Continued)

- Custodial Accounts on Termination of a 403(b) Plan
  - Upon termination of a 403(b) plan, custodial accounts can be distributed in-kind to a participant or beneficiary
  - Once distributed, the custodial accounts retain their tax deferred status until benefits are paid to the participant or beneficiary as long as compliance with the 403(b) plan rules in effect at the time of the in-kind distribution continues
  - Effective for tax years beginning after 2008

SECURE Act (Continued)

- Plan Amendment Adoption Deadline
  - General Rule: On or before the last day of the first plan year, beginning on or after January 1, 2022
  - Collectively Bargained Plan: On or before the last day of the first plan year, beginning on or after January 1, 2024
- Extended Deadline for Adopting New Plans
  - Old Rule: Last day of the employer's taxable year
  - New Rule: Allows an employer to adopt a qualified retirement plan after the close of a taxable year so long as it is adopted before the deadline for filing the employer's tax return for the taxable year
  - Applies to plans adopted for taxable years beginning after December 31, 2019

Bipartisan American Miners Act of 2019

- Reduction of Voluntary In-Service Distributions Age for Defined Benefit Plans
  - Old Rule: Defined Benefit Plans may not allow in-service distributions prior to attainment of age 62
  - New Rule: Defined Benefit Plans may allow participants to take in-service distributions at age 59½
  - Effective for plan years beginning after December 31, 2019

Taxpayer Certainty and Disaster Tax Relief Act of 2019

- Qualified Disaster Relief Distribution
  - “Qualified Disaster Distribution” is a distribution from an eligible retirement plan made to an individual whose principal place of abode (at any time during the incident period of such qualified disaster) is located in the qualified disaster area because such individual sustained an economic loss as a result of such qualified disaster.
  - Up to $100,000 available (aggregate all plans) for each qualified disaster
  - Exempt from 10% early distribution penalty
  - Qualified disaster distributions can be repaid (within 3 years of the distribution)
  - Income taxes due on the qualified disaster distribution can be paid over 3 tax years
  - Can be offered under a 401(k) Plan, 403(b) Plan or Governmental 457(b) Plan
  - Available for distributions made within 180 days after December 20, 2019

Taxpayer Certainty and Disaster Tax Relief Act of 2019 (Continued)

- Disaster-Related Plan Loan Provisions:
  - Loan relief for “qualified individuals” – individual whose principal abode (during any portion of the incident period of a qualified disaster) was located in the qualified disaster area and such individual sustained an economic loss as a result of the qualified disaster
  - Maximum available loan amount is increased to $100,000 (or 100% of present value of individual’s vested account balance)
  - Delay loan repayments due on or after the date of the disaster and ending 180 days after the last day of the disaster by 1 year (or, if later, 180 days from 12/31/2019)
  - Available for loans made within 180 days after December 20, 2019
- Plan amendment deadline is on or before the last day of the plan year beginning on or after January 1, 2020

Final Hardship Distribution Rules

- On 9/23/19, IRS published final regulations that amend the rules for hardship distributions
- Applies only to hardship distributions from:
  - 401(k) plans and 403(b) plans
- Generally effective for hardship distributions made on or after 1/1/20
- Key changes include:
  - No suspension of elective and employee contributions after hardship distribution (applies to contributions to qualified plans, 403(b) plans, and eligible governmental 457(b) plans)
  - No requirement to take all available loans from employer's plans before taking a hardship distribution
  - Replaced facts-and-circumstances test with general standard
  - Expanded sources for hardship distributions to include:
    - Elective contributions, QNECs, Qualified matching contributions & earnings on those amounts

Final Hardship Distribution Rules (Continued)

- Permits plans to require that additional conditions (other than suspension of elective and employee contributions) be met for hardship distributions
- Expanded list of safe harbor “deemed” hardship distribution events to include expenses/losses incurred by participant due to federally declared disaster, if participant’s principal residence or place of employment located in disaster area
- Eliminated requirement that expenses incurred to repair damage to participant’s residence that would qualify for the casualty deduction under section 165 must be attributable to federally declared disaster
- Permits hardship distribution for qualifying medical, educational, and funeral expenses incurred by participant’s primary beneficiary under the plan

Final Hardship Distribution Rules (Continued)

- Required Employee Statement
  - Statement that other sources are unavailable to satisfy the need applies only to those assets that are “reasonably available”
  - Permitted to be given electronically, which includes a verbal representation over a recorded phone line

403(b) Plan Remedial Amendment Period

- In the fall of 2019, the IRS issued new guidance (Rev. Proc. 2019-39) that establishes a new recurring remedial amendment period for 403(b) plans and extends the initial remedial amendment period beyond 3/31/2020 in certain circumstances
  - The initial remedial amendment period for 403(b) plans will end 3/31/2020
  - Employers can self-correct plan provisions that violate the 403(b) written plan rules by adopting either a 403(b) pre-approved plan that has a 2017 opinion or advisory letter, or by amending their individually designed plan by 3/31/2020 retroactive to 1/1/2010
  - If you haven't reviewed your 403(b) plan since prior to 1/1/2010, you should do so now

403(b) Plan Remedial Amendment Period (Continued)

- Rev. Proc. 2019-39 establishes a new recurring remedial amendment period for 403(b) plans
  - New recurring remedial amendment period for individually designed plans – required changes. Under Rev. Proc. 2019-39, form defects (i.e., required changes) have to be corrected by the last day of the second calendar year following the calendar year in which the failure occurred. Similar to the 401(a) rules, the 403(b) plan must be operated in accordance with changes when they become effective. For governmental plans, the ability to amend ends on the later of the second calendar year following the calendar year in which the failure occurred or 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after the end of the calendar year in which the failure occurred. (Note: For terminating plans, any required amendments must be adopted as part of the plan termination.)

403(b) Plan Remedial Amendment Period (Continued)

- Rev. Proc. 2019-39 establishes a new recurring remedial amendment period for 403(b) plans (Continued)
  - New recurring remedial amendment period for individually designed plans – voluntary changes. Under Rev. Proc. 2019-39, discretionary amendments (i.e., voluntary changes) have to be made by the last day of the plan year in which the amendment was effective. For governmental plans, discretionary amendments must be adopted by the later of the plan year in which the amendment was put into effect or 90 days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins after the effective date of the amendment.
  - There is a limited extension of the 3/31/2020 end date of the initial period for discretionary amendments (i.e., discretionary amendment effective 1/1/2018, can still corrected until 12/31/20 (end of this calendar year), but required changes have to be made by 3/31/2020).

403(b) Plan Remedial Amendment Period (Continued)

- Rev. Proc. 2019-39 establishes a new recurring remedial amendment period for 403(b) plans (Continued)
  - 403(b) Plan required changes now will be added to the IRS annual required amendments list — like 401(a) plans, being listed as a required amendment on the annual list will start the period running for making required amendments
  - IRS also will begin to include changes to Code section 403(b) to list of changes where operational compliance is required before amendments to the plan that IRS maintains

403(b) Plan Remedial Amendment Period (Continued)

- Rev. Proc. 2019-39 establishes a 403(b) pre-approved plan cycle system similar to the 401(a) preapproved plan cycles
  - A 403(b) plan will be allowed to apply for a preapproved determination letter during a one-year period beginning at the start of the cycle
  - An entity that sponsors a 403(b) plan as a word-for-word or minor modifier of a plan that received a letter during the initial cycle for pre-approved 403(b) plans (i.e., in the period ending 3/31/2020) will be considered to have a cycle 1 plan
  - The IRS submission period for cycle 2 is not expected to begin until 2023, and the IRS will issue guidance prior to the commencement of cycle 2 submissions
  - Similar amendment deadlines apply as those for individually designed plans

Example of Defined Contribution Plan Remedial Amendment Period—Hardship Changes

- As an example of how the remedial amendment process will work, the Plan Amendment Deadlines for 403(b) and 401(k) plans will be as follows:
  - Non-governmental plans: 2019 Required Amendments List (RAL): Must amend to conform to final regulations relating to hardship distributions: if have suspension of elective deferrals as condition for hardship distribution or do not require representation that employee has insufficient cash or other liquid assets reasonably available to satisfy hardship; must be amended to eliminate the suspension and provide for the representation for hardship distributions effective on or after 1/1/20. Since this is a required change, the amendment must be adopted by the last day of the second calendar year following the calendar year in which the change was published in the RAL. Because these changes were published in the 2019 RAL, this means that the deadline for hardship amendments is 12/31/21
  - Governmental plans: The deadline for adopting the required amendment ends on the later of the last day of the second calendar year following the calendar year in which the change was published in the 2019 RAL (12/31/21) or 90 days after the close of the third regular legislative session that begins after the calendar year in which the change was effective
  - Preapproved plans —Rev. Proc. 2020-9 extended deadline to adopt interim amendment to 12/31/21

IRS Guidance on Uncashed Distribution Checks

- Revenue Ruling 2019-19: Uncashed Retirement Plan Checks
  - When a participant or beneficiary fails to cash a check issued to her or him from a retirement plan:
    - The participant or beneficiary must still recognize the distribution as taxable income in the tax year the check is issued
    - The Plan Sponsor is still required to perform income tax withholding. The recipient's failure to cash the check does not change Plan Sponsor's obligation to withhold and remit taxes on the distribution
    - The Plan Sponsor is still required to report the distribution on Form 1099-R, if it exceeds the reporting threshold

New EPCRS Rules for Self-Correction

- IRS Rev. Proc. 2019-19 (April 19, 2019) significantly expanded the types of qualified plan failures that can be self-corrected under EPCRS
- Self-correction: alternative to VCP — no application, fee, or IRS approval required
  - favorable determination letter & established compliance practices & procedures required
- Self-correction of plan document failures —
  - What is a plan document failure?
  - Applies to qualified plans and 403(b) plans
  - Does not apply to failure to adopt a qualified plan or adopt a 403(b) plan timely
  - Always “significant” — must be corrected by end of 2nd full plan year after failure
  - Must have a favorable determination letter

New EPCRS Rules for Self-Correction (Continued)

- Self-correction of operational failures by plan amendment — three conditions:
  - The amendment must increase a benefit, right, or feature (BRF)
  - The increase in the BRF must be available to all eligible employees
  - The BRF increase must comply with the IRC and general EPCRS correction principles

  Note: general self-correction conditions apply (e.g., if the operational failure is "significant," the amendment must be adopted by correction deadline described above)
- Self-correction of certain plan loan failures:
  - Self-correction of # of loans in excess of plan limit by plan amendment — conditions:
    - The amendment satisfies IRC § 401(a)
    - The plan as amended would have satisfied IRC § 401(a) (and the IRC's loan rules) had it been adopted and effective when loans were first available
    - Plan loans were available to either all participants or solely to those who were NHCEs

New EPCRS Rules for Self-Correction (Continued)

- Self-correction of failure to report deemed distribution of defaulted loan on Form 1099-R for year of default by reporting it on Form 1099-R in year of correction
- Failure to obtain spousal consent for a loan can now be self-corrected by notifying the affected spouse and obtaining consent; if no consent, VCP or Audit CAP is required
- Defaulted loans can now be self-corrected by:
  - A single-sum corrective payment equal to the missed loan repayments, plus interest;
  - Reamortizing the outstanding loan balance (including interest) over the remaining original term or the remaining term had the loan been amortized over the maximum period under the IRC; or
  - Any combination of the above

- Rev. Proc. 2019-19 confirms certain failures remain ineligible for self-correction:
  - Plan loans that, when made, violate statutory limits or amortization or repayment periods
  - Employer “eligibility” or “demographic” failures

Proposed DOL Electronic Disclosure Rule

- DOL has proposed regulations to expand the use of technology for distribution of ERISA-required disclosures (SPDs, benefit statements, SMMs, blackout notices — not available for health plan disclosures)
- Rules are not in effect yet — must wait for final regulations
- "Notice and access" safe harbor available for any participant for whom the employer has a smartphone number or e-mail address
  - Notify participants (active, terminated, beneficiaries)
  - Post materials to website
  - One time paper notice required before relying on the safe harbor

Proposed DOL Electronic Disclosure Rule (Continued)

- Employers must notify participants that the electronic disclosure is on the website
- Notice must describe the document being disclosed, include a prominent subject line and specific language to alert the participant of the importance of the information
- Notice must also include: website address, notice of right to receive paper copy, notice of right to opt out, telephone number for plan administrator
- Notice must be written in plain English
- Existing safe harbor for electronic disclosure still applies

Ninth Circuit Rules ERISA Pension Plan Must Pay Survivor Benefits to Registered Domestic Partner

- In *Reed v. Kron/IBEW Local 45 Pension Plan*, (May 16, 2019, unpublished) the Ninth Circuit ruled that an ERISA pension plan must pay survivor benefits to a deceased participant's RDP
- The plan required:
  - Payment of a QJSA to a "married" participant, with a survivor benefit to his or her "spouse," but did not define "married" or "spouse"
  - It can be administered and interpreted in accordance with California law, consistent with the IRC and ERISA
- The participant and the plaintiff registered as domestic partners in 2004; the participant retired and began receiving benefits in 2009 and died in 2014, 5 days after they married

Ninth Circuit Rules ERISA Pension Plan Must Pay Survivor Benefits to Registered Domestic Partner (Continued)

- The pension committee, the plan administrator, denied plaintiff's survivor benefit claim and the plaintiff sued
- The district court granted the committee's motion for summary judgement, finding it had not abused its discretion
- The Ninth circuit reversed, concluding that the committee had abused its discretion because:
  - California law afforded domestic partners the same rights, protections, and benefits as those granted spouses, and
  - Neither ERISA nor the IRC provided binding guidance inconsistent with applying this interpretation of "spouse" to the plan

Determination Letters for Cash Balance Plans

- The IRS previously closed its periodic individually designed plan determination letter program (still issues determination letters for new and terminating plans)
- Notice 2019-20, issued May 1, 2019, expanded the determination letter program for two specific categories:
  - Statutory hybrid plans, including cash balance plans, submitted between September 1, 2019 and August 31, 2020
  - Certain merged plans on an ongoing basis
- If you sponsor a cash balance plan, this window offers a rare opportunity to get a more current determination letter on your plan

Official Launch of CalSavers

- Mandatory state-sponsored program when employers do not offer a retirement plan
- Formerly known as Secure Choice
- Currently, CalSavers only features Roth IRA (after-tax) accounts
- Employers must enroll employees and remit payroll deductions
- Registration is now open, with rolling deadlines:
  - More than 100 employees: June 30, 2020
  - More than 50 employees: June 30, 2021
  - 5 or more employees: June 30, 2022
- Penalty of $250 per employee for failure to timely comply, with additional $500 per employee penalty if failure persists for 180 days

Third Six-Year Remedial Amendment Period for Preapproved Defined Benefit Plans

- Under Rev. Proc. 2020-10, for pre-approved defined benefit plans:
  - Third six-year remedial amendment cycle
    - May 1, 2020 - January 31, 2025
  - On-cycle submission period for providers to submit for opinion letters
    - August 1, 2020 - July 31, 2021

2020 IRS Limits – Retirement Plans

	2020	2019
Elective Deferral Limit (401(k), 403(b) and eligible 457(b))	$19,500	$19,000
Catch-up Contribution Limit – Age 50 or Older	$6,500	$6,000
415(b) Dollar Limit on Annual Benefits Under Defined Benefit Plan	$230,000	$225,000
415(c) Dollar Limit on Annual Allocations Under Defined Contribution Plan	$57,000	$56,000
401(a)(17) Annual Compensation Limit	$285,000	$280,000
Highly Compensated Employees	$130,000	$125,000
Key Employees	$185,000	$180,000
Social Security Wage Base	$137,700	$132,900

Executive Compensation Updates

HansonBridgett

Proposed IRC § 162(m) Regulations

- Applicable to publicly-traded companies only
- Compensation paid to “covered employees” in excess of $1M is not deductible by the employer
- Tax Cuts and Jobs Act amended the definition of covered employee, publicly traded company, and “applicable remuneration”

Proposed IRC § 162(m) Regulations (Continued)

- Once a covered employee, always a covered employee, even after separation from service
- Remuneration or compensation subject to the limitation includes commissions and performance-based compensation (both previously excluded from the limitation); also includes compensation paid to the covered employee's beneficiary
- Grandfather rule for compensation arrangements in effect prior to November 2, 2017 has limited value
- Amendments required before December 31, 2020 for deferred compensation arrangements that defer compensation that is not deductible under 162(m)

Other Topics

California Consumer Privacy Act (CCPA)

- California Consumer Privacy Act effective January 1, 2020
- AB 25 Employee Exception
  - Employees are not consumers under the CCPA and do not have the same rights
  - Employers do have to provide employees and job applicants with a notice regarding the categories of personal information the employer collects about them and the purpose for doing so
  - Employers may be subject to a private right of action for securing and protecting employee information
  - AB 25 expires January 1, 2021
  - More to come in 2020
- HIPAA still applies

AB 5 and Impact on Benefit Plans

- If an independent contractor is reclassified as employee, he or she will likely be eligible to participate in employee benefit plans on a going forward basis
- Most employee benefit plans contain “Microsoft” provisions, whereby an independent contractor who is reclassified as an employee by a government agency, court, or other third party is not retroactively eligible to participate in the plan

AB 5 – Impact on Employee Benefits

- There may be a different result under the Affordable Care Act
- The ACA specifically states that reclassified employees count as employees for purposes of complying with the 95% rule
  - Employers must offer coverage to substantially all full-time employees
- A reclassification of a significant number of independent contractors could cause the employer to fail the 95% rule
- HOWEVER, there is no guidance from the IRS on this issue
  - The IRS is not bound by AB 5 and has its own 20-factor test
  - ERISA may preempt AB 5
  - Likely to see little to no enforcement of AB 5 in 2020

QUESTIONS?

- Submit your questions using the Q&A button.
- If we are out of time, we will capture all questions and we'll get back to you after.

REMEMBER TO:

- Take our survey to help us plan future events!
- Click on the icons on the bottom for “Survey” and “Certification” to get your CLE certificate.
- Thank you for joining us!