

# Employee Benefits

## Webinar

# 2021

## Annual Employee Benefits Update

**2021** Update for Private Sector Employers



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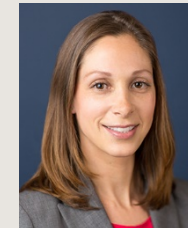


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# Agenda – Private Sector Update – February 11, 2021

- 1) Health & Welfare Plan Updates
- 2) Cafeteria Plans
- 3) Qualified Plan Updates
- 4) COVID-19 Benefits, Leave Requirements, Payroll Tax Credits, and Deferrals
- 5) Executive Compensation
- 6) Other Topics

# HEALTH & WELFARE PLAN UPDATES

# Can an Employer Require Employee Vaccinations?

- It depends.
- ADA: disability-related inquiries and medical examinations must be job-related and consistent with business necessity – reasonable belief based on objective evidence
  - The employee’s ability to perform essential job functions will be impaired by a condition
  - The employee will pose a direct threat due to a condition
- 12/16/2020 EEOC guidance: administration of a COVID-19 vaccine to an employee by an employer itself is **not** a medical examination
- But because prescreening for information required to determine whether an employee can be vaccinated may trigger the ADA disability-related inquiry rules, an employer that administers the vaccine itself must show it is job-related
- Employers can avoid this by requiring employees to be vaccinated by an independent (no contract with employer) outside provider

# Wellness Programs – Proposed EEOC Regulations

- EEOC issued rules for compliance with ADA and GINA for wellness programs that use “health risk assessments” or otherwise collect medical or genetic information
  - Participation must be “voluntary” = incentive cannot render participation “involuntary”
- Two types of wellness programs: “participatory” and “health-contingent”
  - Under HIPAA, incentive limit is 30% of total premium cost for “health-contingent” (or 50% for tobacco use); other requirements apply, including “reasonable alternative standard”
- For ADA compliance:
  - Health-contingent programs that meet HIPAA requirements can offer 30% premium reduction (50% for tobacco use) – must be tied to health plan
  - Rewards for other programs = “de minimis” only
- For GINA compliance: “de minimis” reward only for providing employee’s family medical history in form of information about manifestation of disease/disorder in family members who participate in program
- EEOC guidance on ADA compliance related to COVID-19 vaccines = prescreening questions are “disability-related”

# Affordable Care Act (“ACA”) Update

- Supreme Court heard oral argument in latest challenge to ACA in November 2020
  - Lower courts held “individual mandate” is unconstitutional without penalty
    - If so, is entire ACA is unconstitutional or can individual mandate be “severed”
  - Employer Shared Responsibility Payments and reporting requirements (Forms 1095-C) still apply
- Final rule on “grandfathered” plans issued in December 2020, to increase flexibility for making changes without losing grandfathered status
  - Grandfathered plans don’t have to cover preventive services without cost-sharing
  - Two modifications to types of changes plans can make and retain grandfathered status
    - HDHP plans can increase fixed amount cost-sharing as necessary to comply with IRS rules
    - New alternative method for calculating maximum increase in fixed-amount cost-sharing
- PCORI fee adjusted for plan years ending between 10/1/20 and 10/1/21 to \$2.66



# Mental Health Parity & Addiction Equity Act Changes (“No Surprises Act” in CAA 2021)

- MHPAEA generally prohibits having more restrictive financial and treatment limitations for mental health/substance use disorder (MH/SUD) benefits than for medical/surgical benefits
- “Non-quantitative treatment limitation” (NQTL) = limit on scope or duration of benefits, e.g., prior authorization, medical necessity, UCR, step therapy, exclusion for experimental treatment
  - Subject to “comparable processes” parity rule = processes used in applying NQTL to MH/SUD must be comparable to, and applied no more stringently than medical/surgical
- Group health plans must formally analyze and document compliance with parity requirements for NQTLs and be prepared to disclose by February 10, 2021
- Departments of Labor and Health and Human Services must obtain analysis documents in response to complaints or when deemed appropriate

# Plan Deadlines Extended Due to COVID-19

- Under IRS and DOL guidance, ERISA plan administrators must disregard the “Outbreak Period” in determining the following periods and dates:
  - 30-Day (or 60-Day) HIPAA Special Enrollment Period
  - 60-Day COBRA Coverage Election Period
  - 45-Day Initial COBRA Premium and 30-Day Monthly COBRA Premium Due Dates
  - 60-Day Period for Providing Notice to Plan of COBRA Qualifying Events
  - Time Periods for Filing Plan Claims and Appeals
  - Four-Month Period for Requesting External Review of Denied Health Plan Appeal
  - 14-Day Period for Plan to Furnish COBRA Election Notice to Qualified Beneficiary
- Outbreak Period = from March 1, 2020, until 60 days after the announced end of the COVID-19 national emergency

# Plan Deadlines Extended Due to COVID-19 *(continued)*

- Plan Administration Issues
  - Coordinating with insurance carriers and third-party administrators
  - Plan amendment to reflect extended deadlines
  - New COBRA Model Notices

# Final Rule on Price Transparency in Health Care

- HHS/CMS, DOL, IRS issued final rule on price transparency in late October 2020
- Requires group health plans and health insurance issuers to provide individualized information on cost-sharing and to publically disclose provider rates for specific services
  - Effective 1/1/2022, make publicly available standardized and regularly updated data files that can be used for research and by private online plan comparison tools
  - Effective 1/1/2023, health plans must offer an online “shopping tool” that will allow covered individuals to see the negotiated rate between the provider and the plan, as well as receive a personalized estimate of their out-of-pocket cost for 500 of the most “shoppable” items and services
  - Effective 1/1/2024, these “shopping tools” will be required to show the costs for the remaining procedures, drugs, durable medical equipment, and any other item or service the covered individual may need
- New transparency provisions also included in Consolidated Appropriations Act — *as discussed in other sections in this webinar*

# 2021 Health and Welfare Plan Limits

	2021	2020
Health FSA Contribution Limit	\$ 2,750	\$ 2,750
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)	<b>\$ 3,600</b>	\$ 3,550
HSA Contribution Limit (family)	<b>\$ 7,200</b>	\$ 7,100
HSA Catch-up Contribution Limit	\$ 1,000	\$ 1,000
Qualified Small Employer HRA Contribution Limit (individual)	<b>\$ 5,300</b>	\$ 5,250
Qualified Small Employer HRA Contribution Limit (family)	<b>\$10,700</b>	\$10,600

# CAFETERIA PLANS

# New Cafeteria Plan (IRC § 125) Plan Relief

## (“Taxpayer Certainty and Disaster Tax Relief Act of 2020”)

- Both health care and dependent care FSAs can permit employees to carry over all unused amounts
  - At the end of the 2020 plan year to the 2021 plan year
  - At the end of the 2021 plan year to the 2022 plan year
- Both types of FSAs can extend the grace period from 2½ months to 12 months for 2021 and 2022 plan years
- Both types of FSAs can allow prospective mid-year elections for plan years ending in 2021, regardless of whether a “change in status event” occurs
  - Unlike the mid-year election relief provided for 2020, this does not permit employees to make mid-year election changes regarding medical coverage, e.g., drop major medical or switch plan options
- Health care FSAs can allow employees whose participation ceased during 2020 or 2021 to receive reimbursements from unused benefits after their participation in the FSA ceases for the rest of the plan year (i.e., implement a spend-down feature, regardless of COBRA election)
- Dependent care FSAs may allow employee with unused balance at the end of the 2020 plan year, whose child turned age 13 during the 2020 plan year, to be reimbursed for qualifying expenses up to the amount of their 2020 plan year-end balance during the 2021 plan year, until the child turns age 14

# Cafeteria Plan (IRC § 125) Plan Relief and Other Changes in 2020 *(Please refer to our alerts found in “Resources”)*

- Under the CARES Act, Health FSAs (and HRAs) may reimburse expenses for over-the-counter drugs without a prescription and menstrual products
- HDHP can cover health benefits associated with testing for and treatment of COVID-19 without a deductible, so employees remain eligible for HSA contributions
- Plan amendments for temporary cafeteria plan changes allowed under COVID-19 relief provided in 2020 must be adopted by 12/31/21, can be retroactive to 1/1/20
- Maximum carryover amount for health FSAs after 2022 will increase annually based on increase in maximum contribution amount (\$550 for 2021 before CAA 2021)
- Deadline for filing health FSA claims and HIPAA special enrollment right period extended indefinitely from March 1, 2020, under “Outbreak Period” guidance
  - Required for ERISA plans; “encouraged” for governmental plans



# QUALIFIED PLANS UPDATE

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

- The Coronavirus Aid, Relief and Economic Security Act of 2020 (P.L. No. 116-136)
- Coronavirus-Related Distributions (Section 2202(a))
  - Distributions available to “Qualified Individuals”
  - Distributions available from January 1, 2020, to December 31, 2020
  - Distribution limit: \$100,000 per qualified individual
  - Not subject to 10% early distribution penalty for distributions taken before age 59 ½
  - Income tax can be paid prorated over 3-years
  - Permissible re-contribution within 3-years of distribution (not include in income if repaid)
- Increased Loan Limit (Section 2202(b))
  - Loans made from March 27, 2020, to September 22, 2020
  - Limit increased to lesser of (1) \$100,000 (minus outstanding plan loans) and (2) 100% of the individual's vested benefit under the plan

# CARES Act – Coronavirus-Related Distributions & Loans *(continued)*

- Loan Repayment Suspension (Section 2022(b))
  - Payments due between March 27, 2020, to December 31, 2020
  - Loan term can be extended by up to one year from the date the loan repayment was originally due without triggering a deemed distribution
  - Interest continues to accrue during the suspension period
- IRS Notice 2020-50: Guidance for Coronavirus-Related Distributions and Loans under the CARES Act
  - Expands definition of “Qualified Individual”
  - Expands definition of “Coronavirus-Related Distribution”
  - Employers can rely on employee self-certification of eligibility for relief
  - Expands opportunity to recontribute Coronavirus-Related Distributions to an eligible retirement plan

# CARES Act – Coronavirus-Related Distributions & Loans *(continued)*

- IRS Notice 2020-50: Guidance for Coronavirus-Related Distributions and Loans under the CARES Act (continued)
  - Form 1099-R reporting guidance
  - Safe harbor for loan suspensions
- Sections 2022(a) and 2022(b) Summary
  - Eligible plans: certain 401(a) plans (including 401(k)), 403(a), 403(b) and governmental 457(b) plans
  - Amendment deadline: last day of the first plan year beginning on or after January 1, 2022
  - Optional law change

# CARES Act – 2020 Required Minimum Distribution Waiver

- 2020 Required Minimum Distributions Waiver (Section 2203)
  - Eligible Plans: 401(a), 403(a), 401(k), 403(b) and governmental 457(b) defined contribution plans
  - 2020 Required Minimum Distribution (“RMD”) Waiver applies to (as clarified by Notice 2020-51):
    - Initial RMDs due by April 1, 2020 (if not paid in 2019)
    - Ongoing RMDs that would have been due by December 31, 2020
    - Initial RMDs due by April 1, 2021
    - 5-year period is determined without regard to 2020 for beneficiaries whose entire amount must be distributed within 5 years of the participant’s death
  - Waiver does **not** apply to ongoing RMDs due by December 31, 2021

# CARES Act – 2020 Required Minimum Distribution Waiver *(continued)*

- Notice 2020-51 (June 23, 2020)
  - Transition Relief:
    - Permits rollovers of 2020 RMDs and extends the rollover deadline for those distributions until at least 8/31/20
  - Clarifications
    - Deadline to elect between 5-year and life expectancy rule extended until 12/31/21
    - Deadline for non-spouse designated beneficiary rollovers using the life expectancy rule is extended to 12/31/21 (if employee died in 2019)
    - The 2020 RMD Waiver does not change participant's Required Beginning Date
    - 2020 RMDs that have been taken can be rolled back into the same plan
  - Sample Plan Amendment
- Amendment Deadline: Last day of the first plan year beginning on or after January 1, 2022

# CARES Act – Defined Benefit Pension Plan Funding Relief

- Defined Benefit Plan Funding Relief (Section 3608)
  - Extend Funding Deadline for 2020
    - Applies to single-employer defined benefit pension plan
    - Any minimum required contribution (including quarterly installments) due under Code § 430(j) during the 2020 calendar year are not required to be made until January 1, 2021
    - Interest continues to accrue for the period between the original due date of the contribution or installment and actual due date
      - Interest accrues at the effective interest rate for the plan for the year plan year that includes the payment date
  - Benefit Limitations for Underfunded Defined Benefit Plans
    - Plan Sponsor may elect to treat the plan's AFTAP for the last plan year ending before January 1, 2020, as the AFTAP for plan years that include calendar year 2020

# CARES Act – Defined Benefit Pension Plan Funding Relief *(continued)*

- IRS Notice 2020-61 (July 31, 2020)
  - Form 5500 filing deadline is not extended to account for delayed 2020 payments
  - AFTAP election must be made in writing to plan’s actuary by September 30, 2020
  - AFTAPs for subsequent years must be based on actual certifications from plan’s actuary
- PBGC Tech Update 20-2 (as revised on November 16, 2020)
  - No reporting requirement triggered as a result of taking advantage of the delayed funding deadline
  - Statutory lien on missed payments over \$1 million will **not** be triggered as a result of delaying 2020 payments until January 1, 2021
  - Enables plan sponsors to take advantage of the CARES Act extension and still pay the same variable-rate premium they would have owed had the plan received all prior year contributions by the regular contribution due date



# Notice 2020-68 – SECURE Act Guidance

- Maximum Service Period for Long-Term, Part-Time Employee 401(k) Eligibility
  - Effective for plan years beginning after 12/31/2020, 401(k)s must provide employees can, instead of completing 1,000 hours of service/year, participate after completing 500 hours of service in 3 consecutive years if 21 or older, and define vesting service as 500 hours of service/year
  - Exclusion of years beginning before 1/1/21 applies only to eligibility rule, not vesting rule
- Qualified Birth or Adoption Distributions (Plan Years Beginning After 12/31/2020)
  - Any distribution up to \$5,000 from eligible retirement plan within 1-year of birth/adoption
    - Excepted from 10% early distribution tax; recipient may recontribute all/part to eligible plan in which he/she is a beneficiary and to which rollover can be made
    - Recipient must include name, age, and TIN of child/adoptee on distribution-year tax return
    - Eligible adoptee: < 18 or physically/mentally incapable of self-support; not spouse's child
    - Each parent eligible for QBAD for same child/eligible adoptee; multiple QBADs permitted

## Notice 2020-68 *(continued)*

- Eligible plans: qualified, 403(b), and governmental 457(b) plans
  - In-service QBADs optional, not required; treated as meeting applicable distribution restrictions
    - If not permitted, participant may still treat otherwise permitted in-service distribution as a QBAD on his/her tax return and recontribute to eligible retirement plan/IRA
  - May rely on participant's reasonable representations absent actual knowledge to contrary
  - Not subject to direct rollover, 402(f) notice, or 20% mandatory tax withholding requirements
  - Must allow recontribution if QBAD permitted, received from plan, and rollover contribution-eligible; treated as a direct rollover
- Miners Act: In-Service Distributions From Pension Plans at Age 59½ (Plan Years Beginning After 12/31/2019)
  - Optional, not required
  - No impact on plan's definition of normal retirement age
- Plan Amendment Deadline: last day of first plan year beginning on or after 1/1/2022 (2024 for governmental and certain collectively bargained plans)

# Notice 2020-86 SECURE Act Safe Harbor Plan Guidance

- Auto-Enrollment Safe Harbor Cap Increased From 10% to 15% (10% First Year) (Plan Years Beginning After 12/31/2019)
  - Optional, not required
  - Plan amendment needed if cap incorporated by reference, but remains at 10%
  - Amendment deadline: last day of first plan year beginning on or after 1/1/22 (2024 for certain collectively bargained plans) (If later, last day of plan year in which effective)
- NEC Safe Harbor 401(k) Notice Requirement Eliminated (Plan Years Beginning After 12/31/2019)
  - Traditional NEC safe harbor plans with non-safe harbor matching contributions exempt from ACP test and EACAs with NECs that happen to satisfy traditional or QACA safe harbor must still provide notice
  - But notice requirement for a matching QACA that satisfies NEC safe harbor is eliminated
  - May provide notice re ability to amend plan mid-year to suspend/reduce safe harbor NECs in any form

## Notice 2020-86 *(continued)*

- Mid-Year 401(k) Plan Amendment to Add Nonelective Safe Harbor (Plan Years Beginning After 12/31/2019)
  - Amendment must be adopted before the 30<sup>th</sup> day before plan year-end or after the 30<sup>th</sup> day if:
    - the amendment is made by the end of the following plan year, and
    - the nonelective contribution is at least 4%
  - N/A if plan provided for safe harbor matching contributions at any time during the year
  - A traditional or QACA safe harbor 401(k) plan amended mid-year to reduce/suspend safe harbor NECs and later amended to restore them, not subject to ADP, ACP, or top heavy
  - Safe harbor NECs of at least 4% to plan after tax return deadline (including extensions) but before the end of the following year not deductible for the prior year
  - New retroactive amendment rules for adding safe harbor NECs mid-year supersede the retroactive amendment rules under Treas. Reg. 1.401(m)-3(g)
  - Retroactive NEC plan amendments must be adopted by the later of (1) the deadline above, or (2) generally the end of the first plan year beginning on or after 1/1/2022

# DOL Interim Final Lifetime Income Disclosure Rule

- Lifetime Income Illustrations
  - At least annually based on participant account balance value
  - Two required illustrations:
    - Single life annuity, and
    - QJSA
  - Mandatory factors:
    - Commencement: last date of statement period at age 67 (actual age if older)
    - Marital status: married with spouse the same age and 100% survivor annuity
    - Interest rate: 10-year CMT yield rate for 1st business day of last month of statement period
    - Mortality: IRC § 417(e)(3)(B) applicable mortality table for last month of statement period
  - Excludes insurance loads, inflation adjustments, or term-certain/other features
- Required Participant Explanations
  - Annuity commencement and age, marital status, interest rate, and mortality assumptions;
  - Single life annuity;

# DOL Lifetime Income Disclosure IFR *(continued)*

- Required Participant Explanations *(continued)*
  - 100% QJSA, availability of other percentages, and impact of choosing lower percentage;
  - Monthly payment amounts are illustrations only;
  - Many factors could cause monthly income to be different than illustrated;
  - Illustrations not inflation-adjusted;
  - Assume the participant is 100% vested; and
  - Assume participant loans not in default and fully repaid by retirement
  - Optional model language
- Special Rule for Plans With Distribution Annuities
- Special Rule for Plans With Deferred Income Annuities
- Model Notice
- Liability Limitation

# New DOL Electronic Disclosure Safe Harbor

- DOL Default Electronic Disclosure by Employee Pension Benefit Plans under ERISA Final Rule (85 CFR 102)
  - New safe harbor for providing certain disclosures by email, website posting or through a mobile application
    - Applies to documents plan administrators are required to furnish to covered individuals under Title I of ERISA (i.e., SPDs, SMMs, fee disclosures, annual funding notices, ERISA 404(c) disclosures, QDIA notices and blackout notices, etc.)
    - Does **not** apply to documents within the IRS's jurisdiction (e.g., 402(f) Notices) or documents required to be provided only upon request (e.g., plan document)
  - Must provide initial notice of electronic delivery and right to opt-out
  - Alternative to 2002 Safe Harbor Electronic Disclosure Rule
  - Not applicable to health and welfare plans, only retirement plans

# Private Equity Investment Options for Defined Contribution Plans

- Regulatory Relief to Support Economic Recovery Executive Order 13924
- DOL Information Letter: 2020-06-03
  - It is not a violation of the fiduciary's duties under ERISA • 403 and 404 solely because a fiduciary offers a fund with a private equity component as a designated investment alternative in a defined contribution plan.
  - Fiduciaries must evaluate whether the fund:
    - offers participants the opportunity to invest in more diversified investment options within an appropriate range of expected returns net of fees and diversification of risks over a multi-year period;
    - is overseen by plan fiduciaries (using third-party investment experts as necessary) or managed by investment professionals that have the capabilities to manage a fund that includes private equity investments effectively; and
    - has limited the private equity allocation in a manner designed to address the unique characteristics associated with such an investment.



# Private Equity Investment Options for Defined Contribution Plans *(continued)*

- DOL Information Letter: 2020-06-03 *(continued)*
  - Fiduciary's still cannot provide investment options that result in a direct investment in private equity.
  - Not Addressed:
    - Prohibited Transaction under ERISA § 406
    - Issues that may arise under SEC or banking laws, IRC, etc.

# Final ESG Regulations

- The final rule differs from the proposed rule in that it eliminates references to ESG
- But retains the requirement that investment selection must be based solely on economic factors
- The final rule
  - Requires plan fiduciaries to select investments based solely on economic factors
  - Prohibits the sacrifice of investment return or taking on additional risk to promote non-economic benefits or goals
  - Requires plan fiduciaries to satisfy specific conditions before adding investments to a participant-directed individual account plan investment lineup based on non-economic factors

# Final Proxy Voting Regulations

- Plan fiduciaries are tasked with voting on proxies in connection with mutual funds and other plan investments (collective investment trusts and pooled separate accounts)
- Final regulations require voting decisions to be based only on economic factors and the best interest of plan participants and beneficiaries
- As a result, fiduciaries should not take into account non-economic factors that do not advance the financial interests of the plan participants and beneficiaries
- Where the authority to vote proxies has been delegated to investment managers, prudent fiduciaries should monitor the proxy voting activities of the investment managers

# Final Fiduciary Rule

- Impacts professionals who recommend investments to 401(k) plans and plan participants
  - Generally, ERISA prohibits investment advisors from engaging in self-dealing and receiving compensation from third parties in connection with transactions involving plan assets
  - ERISA also prohibits purchasing and selling investments with plan assets when the fiduciaries are acting on behalf of their own accounts
- The new Fiduciary Rule adopts a class exemption that allows investment advisors to receive compensation, including as a result of advice to roll over assets from a plan to an IRA, and to engage in principal transactions that would otherwise violate ERISA

# Final Fiduciary Rule

- Five-Part Test rule incorporated into new Fiduciary Rule
  - Render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property,
  - On a regular basis,
  - Pursuant to a mutual agreement, arrangement, or understanding with the Plan, Plan fiduciary or IRA owner, that
  - The advice will serve as a primary basis for investment decisions with respect to Plan or IRA assets, and that
  - The advice will be individualized based on the particular needs of the Plan or IRA

# Fiduciary Rule

- Exemption includes:
  - Impartial Conduct Standards;
  - Disclosure requirements, including written acknowledgement of fiduciary status;
  - Policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and that mitigate conflicts of interest; and
  - Retrospective compliance review and self-correction program
- Rollovers
  - An investment advisor's recommendation to roll assets from a retirement plan to an IRA creates an ERISA fiduciary relationship with the plan participant if all of the requirements of The Five-Part Test are satisfied
  - Investment advisors who are fiduciaries must provide a written disclosure to plan participants stating the reasons that a rollover recommendation was in their best interest

# Escheat – IRS Missing Plan Participant Guidance

- Rev. Rul. 2020-24 (October 16, 2020)
  - Withholding and reporting of qualified plan payments to state unclaimed property funds:
    - Presumptive 20% withholding on qualified plan payments to state unclaimed property fund.
    - Distribution to unclaimed property fund is reportable to the missing participant on Form 1099-R at the time of escheatment.
  - Transition relief: Will not be treated as failing to comply with these withholding and reporting requirements with respect to payments made before January 1, 2022, or the date it becomes reasonably practicable to comply with these requirements.
- Rev. Rul. 2020-46 (October 16, 2020)
  - Missing participants whose retirement plan balances are escheated to a state unclaimed property fund who later locate their money are eligible to rollover the funds
  - Eligible to self-certify meeting the requirements for waiver of the 60-day rollover period.

# DOL Missing Participant Guidance

- DOL Missing Participant Best Practices (January 12, 2021)
  - Informal Guidance:
    - “Red Flags” that plan sponsors have a problem with missing and non-responsive participants.
      - Red flags include absence of sound procedure for dealing with returned participant mail; missing, incomplete or inaccurate contact information; more than a small number of terminated vested participants who have attained NRA but have yet to begin receiving benefits, etc.
    - Four categories of “Best Practices” that proven effective at minimizing and mitigating problems with missing and non-responsive participants:
      - Maintaining accurate census information for the plan’s participant population
      - Implementing effective communication strategies
      - Missing participant search procedures
      - Documentation of procedures and actions



# DOL Missing Participant Guidance *(continued)*

- DOL Compliance Assistance Release 2021-01 (January 12, 2021)
  - DOL shares its investigation procedure for defined benefit pension plan “terminated vested participant project” audits.
  - Identifies a list of compliance errors the DOL looks for when reviewing plan records and procedures.
- DOL Field Assistance Bulletin 2021-01 (January 12, 2021)
  - DOL will not pursue fiduciary breach claims when fiduciaries transfer missing participant’s or beneficiary’s account balances to the PBGC Missing Participant Program instead of utilizing one of the options available under the DOL’s fiduciary safe harbor regulations.
  - Temporary hold on enforcement does not preclude pursuit of ERISA violations for failure to diligently search for participants and beneficiaries prior to transferring their accounts to the PBGC or for failures to maintain sufficient plan and employer records.

# Default Income Tax Withholding Rules – Certain Periodic Retirement and Annuity Payments

- 85 FR 61813 (October 1, 2020)
  - Response to change in the default withholding rules made by the Tax Cuts and Jobs Act of 2017 (“TCJA”)
  - TCJA changes the default income tax withholding rate for certain periodic retirement and annuity payments (those ineligible for rollovers)
  - Beginning with certain periodic retirement and annuity payments made after December 31, 2020, the Treasury Department and the IRS will provide the rules and procedures for determining the default rate of withholding on periodic payments in applicable forms, instructions, publications, and other guidance
  - Default withholding rate for 2021 is determined by treating the taxpayer as a married individual claiming three withholding allowances

# Relief for Plan Fiduciaries Due to COVID-19 (EBSA Disaster Relief Notice 2020-01)

- Under DOL guidance, plan fiduciaries have additional time to provide notices and disclosures that must be furnished during Outbreak Period
  - Good faith requirement (e.g., electronic disclosure)
  - Notice/disclosure must be provided as soon as administratively practicable under the circumstances, subject to the 1-year extension limit under ERISA § 518
- Relief also provided for failure to perform certain administrative activities during Outbreak Period:
  - Loan verification procedures
  - Late contributions or loan repayments to plan
  - Inability to provide “blackout notices”
- General ERISA fiduciary compliance relief

# Extended Relief from Physical Presence Requirement for Participant Elections

- Temporary relief from the physical presence requirement for participant elections extended through June 30, 2021 (IRS Notice 2021-03)
  - Election witnessed by a notary public of a state that permits remote electronic notarization
    - Physical presence requirement deemed satisfied for an electronic system that uses remote notarization if executed via live audio-video technology that otherwise satisfies the requirements of participant elections under Treas. Reg. 1.401(a)-21(d)(6) and is consistent with state law requirements that apply to the notary public
  - Election witnessed by a plan representative
    - Physical presence requirement deemed satisfied for an electronic system if the electronic system using live audio-video technology satisfies the following 4 requirements:

# Extended Relief from Physical Presence Requirement for Participant Elections *(continued)*

- 1) Individual presents valid photo ID during live audio-video conference
- 2) Live audio-video allows for direct interaction between the individual and plan representative
- 3) Individual provides a legible copy of the signed document by fax or electronic means directly to plan representative on the same date it was signed
- 4) After receipt of signed document, plan representative acknowledges that the signature has been witnessed by the plan representative in accordance with the requirements of Notice 2021-3 and transmits the signed document, including the acknowledgement, back to the individual in a manner that complies with the notice requirements under Treas. Reg. 1.401(a)-21(c)

# Consolidated Appropriations Act of 2021

- MPPs qualify for temporary in-service distribution exception for CARES Act CRDs
- Optional Limited Retirement Plan Disaster Relief
  - Qualified Disaster: between 12/28/19 and 12/27/20 and declared major disaster by President under Stafford Act between 1/1/20 and 2/25/21 (excluding disasters declared solely due to COVID-19)
  - Qualified individual: principal abode in disaster area during incident period and economic loss sustained due to disaster
  - Qualified Disaster Distribution: any distribution of up to \$100,000 from a qualified, 403(b) or governmental 457(b) plan from when the qualified disaster began until 6/25/21
    - 10% early distribution tax does not apply
    - May be included ratably in income over three years
    - May be recontributed within three years
    - Temporary exception to applicable in-service distribution restrictions

# Consolidated Appropriations Act of 2021 *(continued)*

- Temporary loan relief
  - Limit on loans from eligible retirement plan to a qualified individual from 12/27/20 to 6/25/21 increased to the lesser of \$100,000 or 100% of vested account balance
  - Repayments on loan to qualified individual with outstanding loan after the first day of the qualified disaster incident period from an eligible retirement plan that are due during the qualified disaster incident period and up to 180 days after it ends may be suspended for up to one year
    - Loans must be reamortized to take into account the missed payments
    - Suspension period disregarded for purposes of the five-year loan term limit
- Re-contribution of Hardship Distributions
  - An individual who received a hardship distribution from a 401(k) or 403(b) plan to purchase a principal residence in a qualified disaster area from 180 days before the first of the incident period to 30 days thereafter may recontribute it to the plan between the first of the incident period and 6/25/21
- Plan Amendment Deadline: last day of the first plan year beginning on or after 1/1/22

# Consolidated Appropriations Act of 2021 *(continued)*

- Expansion of ERISA § 408(b)(2) Disclosures for Health Plans
  - Effective 12/27/2021, group health plan consultants and brokers must provide required comprehensive compensation disclosures to plan
- Temporary Partial Plan Termination Relief
  - Plan will not be treated as partially terminated from 3/13/20 to 3/31/21, if # of active participants on 3/31/21 is at least 80% of the number of those participants on 3/13/20



# 2021 Retirement Plan Limits

	2021	2020
Elective Deferral Limit (4019k), 403(b) and eligible 457(b)	\$ 19,500	\$ 19,500
Catch-up Contribution Limit– Age 50 or Older	\$ 6,500	\$ 6,500
415(b) Dollar Limit on Annual Benefits under Defined Benefit Plan	\$230,000	\$ 230,000
415(c) Dollar Limit on Annual Allocations under Defined Contribution Plan	<b>\$ 58,000</b>	\$ 57,000
401(a)(17) Annual Compensation Limit	<b>\$290,000</b>	\$ 285,000
Highly Compensated Employee	\$130,000	\$ 130,000
Key Employees	\$185,000	\$185,000
Social Security Wage Base	<b>\$142,800</b>	\$137,700

# **COVID-19 BENEFITS, LEAVE REQUIREMENTS, PAYROLL TAX CREDITS, AND DEFERRALS**

# COVID-19 Leave Donation Programs

- Employers may establish leave based donation programs to allow employees to donate vacation, sick or personal leave that the employer contributes to an Internal Revenue Code Section 170(c) charitable organization for COVID-19 relief
- If program meets requirements, employees do not recognize income on the amount of the donation. The employer (not the employee) can deduct the amounts contributed
- Payments must be made to a 170(c) charity for the relief of victims of the pandemic in the US areas covered by the Presidential declaration of disaster under the Robert T. Stafford Disaster Relief and Emergency Act and paid to the charity before January 1, 2021

# FFCRA Extended Leave Must Be Reported On or With Form W-2

- Extended Sick Leave and Family Leave Required under FFCRA Must Be Reported
  - IRS issued guidance in Notice 2020-54 regarding reporting of required COVID-19 extended sick leave and family leave on Form W-2 for 2020
  - To the extent a self-employed individual's employer took tax credits for FFCRA leave paid to the individual, the individual will not also be able to take self-employment income tax credits—FFCRA included provisions to eliminate any "double" credit-taking
  - To prevent any double credit-taking, employer must report in Box 14 or on a separate statement provided at the same time as the W-2 the amount of FFCRA sick leave or family leave paid to an employee
  - Use headings and report separately: “sick leave wages subject to the \$511 per day limit,” “sick leave wages subject to the \$200 per day limit,” and “emergency family leave wages” and provide language provided in Notice regarding limit for self-employed

# Consolidated Appropriations Act of 2021 (“CAA”)

- CAA included a number of benefits and tax credit provisions as part of the coronavirus relief package
  - Extension of refundable tax credits under FFCRA for extended sick and family leave through 3/31/2021
    - Not required to provide additional leave past 12/31/2020, but if employer voluntarily provides access to any leave not taken in 2020, employer is eligible for tax credits up to the original limits under FFCRA

# CAA *(continued)*

- **Extension of retention tax credits for wages paid through 6/30/2021**
  - Increase in credit from 50% (under the CARES Act) to 70% of qualified wages per employee up to \$10,000 per quarter for first two quarters of 2021 (including health benefits)
  - For employers that averaged 500 or fewer FT employees during 2019, qualified wages include any wages paid to any employee during a calendar quarter in which business operations are fully or partially suspended due to a government order or in which gross receipts have declined by more than 20%
  - For employers that averaged more than 500 FT employees during 2019, qualified wages include those paid to employees for time not worked during any calendar quarter due to either a full or partial suspension of the employer's business operations by a governmental order or a significant decline in gross receipts (more than 20 percent).

# CAA *(continued)*

- **Extension of retention tax credits for wages paid through 6/30/21** (continued)
  - Tax credits can be claimed (including retroactively) by employers who received PPP loans on qualified wages that were not paid with forgiven loan proceeds
  - IRS is directed to provide guidance on how employers whose number of average FT employees in 2019 was not greater than 500 may receive advance payment of the employee retention payroll tax credit based on using 70 percent of the average quarterly payroll for the same quarter in 2019
    - If the amount of the actual payroll credit determined at the end of the quarter in 2021 is less than the amount of the advanced payment, the employer will have to repay the excess to the IRS
    - We expect the IRS to issue guidance regarding the process for claiming advanced payment (e.g., Form 7200)

# CAA *(continued)*

- **Business Meal Deductions**

- The 50% deduction for business meals is increased to 100% for expenses incurred from 1/1/2021 through 12/31/2022 for food and beverages provided by a restaurant

- **Student Loan Repayment Income Exclusion**

- Employer payments of student loans for employees will be non-taxable if provided under an educational assistance plan meeting the requirements of Internal Revenue Code section 127
- This relief is extended through 12/31/2025



# CAA *(continued)*

- **Extension of Time to Repay Deferred Employee Social Security Taxes**
  - CAA included an extension of the time to withhold and deposit any deferred employee portion of Social Security taxes for the period from 9/1/2020 through 12/31/2020 for employees earning less than \$4,000 per bi-weekly pay period
    - End of year IRS guidance in Notice 2020-65 required repayment ratably from wages paid 1/1/2021 through 3/31/2021
    - CAA extended the period of time to withhold and repay the deferred employee Social Security taxes to 12/31/2021, allowing the ratable amounts to be smaller since spread over a longer period

## CAA *(continued)*

- **“No Surprises Act” Included in CAA**
  - Builds on ACA structure; regulates providers as well as health plans and health insurance issuers
  - Focus on preventing surprise medical bills; Amends PHSA, ERISA, and the Code
    - Covers 3 categories: emergency services by non-network providers; non-network providers at network facilities; and air ambulance providers and their services

## CAA *(continued)*

- **“No Surprises Act” Included in CAA**

- Emergency Services: must cover emergency services at network rate; no greater restrictions than in-network; cost-sharing applied to in-network deductible and out-of-pocket max
- Prompt submission of either payment or denial within 30 days
- New payment audit requirement applies to health plans and health insurers
- Eliminates balance billings for emergency care

## CAA *(continued)*

- **“No Surprises Act” Included in CAA** *(continued)*

- Non-Emergency Services By Out-of-Network Provider at Network Facility: must use in-network cost-sharing; pay or deny within 30 days; pay provider directly, and count cost-sharing toward in-network deductible and in-network out-of-pocket max
  - May balance bill if provide qualifying written notice (including an estimate of charges and a list of network providers ) and receive qualifying consent from the health plan member
  - Note: ancillary services (e.g., emergency medicine, anesthesiology) cannot use notice/consent so cannot balance bill
- Similar provisions apply for air ambulance services

# CAA *(continued)*

- **“No Surprises Act” Included in CAA** *(continued)*
  - What if provider wants more?
    - Generally plan/insurer must pay at median contracted rate w/i 30 days
    - 30 days to negotiate
    - If don't agree, plan or insurer has 4 days to initiate the binding arbitration process
    - W/I 30 days, certified independent dispute resolution entity determines amount of payment by selecting one of the parties submitted offer of payment
    - Party whose offer not chosen must pay fees for arbitration process
    - HHS, DOL, IRS must establish process to certify arbitration entities

## CAA *(continued)*

- **“No Surprises Act” Included in CAA** *(continued)*
  - Effective for plan years beginning on or after **1/1/2022**
  - Regulations to implement processes are required for several components
    - Audit process for plans and health insurers: not later than 10/1/2021
    - Methodology for payment amounts: not later than 7/1/2021
    - Arbitration process, including certification process for arbitration entities: not later than 12/27/2021
    - Complaint process for providers: not later than 1/1/2022

# CAA *(continued)*

- **Other Health Provisions Included in No Surprises Act**

- Plans and insurers must provide advance estimate of benefits (EOB) within 1 day after receiving good faith estimate from provider or request from participant (as of 1/1/2022)
- All-payer claims data base to be established by states (DOL to establish standardized reporting format for voluntary reporting by health plans to State of claims, eligibility, and provider data)
- Transparency provisions: no gag clauses; disclosure of broker and consultant compensation (12/27/2021); required comparative analyses ensuring compliance with Mental Health Parity and Addiction Equity Act non-quantitative limitations (effective 2/10/2021 upon request from DOL or HHS or state insurance regulator); mandatory annual reporting on pharmacy benefits and drug costs (effective 12/27/2021)
- Many more detailed provisions—significant efforts will be required to comply

# EXECUTIVE COMPENSATION



# Executive Compensation – Code Section 162(m)

## *Applicable only to publicly-traded corporations*

- Definition of “covered employees”
  - Principal executive officer, principal financial officer, top three paid officer, and any individual who was a covered employee for any preceding year beginning after December 31, 2016
- Grandfather rule for compensatory arrangements subject to a written binding contract in effect on November 2, 2017, that are not materially modified
  - Extension of stock option post-termination exercise period is not a material modification

# Executive Compensation – Excise Tax on Excess Comp

## *Applicable only to tax-exempt employers*

- Applicable tax-exempt organizations (AETO)
- Taxable year
- Covered employees
  - Current and former employees, officers, or elected or appointed officials, certain officers
  - One of the five highest-compensated employees of the AETO for any preceding taxable year beginning after December 31, 2016
  - Medical services exception; other exceptions
- Remuneration; excess remuneration
- Excess parachute payments

# OTHER TOPICS

# California Privacy Rights and Enforcement Act (CPRA)

- CPRA replaces the California Consumer Privacy Act (CCPA)
- CPRA effective January 1, 2023, effectively delaying the CCPA rules applicable to employee information
- Notably, employers have a reprieve from responding to requests from employees to know, delete or opt-out of the data of personal information held by employers; the CCPA notice requirements remain in effect
- Applicable to information regarding employees and dependents collected by employers to administer equity compensation and employee benefit plans

*CCPA and CPRA are not applicable to tax-exempt employers, including governmental entities – but are applicable to their service providers*

# Closing and Q&A

- Submit a question using the **Q&A** engagement tool
- We will do our best to answer all questions. If we do not get to your question, feel free to reach out to your Hanson Bridgett attorney after the event.
- Share your comments about the webinar under the **Evaluation** tool
- Remember to download your CLE certificate under the **Certification** tool

Thank you for attending today's webinar!