

# Tulsa Employee Benefits Group Legislative Update

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**SECURE ACT**



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## SECURE ACT

- Setting Every Community Up for Retirement Enhancement Act (the “SECURE Act”) included with other legislation as part of 2020 spending bill.
- Enacted December 20, 2019.
- Bipartisan American Miners Act of 2019 and Taxpayer Certainty and Disaster Tax Relief Act of 2019 also impact retirement plans.



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## RMDs – AGE 72

- The age at which RMDs are required to begin has increased from 70½ to 72.
- Applies to distributions required to be made after 2019, with respect to individuals who attain age 70½ after 2019.
- Not applicable to:
  - Qualified charitable distributions from IRAs.
  - Required actuarial increases in a DB plan for active service after reaching age 70½.



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## BENEFICIARY RMDs

- Subject to significant exceptions, distribution to designated beneficiaries must be completed by end of 10<sup>th</sup> calendar year following the IRA owner/participant's death.
- Applies to IRAs and defined contribution plans (including governmental 457(b) plans).
- Effective for distributions with respect to employees who die after 2019 (2021 for governmental plans and certain collectively bargained plans).



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## BENEFICIARY RMDs

- Change does not apply to “eligible designated beneficiaries”:
  - Surviving spouse.
  - Disabled under Code § 72(m)(7).
  - Chronically ill.
  - Not more than 10 years younger than the IRA owner/participant.
  - Minor child of IRA owner/participant (upon age of majority, 10-year rule applies).



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## BENEFICIARY RMDs

- New rule eliminates the common planning technique referred to as the “stretch IRA.”
- If no “designated beneficiary” (e.g., an estate), current 5-year rule continues to apply.
- Change does not apply to certain commercial annuities in effect on 12/20/19, if participant had made irrevocable election regarding distributions prior to 12/20/19.



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## BENEFICIARY RMDs

- Special rules regarding death of beneficiary.
- When eligible designated beneficiary dies, 10-year rule applies to his or her beneficiary.
- If an employee dies before 1/1/20 and designated beneficiary dies after 12/31/19, the new rule applies to any beneficiary of the designated beneficiary.
  - Example: John Doe dies on November 1, 2019. Participant’s designated beneficiary, Jane Doe, names a new beneficiary and then dies. The 10-year rule will apply to Jane Doe’s beneficiary.



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## BIRTH OR ADOPTION WITHDRAWALS

- Applies to:
  - Qualified defined contribution plans.
  - 403(b) plans.
  - 403(a) plans.
  - IRAs.
  - Governmental 457(b) plans.
- \$5,000 maximum per birth or adoption.
- Effective for distributions made after December 31, 2019.



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## BIRTH OR ADOPTION WITHDRAWALS

- Distribution must be taken within 1 year of the birth or finalized adoption.
  - Adopted child must be under 18 or physically or mentally incapable of self-support.
  - Child cannot be child of participant's spouse.



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## BIRTH OR ADOPTION WITHDRAWALS

- Exempt from:
  - 10% early distribution penalty.
  - 20% mandatory withholding requirement.
  - 402(f) notice.
  - Direct rollover rules.



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## BIRTH OR ADOPTION WITHDRAWALS

- Qualified birth or adoption distributions can be repaid to the following types of plans:
  - Qualified defined contribution plans.
  - 403(a) and 403(b) plans.
  - IRAs.
  - Governmental 457(b) plans.
- No time frame on repayment.
- Repayment treated as direct trustee-to-trustee transfer made within 60 days.



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## BIRTH OR ADOPTION WITHDRAWALS

- Open issues:
  - Whether a plan is required to permit these withdrawals.
  - Whether a plan is required to accept repayments.
  - Tax withholding and reporting requirements if participant is eligible for another type of distribution in same year as birth or adoption.
  - Can participant avoid 10% penalty even if plan does not permit these withdrawals?



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## LIFETIME INCOME DISCLOSURE

- ERISA defined contribution plans will be required to provide a lifetime income disclosure annually.
- Must describe the amount of monthly lifetime payments the participant would be eligible to receive under single life annuity and joint and survivor annuity.
- DOL directed to issue (by 12/20/20) a model notice and prescribe assumptions for determining monthly payments. Disclosures required 1 year after guidance issued.



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## LIFETIME INCOME DISCLOSURE

- Interim final rule issued on August 18.
- IFR will be effective one year after publication in Federal Register, though DOL intends to issue a final rule that supersedes IFR.
- IFR provides assumptions to be used for commencement date, age, interest rate and mortality.
- IFR provides model language to be used in providing the explanation.



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## LONG-TERM PART-TIME EMPLOYEES

- 401(k) plans that impose a service requirement must permit participation by an employee who:
  - has worked 3 consecutive 12-month periods, and
  - completed at least 500 hours of service during each period.
- Applies only to deferrals; employer contributions not required.
- Age 21 requirement can still apply.



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## LONG-TERM PART-TIME EMPLOYEES

- Affected employees can be excluded from testing under the nondiscrimination (including safe harbor), coverage, and top-heavy rules.
  - Exclusion does not apply if eligible for other reasons, such as immediate eligibility.
  - Exclusion ends after the affected employee completes a year of service.



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## LONG-TERM PART-TIME EMPLOYEES

- For vesting in employer contributions, each 12-month period for which an affected employee has at least 500 hours of service must be counted as a year of vesting service.
- It is unclear whether this rule ends when the affected employee completes a year of service.



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## LONG-TERM PART-TIME EMPLOYEES

- Effective for plan years beginning after 12/31/20.
- 12-month periods of service prior to 1/1/21 will not be taken into account.
- The first year that an employee could become eligible under the new rule would be 2024.
- Not applicable to collectively bargained plans.



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## IN-SERVICE DISTRIBUTIONS AT AGE 59 1/2

- Defined benefit plans, money purchase pension plans, and governmental 457(b) plans may now permit in-service distributions at age 59½ (previously 62).
- Effective for plan years after 12/31/19.
- Included in Bipartisan American Miners Act.
- Not clear if amendment timing provisions of SECURE Act also apply to plan amendments for this change.



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## SAFE HARBOR 401(K) PLANS

- Two changes for safe harbor 401(k) plans that utilize nonelective contributions (rather than matching contributions).
- Effective for plan years beginning after 12/31/19.
- Change #1: Annual notice requirement eliminated for safe harbor 401(k) plans that utilize nonelective safe harbor contributions (rather than matching contributions).



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## SAFE HARBOR 401(K) PLANS

- Change #2: A plan can be amended to become a safe harbor plan utilizing nonelective contributions:
  - Any time before the 30<sup>th</sup> day before the end of the plan year (3% contribution can be used), or
  - By the last day of following plan year, if the nonelective contribution is at least 4%.



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## PLAN LOAN LIMITATION

- Plans are not allowed to use credit card or similar type arrangements for distribution of plan loans.
- Effective for loans made after December 20, 2019.



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## INCREASED FAILURE TO FILE PENALTIES

- Form 5500: Increased from \$25 to \$250 a day with the maximum penalty for any failure increased from \$15,000 to \$150,000.
- Form 8955-SSA: Increased from \$1 to \$10 a day for each plan participant with respect to whom the failure applies with the maximum penalty imposed for a plan year increased from \$5,000 to \$50,000 (maximum penalty for failure to report changes increased from \$1,000 to \$10,000).
- Withholding Notice: Increased from \$10 to \$100 per each failure with the maximum penalty increased from \$5,000 to \$50,000.



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## AMENDMENT DEADLINES

- SECURE Act amendments: Last day of the first plan year beginning on or after 1/1/22 (1/1/24 for governmental and collectively bargained plans).
- Further guidance needed regarding deadline for age 59½ in-service distributions from pension plans and governmental 457(b) plans.



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## AMENDMENT DEADLINES

- Amendments for disaster-related distributions and loans are required on or before last day of the plan year beginning on or after 1/1/20 (1/1/22 for governmental plans).



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## FIDUCIARY SAFE HARBOR - ANNUITY SELECTION

- ERISA fiduciary provision amended to provide safe harbor guidelines for plan fiduciaries that select lifetime income options for defined contribution plans.
- Fiduciaries that comply with the requirements not liable for losses resulting from insurer's inability to satisfy its financial obligations.
- No requirement to select lowest cost insurer.



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## FIDUCIARY SAFE HARBOR - ANNUITY SELECTION

- Fiduciary must:
  - Engage in objective thorough and analytical search.
  - Consider and obtain written representations regarding financial capability of insurer.
  - Consider cost of contract relative to benefits and services under the contract.



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## PORTABILITY OF LIFETIME INCOME OPTION

- If a plan discontinues a “lifetime income investment” (generally, an annuity option), a participant can take distribution of that option even if no distributable event.
- Applies to qualified defined contribution plans, 403(b) plans and governmental 457(b) plans.
- Can be rolled over to an IRA or taken as an in-kind distribution of an annuity contract.
- Effective for plan years beginning after 12/31/19.



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## QACAs

- For plans that use the automatic enrollment safe harbor design (qualified automatic contribution arrangements, or QACAs), the maximum percentage to which automatic deferrals can be increased has changed from 10% to 15%.
- For first year of plan participation, 10% is still the maximum automatic deferral percentage.
- Effective for plan years beginning after 12/31/19.



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## MULTIPLE EMPLOYER PLANS

- Unrelated employers can participate in a multiple employer plan if “pooled plan provider” used to administer the plan.
- Plan will be treated as a single employer plan.
- Many requirements apply to pooled plan providers and pooled employer plans.



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## MULTIPLE EMPLOYER PLANS

- “One bad apple” rule eliminated for multiple employer plans that:
  - Are maintained by employers that have a common interest other than having adopted the plan, or
  - Have a pooled plan provider.
- Effective for plan years beginning after 12/31/20.



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## RELIEF FOR CLOSED DEFINED BENEFIT PLANS

- Subject to detailed requirements:
  - Closed DB Plans deemed to pass benefits, rights & features testing.
  - Closed DB Plans permitted to aggregate with DC plans for testing.
  - Frozen/closed plans deemed to satisfy minimum participation requirements.
- Effective 12/20/19, but sponsors can elect to apply retroactively to plans years beginning after 12/31/13.



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## DIFFICULTY OF CARE PAYMENTS

- Certain “qualified foster care payments” include “difficulty of care payments,” which are excluded from income.
- Difficulty of care payments:
  - Increase the IRA contribution nondeductible limit.
  - Increase compensation for 415 purposes.



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## DIFFICULTY OF CARE PAYMENTS

- A plan contribution based on this increase is treated as an after-tax contribution and a plan does not fail other Code requirements by permitting such contribution.
- For IRAs, effective for contributions made after 12/20/19.
- For defined contribution plans, effective for plan years beginning after 12/31/15.



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## DISASTER-RELATED RELIEF

- The following distribution, hardship and loan relief applies to disasters that were declared by the President as major disasters during the period beginning 1/1/18 and ending on 2/18/20.
  - California wildfire disaster area excluded.
- Plan amendments to implement these provisions are required on or before the last day of the first plan year beginning on or after 1/1/20 (1/1/22 for governmental plans).



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## DISASTER-RELATED RULES – DISTRIBUTIONS

- “Qualified disaster distributions” up to \$100,000 can be taken on or after the first day of the incident period of a qualified disaster and before 6/17/20.
- Must have principal place of abode in a presidentially-declared disaster area.
- Must have sustained an economic loss because of disaster.
- QDD can be made from an “eligible retirement plan” (401(a) plan, 403(a) plan, 403(b) plan, governmental 457(b), IRA).



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## DISASTER-RELATED RULES – DISTRIBUTIONS

- Exempt from 10% early distribution penalty, 20% mandatory withholding, and 402(f) notice.
- Can be included in income ratably over a 3-year period.
- Can be contributed back into a qualified plan or IRA for up to 3 years after the distribution.



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## DISASTER-RELATED RULES - HARDSHIP

- If a hardship distribution was taken for the purchase or construction of a principal residence but was not used due to a qualified disaster, such amounts can be re-contributed to the plan.
- Applies to hardship distributions taken during the period beginning on the date that is 180 days before the first day of the disaster incident period and ending on date that is 30 days after the last day of the disaster incident period.



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## DISASTER-RELATED RULES - LOANS

- Maximum loan limit for “qualified individuals” is increased to the lesser of (i) \$100,000, or (ii) the greater of 100% of the vested benefit or \$10,000.
- A “qualified individual” is an individual whose principal place of abode is located within a qualified disaster area and who has sustained an economic loss by reason of such qualified disaster.
- Applies from 12/20/19 through 6/17/20.



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## DISASTER-RELATED RULES - LOANS

- Loan repayments for “qualified individuals” can be extended for up to 1 year (or if later, until 180 days after enactment of the Disaster Tax Relief Act, which is June 17, 2020).
- Subsequent loan repayments will be adjusted to reflect the delay and interest that accrues.
- Applies to due dates occurring during the period beginning on the first day of the disaster incident period and ending on the date that is 180 days after the last day of the disaster incident period.



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## DISASTER-RELATED DEADLINE EXTENSIONS

- Extensions apply to federally declared disasters declared after December 20, 2019.
- Certain deadlines for filing tax returns, paying taxes and performing certain other acts automatically extended by 60 days for certain individuals affected by federally declared disasters.
- Automatic 60-day extension for making contributions to a qualified retirement plan for employer to obtain tax deduction, completing rollovers, withdrawing excess IRA contributions, and recharacterizing IRA contributions (unclear if applicable to Forms 5500 or RMDs).



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## NON-QCCOs IN 403(B)(9) PLANS

- SECURE Act clarifies that non-qualified church-controlled organizations (“non-QCCOs”) are eligible to participate in 403(b)(9) church retirement income arrangements.
- Effective for years beginning before, on or after December 20, 2019.



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## TERMINATION OF 403(B) CUSTODIAL ACCOUNTS

- Treasury directed to issue guidance (by June 20, 2020) to permit a 403(b)(7) custodial account to be distributed in kind to permit termination of plan.
- 403(b)(1) annuity contract arrangements can already do this.
- Guidance will be retroactively effective for taxable years beginning after 12/31/08.



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## DEADLINE FOR PLAN ADOPTION

- An employer will be treated as having adopted a stock bonus, pension, profit-sharing, or annuity plan as of the last day of a taxable year if such plan is adopted by the due date (including extensions) for the employer's tax return of the applicable year.



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## SMALL EMPLOYER TAX CREDITS

- Employers with less than 100 employees:
  - Can receive tax credits for 3 years equal to 50% of certain costs incurred in connection with starting a retirement plan. SECURE Act increases maximum credit from \$500 to \$5,000 per year.
  - That add an automatic enrollment feature are eligible to receive tax credits up to \$500 for each of first 3 years automatic enrollment added.
- Effective taxable years beginning after 12/31/19.



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## CARES ACT – RETIREMENT PLANS



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## CRDs AND LOANS

- IRS Q&A confirms that it is optional for employers to adopt distribution and loan provisions.
- An employer is permitted to choose whether, and to what extent, to provide for coronavirus-related distributions and/or loan changes under the CARES Act.



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## QUALIFIED INDIVIDUALS

- Individual diagnosed with SARS-CoV-2 or with COVID-19 by a CDC-approved test.
- Individual whose spouse or Code § 152 dependent is diagnosed with SARS-CoV-2 or with COVID-19 by a CDC-approved test.



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## QUALIFIED INDIVIDUALS

- Individual who experiences adverse financial consequences as a result of:
  - Being quarantined, furloughed or laid off or having work hours reduced due to SARS-CoV-2/COVID-19.
  - Being unable to work due to lack of child care due to SARS-CoV-2/COVID-19.
  - Closing or reducing hours of business owned or operated by the individual due to SARS-CoV-2/COVID-19.



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## QUALIFIED INDIVIDUALS

- [Notice 2020-50] Individual who experiences adverse financial consequences as a result of:
  - the individual having a reduction in pay/self-employment income due to COVID-19 or having a job offer rescinded or start date for a job delayed due to COVID-19;



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## QUALIFIED INDIVIDUALS

- [Notice 2020-50] Individual who experiences adverse financial consequences as a result of:
  - the individual's spouse or member of individual's household being quarantined, furloughed or laid off, or having work hours reduced due to COVID-19, being unable to work due to lack of childcare due to COVID-19, having a reduction in pay/ self-employment income due to COVID-19, or having a job offer rescinded or start date for a job delayed due to COVID-19; or



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## QUALIFIED INDIVIDUALS

- [Notice 2020-50] Individual who experiences adverse financial consequences as a result of:
  - closing or reducing hours of a business owned or operated by the individual's spouse or a member of the individual's household due to COVID-19.



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## QUALIFIED INDIVIDUALS

- Plan administrator can rely on employee's certification that the employee meets the applicable conditions to be a qualified individual.
- IRS Q&A adds "unless the administrator has actual knowledge to the contrary" – which is not in the statute.
- Notice 2020-50 clarifies that administrator is not required to inquire.
- Notice 2020-50 provides sample certification.



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## CORONAVIRUS-RELATED DISTRIBUTIONS

- Amount:
  - Plan: Aggregate CRDs may not exceed \$100,000 from all plans maintained by an employer and any member of the employer's controlled group.
  - Taxpayer: IRS Q&A refers to "[a]ggregate limit of \$100,000 from all plans and IRAs."
  - CRD can be made from an "eligible retirement plan" (401(a) plan, 403(a) plan, 403(b) plan, governmental 457(b), IRA).



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## CORONAVIRUS-RELATED DISTRIBUTIONS

- Timing:
  - Statute: Distribution made on or after January 1, 2020, and before December 31, 2020.
  - IRS Q&A: Distribution made from January 1, 2020, to December 30, 2020.



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## CORONAVIRUS-RELATED DISTRIBUTIONS

- A qualified individual can treat a distribution as a CRD on his or her tax return even if an employer does not treat a distribution as coronavirus-related under the employer's plan.



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## CORONAVIRUS-RELATED DISTRIBUTIONS

- Notice 2020-50:
  - Distribution received by a qualified individual as a beneficiary can be treated as a CRD (but not recontributed).
  - Reduction or offset of a qualified individual's account balance to repay a plan loan is permitted to be treated as a CRD.
    - However, loans that are treated as deemed distributions are not CRDs.
  - Generally, corrective distributions (e.g., 402(g); ADP/ACP corrections) are not CRDs.



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## CORONAVIRUS-RELATED DISTRIBUTIONS

- A CRD is treated as satisfying the distribution restrictions otherwise applicable to 401(k), 403(b) and governmental 457(b) plans.
- Other distribution limits are not changed.
  - For example, early distribution not permitted for a money purchase pension plan. (Keep in mind SECURE Act change re age 59½.)



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## CORONAVIRUS-RELATED DISTRIBUTIONS

- The 10% additional tax on early distributions does not apply to a CRD.
- CRD can be included in income ratably over a 3-year period, starting with year of distribution.
  - Employee can choose to include entire distribution in income for 2020.



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## CORONAVIRUS-RELATED DISTRIBUTIONS

- CRDs subject to 10% withholding unless employee makes a different withholding election.
- 402(f) notice not required.
- Notice 2020-50:
  - Plan must report CRD on Form 1099-R, even if repaid in the same year.
  - Plans permitted to use code 2 (early distribution exception applies) or code 1 (early distribution, no known exception) in box 7.



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## CORONAVIRUS-RELATED DISTRIBUTIONS

- A CRD may be repaid to an IRA, qualified plan, 403(a) plan, 403(b) plan, or governmental 457(b) plan in 1 or more payments.
- Repayment can be made at any time during the 3-year period beginning on the day after receipt of the distribution.
- Repayment of CRD will be treated as though repaid in a direct trustee-to-trustee transfer so that participant does not owe federal income tax on the distribution.



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## CORONAVIRUS-RELATED DISTRIBUTIONS

- Form 8915-E will be used by recipient to report receipt of a CRD and repayment of a CRD.
- Notice 2020-50 provides examples of how distributions are included in income and how repayments at various times are reported by the taxpayer.



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## CORONAVIRUS-RELATED DISTRIBUTIONS

- Notice 2020-50: “In general, it is anticipated that eligible retirement plans will accept recontributions of coronavirus-related distributions, which are to be treated as rollover contributions. However, eligible retirement plans generally are not required to accept rollover contributions. For example, if a plan does not accept any rollover contributions, the plan is not required to change its terms or procedures to accept recontributions of coronavirus-related distributions.”



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## INCREASED LOAN LIMITS

- Applies for plan loans made to a qualified individual from March 27, 2020, to September 22, 2020.
- \$50,000 loan maximum can be increased to \$100,000.
- 50% of vested benefit loan limitation can be increased to 100% of the vested benefit.



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## LOAN PAYMENT DEFERRALS

- If a loan is outstanding on or after March 27, 2020, and any repayment on the loan is due from March 27, 2020, to December 31, 2020, that due date may be delayed under the plan for up to one year.
- In determining the 5-year maximum term of the loan, the 1-year delay is disregarded.



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## LOAN PAYMENT DEFERRALS

- Notice 2020-50 provides repayment safe harbor:
  - Suspension ends at 12/31/20.
  - Loan term extended by 1 year from date loan was originally due to be repaid.
  - Loan payments at end of suspension period are reamortized to repay loan over extended term.



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## LOAN PAYMENT DEFERRALS

- IRS acknowledges other administration options.
  - Suspension period ends at 1-year anniversary.
  - Payments begin at 1/2020 in original amount.
  - When suspension period ends, payments reamortized to repay loan over extended term.



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## 2020 RMD WAIVER

- Applies to defined contribution 401(a) plans, 403(a) and 403(b) plans, governmental 457(b) plans and for IRAs.
- Affected individuals:
  - Already receiving RMDs (70½ or retired before 2019).
  - Turned 70½ (or retired, if later) in 2019 but didn't take first RMD in 2019.
- Per Notice 2020-51, also applies to those with an April 1, 2021 RBD due to retirement.



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## 2020 RMD WAIVER

- For beneficiary distributions that are subject to a 5-year payout period, 2020 is disregarded in calculating the 5-year payout period.
- Extension also provides a surviving spouse an additional year to commence lifetime income payments if commencement was otherwise due in 2020.



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## 2020 RMD WAIVER

- In Notice 2020-51, IRS provided model amendments for plan sponsor use.
- Includes election regarding whether 2020 MRDs were eligible for direct rollover from the plan.



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## 2020 RMD WAIVER – NOTICE 2020-51

- Distributions paid in 2020 (or paid in 2021 for 2020 calendar year for employee with 4/1/21 required beginning date) that are equal to RMD amount or are part of certain periodic payments can be rolled over into eligible retirement plan.
- 60-day rollover deadline extended to August 31, 2020.
- Distributions can be rolled over back into the same plan if the plan permits rollovers.



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## 2020 RMD WAIVER – NOTICE 2020-51

- If plan made 2020 distribution that would have been an RMD but for SECURE Act change, plan will not have a failure due to not treating it as eligible for rollover and not providing 402(f) notice.
- Anti-cutback relief not provided in certain situations. For example, if plan permits distribution of amounts equal to 2020 RMD without regard to CARES Act waiver, then amendment to eliminate that right would violate anti-cutback rules.



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## 2020 RMD WAIVER – NOTICE 2020-51

- CARES Act waives RMD for 2020 regardless of whether the employee's required beginning date is 4/1/21.
- Example:
  - Employee attains age 70½ before 1/1/20 and retires in 2020. Thus, RBD is 4/1/21.
  - Employee is not required to receive RMD for 2020 before 4/1/21, but must still receive RMD for 2021 by 12/31/21.
  - A 2021 distribution is an RMD for 2021 up to the total RMD amount for 2021 (even if made before 4/1/21) and may not be rolled over. Additional 2021 distributions could be rolled over.



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## PENSION PLAN FUNDING RELIEF

- The due date for single-employer plan minimum funding contributions that would otherwise be due during 2020 is delayed to January 1, 2021.
- The amount of the minimum required contribution will be increased by interest accruing from the original due date and the payment date, at the effective rate of interest for the plan for the plan year which includes the payment date.



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## PENSION PLAN FUNDING RELIEF

- This extension is only applicable to minimum required contributions under Code § 430. Funding obligations from other sources (such as a collective bargaining agreement or a PBGC agreement) are not necessarily delayed.
- Notice 2020-61 (August 6, 2020) provides Q&A guidance.
  - Form 5500 due date not delayed.
  - No extension of due date for contributions to be deductible.



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## PENSION PLAN BENEFIT RESTRICTION RELIEF

- For purposes of applying the limitations applicable under Code § 436 (which can impact payment of accelerated benefit distributions and accrual of certain benefits), a plan sponsor may elect to treat a pension plan's adjusted funding target attainment percentage (AFTAP) for the last plan year ending before January 1, 2020, as the AFTAP for plan years that include calendar year 2020.



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## REGULATORY ITEMS – RETIREMENT PLANS



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## ELECTRONIC DISCLOSURE

- Final regulations issued on May 27, 2020 and effective July 27, 2020.
- Applicable to retirement plans only.
- Provide two new safe harbors for electronic disclosure which are in addition to existing safe harbor regulation.
- Applicable to documents required by ERISA or DOL regulations – not to disclosures required under Internal Revenue Code.



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## ELECTRONIC DISCLOSURE

- Notice and Access Safe Harbor
  - Documents are made available online; participants are provided a notice of internet availability.
  - Notice of availability must be sent to electronic address provided by the recipient or assigned by the employer for employment-related purposes.
  - In some cases a single notice of availability can be used for multiple notices.
  - Initial paper notice required, which identifies electronic address that will be used.



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## ELECTRONIC DISCLOSURE

- Direct Email Safe Harbor
  - Documents sent via email are made available online; participants are provided a notice of internet availability when documents are posted.
  - Initial paper notice and certain other requirements of notice and access safe harbor are applicable.



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## NOTICE 2020-52 – SAFE HARBOR PLANS

- Amendment reducing or suspending safe harbor contributions adopted between March 13 and August 31, 2020 permitted even if (i) not operating at economic loss or (ii) right to reduce not specified in safe harbor notice.
- For reduction of nonelective contributions, 30-day advance notice not required if (i) notice provided no later than August 31, 2020 and (ii) plan amendment adopted no later than effective date of reduction or suspension.
  - This notice relief is not available for safe harbor matching contributions.



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## NOTICE 2020-52 – SAFE HARBOR PLANS

- Clarifies that a reduction of contributions only for HCEs is not a reduction or suspension of safe harbor contributions, but would require compliance with safe harbor mid-year change notice requirements.



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## IRS Q&A RE PARTIAL TERMINATION

- IRS Q&A clarifies that, generally, employees are not treated as having an employer-initiated severance for partial termination purposes if they are rehired by the end of the applicable period.
- Thus, employees terminated due to COVID-19 and rehired by the end of 2020 generally would not be treated as having an employer-initiated severance for purposes of determining whether a partial termination occurred during the 2020 plan year.



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## 402(F) NOTICE

- Model 402(f) notice issued in Notice 2020-62 (August 6, 2020).
- Reflects SECURE Act RMD change.
- Reflects CARES Act coronavirus-related distributions qualified birth or adoption distributions.



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## “NEW” FIDUCIARY RULE

- On June 29, 2020, the DOL issued new guidance regarding the regulation of investment advice under ERISA and the Code.
  - Proposed prohibited transaction exemption that would permit compensation as a result of providing fiduciary investment advice if provided in accordance with certain “impartial conduct standards.”
  - Technical amendment to existing regulations to reinstate the five-part terms for defining an investment advice fiduciary and prior guidance regarding participant investment education.



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## “NEW” FIDUCIARY RULE

- Comments provided by DOL on how rollover advice is analyzed as part of five-part test.
- Certain prohibited transaction exemptions that were based on the vacated 2016 rule were removed and other exemptions were returned to their form in effect prior to 2016.



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## COVID-19 LEGISLATION AND GUIDANCE – WELFARE PLANS



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## COVID-19 LEGISLATION

- Families First Coronavirus Response Act (“FFCRA”) – signed into law on March 18, 2020.
- Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) – signed into law on March 27, 2020.
- The FFCRA and CARES Act include several provisions impacting health and welfare plans.



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## COVID-19 TESTING

### Tests Required to be Covered

- Under the FFCRA, group health plans must cover:
  - COVID-19 diagnostic testing approved by the U.S. Food and Drug Administration; and
  - Items and services furnished during an office, telehealth, urgent care center, or emergency room visit relating to the test or evaluation of the need for the test.
- Must provide coverage without cost-sharing (such as deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements.



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## COVID-19 TESTING

### Tests Required to be Covered

- The CARES Act extended this coverage requirement to additional categories of COVID-19 diagnostic testing, including testing:
  - for which the developer has requested or intends to request emergency authorization;
  - developed in and authorized by a State; or
  - otherwise identified in subsequent guidance.



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## COVID-19 TESTING

### Regulation of the Price of Testing

- A plan must reimburse the provider at the rate that the plan had negotiated before the public health emergency.
- If no negotiated rate, the plan must reimburse at the cash price listed by the provider on a public website (or negotiate a lower price).
- Providers must publish the cash price on a public website or potentially be subject to penalties.
- Per FAQ 43, this applies to testing but not other items and services.



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## FAQ GUIDANCE ON TESTING

- April 11 FAQs clarify that the COVID-19 coverage requirements:
  - Apply to insured and self-insured group health plans, including church plans;
  - Do not apply to excepted benefits or group health plans that do not cover at least two current employees (e.g., retiree-only plans).
- Must comply with the COVID-19 coverage requirements as of March 18, 2020 and throughout the public health emergency related to COVID-19.



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## FAQ GUIDANCE ON TESTING

- If other tests are performed during a visit, and the visit results in COVID-19 testing, the plan must provide coverage for the related tests (without cost-sharing, prior authorization or other medical management requirements).
  - Examples of other tests are influenza tests and blood tests.
  - Coverage must be provided when medically appropriate, as determined by the attending provider.
- These requirements apply to items and services furnished by out-of-network providers.



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## FAQ GUIDANCE ON TESTING

- Plans may not impose cost-sharing requirements, prior authorization requirements or medical management requirements for mandated benefits.
- “Items and services must be covered without cost sharing when medically appropriate for the individual, as determined by the individuals’ attending health care provider in accordance with accepted standards of current medical practice.”



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## FAQ GUIDANCE ON TESTING

- FAQ 43 issued on June 23 provides additional guidance:
  - Health care provider does not have to be “directly” responsible for providing care to patient to be considered an attending provider, if provider makes an individualized clinical assessment of the individual.
  - At-home testing must be covered if other requirements are satisfied.



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## FAQ GUIDANCE ON TESTING

- FAQ 43 issued on June 23 provides additional guidance:
  - Coverage not required for testing conducted to screen for general workplace health and safety (such as employee “return to work” programs), for public health surveillance, or for any other purpose not primarily intended for individualized diagnosis or treatment.
  - Multiple tests must be covered if other requirements are satisfied.
  - Facility fee must be covered without cost-sharing if related to furnishing of test or evaluation of need for test.



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## FAQ GUIDANCE ON SBCs AND NOTICES

- Plans must normally provide 60 days advance notice of material modifications affecting the terms of a summary of benefits and coverage (“SBC”).
- The agencies will not take enforcement action against a plan that makes a change without providing 60 days advance notice to:
  - Provide greater coverage for the diagnosis and/or treatment of COVID-19.
  - Add benefits, or reduce or eliminate cost sharing, for telehealth and other remote care services.
- Plans must provide notice of the changes as soon as reasonably practicable.



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## FAQ GUIDANCE ON SBCS AND NOTICES

- Relief only applies to changes made while a public health emergency declaration or national emergency declaration related to COVID-19 is in effect.
- The agencies will take action against plans that limit other benefits or increase cost-sharing to offset the costs of increasing COVID-19 benefits.
- If a plan reverses benefit changes when the public health emergency ends, a plan will have satisfied its obligation to provide advance notice of a material modification if the plan had previously given notice of the general duration of the changes (e.g., only during the public health emergency) or provides such notice within a reasonable timeframe before reversal.



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## FAQ GUIDANCE ON EAPs AND ON-SITE CLINICS

- Under the ACA, an employee assistance program (“EAP”) is an “excepted benefit” if it satisfies certain requirements (e.g., it does not provide significant benefits in the nature of medical care).
- An EAP that offers benefits for COVID-19 testing while a public health emergency declaration or a national emergency declaration is in effect will be considered an “excepted benefit” and will not be considered to provide benefits that are significant in the nature of medical care.
- An on-site clinic may also offer benefits for diagnosis and testing for COVID-19 and still be considered an “excepted benefit.”



100

## CARES ACT – HSAs, FSAs AND HRAs

- The CARES Act permits the following items to qualify for tax-favored reimbursement from HSAs, HRAs, and health FSAs:
  - Over-the-counter drugs without a prescription; and
  - Menstrual care products.
- These changes are effective for expenses incurred after December 31, 2019.



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## CARES ACT – TELEHEALTH

- HDHPs may cover telehealth and other remote services without applying a deductible and without jeopardizing a participant's ability to make HSA contributions.
- This change is effective March 27, 2020 and applies for plan years beginning on or before December 31, 2021.



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## TELEHEALTH – FAQ GUIDANCE

- June 23 FAQ guidance: Large employers can offer telehealth benefits to employees that are not eligible for coverage under another plan, without application of ACA group market reforms.
- Applicable for the duration of any plan year beginning before the end of the public health emergency related to COVID-19.



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## CARES ACT – PREVENTIVE SERVICES AND VACCINES

- The CARES Act requires group health plans to cover COVID-19 preventive services and vaccines without cost-sharing in the same manner as other preventive services required under the ACA.
- Under the ACA, a plan is not required to cover a preventive service or item until a year or more after the service or vaccine receives the required recommendation for coverage.
- For COVID-19 preventive services and vaccines, the CARES Act requires plans to cover these services and vaccines within 15 business days after the required recommendation.



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## CARES ACT – PROTECTED HEALTH INFORMATION

- The CARES Act directs the Secretary of HHS to issue guidance related to the sharing of patients' protected health information during the COVID-19 public health emergency.
- Guidance must be issued within 180 days of the enactment of the CARES Act.
- HHS has issued a few bulletins reminding covered entities that the privacy rule still applies during the COVID-19 crisis and providing guidance on the ways in which patient information may be shared under HIPAA.



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## EXTENSION OF CERTAIN PLAN DEADLINES

- On April 28, 2020, the DOL and IRS issued a notification of relief that extends certain plan deadlines.
- The notification of relief requires benefit plans to disregard the “Outbreak Period” when determining whether certain deadlines have been satisfied.
  - “Outbreak Period” – the period from March 1, 2020 until 60 days after the announced end of the COVID-19 national emergency or such other date announced by the DOL and the IRS in a future notice.
- The plans subject to the relief are group health plans, disability plans, and other welfare plans subject to ERISA or the Code.



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## EXTENSION OF CERTAIN PLAN DEADLINES

- Affected plans must disregard the Outbreak Period in determining:
  - The 30-day period (or 60-day period for certain rights relating to Medicaid and CHIP) to request special enrollment.
  - The 60-day election period for COBRA continuation coverage.
  - The date for making COBRA premium payments.
  - The date for individuals to notify the plan of a qualifying event or determination of disability with respect to COBRA coverage.



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## EXTENSION OF CERTAIN PLAN DEADLINES

- Plans subject to the notification must disregard the Outbreak Period in determining:
  - The date within which individuals may file a benefit claim.
  - The date within which claimants may file an appeal of an adverse benefit determination.
  - The date within which claimants may file a request for an external review.
  - The date within which a claimant may file information to perfect a request for external review upon a finding that the request was not complete.



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## EXTENSION OF CERTAIN PLAN DEADLINES

### Relief for Group Health Plans

- The Outbreak Period will be disregarded when determining the date a group health plan must provide a COBRA election notice.



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## CAFETERIA PLAN GUIDANCE

- On May 12, 2020, the IRS issued two notices providing employers additional flexibility with respect to cafeteria plans, health FSAs, and dependent care FSAs:
  - Notice 2020-29: provides guidance relating to mid-year election changes, extended claims periods, and HDHPs.
  - Notice 2020-33: provides guidance relating to carryovers from health FSAs.



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## MID-YEAR ELECTION CHANGES

- Notice 2020-29 expands the mid-year election changes permitted under cafeteria plans with respect to employer-sponsored coverage, health FSAs, and dependent care FSAs during calendar year 2020.
- An employer is permitted, but not required, to allow one or more of these changes, provided any changes:
  - are prospective; and
  - comply with applicable nondiscrimination rules.
- The relief may be applied retroactively to January 1, 2020 for cafeteria plans that permitted mid-year election changes consistent with these requirements prior to the issuance of the notice.



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## MID-YEAR ELECTION CHANGES

### Election Changes for Employer-Sponsored Coverage

- With respect to employer-sponsored coverage, an employer may permit an employee to:
  - Make a new election, if the employee initially declined to enroll;
  - Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer (including changing enrollment from self-only coverage to family coverage); and
  - Revoke an existing election, provided the employee attests in writing that he/she is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer.



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## MID-YEAR ELECTION CHANGES

### Election Changes for Employer-Sponsored Coverage

- The employer may rely on the written attestation of an employee unless the employer has actual knowledge that the employee is not, or will not be, enrolled in other comprehensive health coverage.
- The notice includes an example of an acceptable attestation.



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## MID-YEAR ELECTION CHANGES

### Election Changes for Health or Dependent Care FSAs

- An employer may permit an employee to revoke an existing election, make a new election, or decrease or increase an existing election for health and dependent care FSAs.
- Employers are permitted to limit mid-year election changes under health FSAs and dependent care FSAs to amounts no less than amounts already reimbursed.



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## EXTENDED CLAIMS PERIOD

- Cafeteria plans may be amended to allow participants until December 31, 2020 to spend unused amounts remaining in a health FSA or dependent care FSA at the end of a grace period or plan year ending in 2020.
- Applies to cafeteria plans with either a grace period or carryover feature.
  - However, calendar year plans with a carryover are not able to use this relief.



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## EXTENDED CLAIMS PERIOD

### Example:

- Health FSA has a plan year ending June 30, 2020 and a \$500 carryover.
- The plan can be amended to permit claims incurred through December 31, 2020 to be paid from amounts contributed for the plan year ending June 30, 2020.
- Employee has \$1,900 remaining as of June 30, 2020. Employee can use those funds to pay for expenses incurred through December 31, 2020.
  - Normally, only \$500 would be eligible to be carried over beyond June 30, 2020.



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## EXTENDED CLAIMS PERIOD

- An individual with unused amounts in a health FSA who is allowed an extended period to incur expenses will not be eligible to contribute to an HSA during the extended period, unless the health FSA is an HSA-compatible health FSA.
- The extended claim period provision applies January 1, 2020 through December 31, 2020.



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## AMENDMENTS

- Plan amendments to reflect the additional mid-year election changes or extended claims period for the 2020 plan year must be adopted on or before December 31, 2021.
- The amendment may be effective retroactively to January 1, 2020, but the plan must operate in accordance with the notice and inform all eligible employees of the changes.



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## CARRYOVERS

- Prior to Notice 2020-33, health FSAs could permit up to \$500 in unused amounts in a participant's health FSA to be carried over to pay or reimburse medical care expenses incurred in next year.
- Notice 2020-33 adjusts the maximum carryover to an amount equal to 20% of the maximum health FSA contribution for that plan year.
- The maximum amount that can be carried over from a plan year starting in 2020 is \$550 (20% of \$2,750, the indexed 2020 health FSA limit).



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## CARRYOVERS

- Plan amendments:
  - Generally must be adopted on or before the last day of the plan year from which amounts may be carried over;
  - For the 2020 plan year, must be adopted on or before December 31, 2021 and may be effective retroactively to January 1, 2020.
- Retroactive amendments permitted only if the plan operates in accordance with the change and notifies eligible employees.
- An employer will need to decide whether to automatically incorporate future increases.



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## PROPOSED COVID-19 LEGISLATION

- Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act (H.R. 6800) - passed by the House on May 15, 2020.
- Includes provisions impacting health plans, cafeteria plans, health FSAs, and dependent care FSAs, including:
  - A 100% subsidy of health plan premiums from March 1, 2020 through January 31, 2021 for terminated workers enrolled in COBRA and furloughed workers remaining on health plans.
  - Provision of relief funds by health care providers would be conditioned on the agreement of the provider not to balance bill patients for certain COVID-19-related items or services.



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## PROPOSED COVID-19 LEGISLATION

- Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act (H.R. 6800) - passed by the House on May 15, 2020.
- Additional provisions impacting group health plans include:
  - A requirement to cover items and services for the treatment of COVID-19 with no cost-sharing during the public health emergency;
  - A requirement to notify participants about whether the plan will waive time restrictions on refills of prescription drugs;
  - Additional notification to qualified beneficiaries about the availability of ACA marketplace coverage; and
  - A requirement to cover COVID-19 testing before the enactment of the FFCRA.



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## PROPOSED COVID-19 LEGISLATION

- Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act (H.R. 6800) - passed by the House on May 15, 2020.
- Additional provisions impacting cafeteria plans, health FSAs, and dependent care FSAs include:
  - Permitting cafeteria plans, health FSAs, and dependent care FSAs to allow carryovers of certain amounts from the plan year ending in 2020 to the plan year ending in 2021.
  - Permitting cafeteria plans or health care FSAs to allow employees to make one election change during 2020.
  - Permitting cafeteria plans, health FSAs, and dependent care FSAs to provide an extension of the grace period for the 2020 plan year to a maximum of 12 months after the end of the 2020 plan year.



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## PROPOSED COVID-19 LEGISLATION

- Health, Economic Assistance, Liability Protection and Schools (HEALS) Act – proposed by Senate Republicans on July 27.
  - Permits carryovers of health and dependent care FSA balances from 2020 to 2021.
  - Telehealth can be provided as an excepted benefit for employees who are not eligible for employer's health coverage (temporary).
  - Access to full service onsite clinic would not prevent HSA contributions through 2021.



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## REGULATORY ITEMS – WELFARE PLANS



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## EMPLOYER MANDATE

- Still applies despite elimination of individual mandate penalty.
- In June 2020, Treasury Inspector General issued report encouraging stricter enforcement.
  - Report noted that revenues from employer mandates are significantly below assumptions made by the Congressional Budget Office.
- Affordability threshold for 2021 will be 9.83%.



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## SECTION 1557

- ACA section 1557 prohibits nondiscrimination on the basis of race, color, national origin, sex, age, or disability in certain federally funded health programs or activities.
- Initial regulation issued in 2016 was the subject of litigation relating to gender identity protections.
- New final regulation, issued on June 12, 2020, provided that sex would be interpreted as “biological sex” (reversing approach in 2016 regulations).
- These regulations have now been enjoined following the Supreme Court decision in *Bostock v. Clayton County*, which held that an employer who fires an individual merely for being gay or transgender violates Title VII.



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## CADILLAC TAX

- The Cadillac tax was a 40% excise tax on certain high-cost employer-sponsored health care plans to the extent that the annual cost for an employee exceeds a threshold amount.
- The Cadillac tax was originally effective in 2018, but was delayed until 2022.
- The Cadillac tax was then repealed at the end of 2019 as part of the budget legislation.



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## PCORI FEE

- The PCORI fee is a fee imposed on certain health insurance policies and plan sponsors of certain self-insured health plans.
- The fee was originally imposed for each plan or policy year ending after September 30, 2012, and before October 1, 2019.
- The budget legislation enacted at the end of 2019 extended the fee through plan years ending before October 1, 2029.



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## SUMMARY OF BENEFITS AND COVERAGE

- A new template for Summaries of benefits and coverage (SBCs) will be required for plan years beginning on or after January 1, 2021.
- New template originally posted in November 2019, but corrections made in revised documents posted in February 2020.
- <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/summary-of-benefits>



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## GRANDFATHERED PLANS – PROPOSED REGULATIONS

- On July 10, 2020, DOL/IRS/HHS proposed regulations that would amend the current grandfathered plan rules.
  - The limitation on increases in cost-sharing would be amended to provide another option for measuring the maximum permitted increase.
  - High deductible health plans that must increase cost-sharing amounts to remain an HDHP would not lose grandfathered status.
- New rules would apply 30 days after publication of final rule.



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## HDHPs

- Generally, an HDHP may not provide benefits until the deductible is met.
- An HDHP may cover preventive care benefits before the deductible is satisfied.
- Notice 2019-45 (issued July 17, 2019) lists services and items treated as preventive care benefits when provided to individuals with certain chronic conditions.
  - For example, a blood pressure monitor qualifies as preventive care for individuals with hypertension and a glucometer qualifies as preventive care for individuals with diabetes.



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## DIRECT PRIMARY CARE ARRANGEMENTS

- Contract between an individual and one or more primary care physicians under which the physician(s) agree to provide medical care for a fixed annual or periodic fee without billing a third party
- Generally combined with a high deductible health plan.



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## DIRECT PRIMARY CARE ARRANGEMENTS

- Proposed regulations issued on June 6, 2020.
  - Amounts paid for DPC arrangements constitute medical care under Code Section 213 (thus can be reimbursed by an HRA).
  - Generally, an individual with a DPC arrangement is not eligible to contribute to a health savings account (HSA).
- Over 11,000 comments filed.



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## 2021 HSA/HDHP COST OF LIVING ADJUSTMENTS

- HSA contribution limit for 2021:
  - \$3,600 for individuals with self-only coverage (increased from \$3,550)
  - \$7,200 for individuals with family coverage (increased from \$7,100)
- HDHP minimum deductibles for 2021:
  - \$1,400 for self-only HDHP coverage (unchanged from 2020)
  - \$2,800 for family HDHP coverage (unchanged from 2020).
- HDHP out-of-pocket maximums for 2021:
  - \$7,000 for self-only HDHP coverage (increased from \$6,900)
  - \$14,000 for family HDHP coverage (increased from \$13,800)



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## PAYROLL TAX EXECUTIVE ORDER

- Issued on August 8, 2020.
- Deferral (but not forgiveness) of 6.2% Social Security tax on employees earning less than \$104,000 annually.
- Employers are not required to implement the deferral.
- Deferral is not applicable to employer portion of Social Security tax.
- Forgiveness would require Congressional action.



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**The foregoing presentation is a summary of applicable legislation and guidance. As with any summary, some details are omitted.**

**This summary should not be relied upon for legal or tax advice for particular situations.**

