



Pension & Benefits Quarterly

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June 2020

Qualified Retirement Plans Updates

By Ami Givon | GCA Law Partners LLP

Coronavirus Aid, Relief, and Economic Security Act (CARES Act) Provisions: Section 2202 of the CARES Act, the expansive legislation signed into law on March 27, 2020 in response to the COVID-19 pandemic, includes special distribution options for “eligible retirement plans” (i.e., qualified plans, individual retirement plans and other permissible recipients of rollover contributions) and modified the loan rules for certain plans. On May 4, 2020, the Internal Revenue Service (IRS) issued frequently asked questions (FAQs) regarding section 2202. The Treasury Department (Treasury) and the IRS expect to release further guidance on section 2202 in the future and anticipate that such guidance will apply the principles of Notice 2005-92 (providing guidance on distributions and plan loans under the

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“...my first (of two) years as president is coming to an end. I am really proud to represent such a wonderful organization and am optimistic about next year.”

Karen Mack,
*Altman & Cronin
Benefit Consultants*

President’s Letter - Pg 2



President's Letter

Greetings all,

I hope that everyone reading this is doing well, safe and healthy.

When I initially drafted the President's letter to highlight our accomplishments this past quarter, COVID-19 was the center point of what we were all dealing with. Since then, however, our country has borne witness to more senseless violence. The needless killing of George Floyd - and the many other black lives lost for just being black - is unacceptable. We should take pause and not only reflect on what's happening but look inward on what we can all do to help make change. I don't have the answers, but I do know that change starts with one person at a time. Thank you for taking a moment with me to reflect on all of this.

We've all had a couple of months to get used to the new normal brought on by COVID. Whether it's sheltering in place, which changes the way business meetings are held (from in-person to Zoom/Webex/Skype), to dealing with market volatility, to working through details of the CARES Act, to helping our clients manage their business challenges from the economic fallout (layoffs, furloughs, expense constraints) to working with our own businesses doing the same. And, atop of that, we are also dealing with the racial divide harming people of color and the underserved in our communities.

We at the board have been dealing with the same challenges. We would "normally" have had a packed Spring schedule - with two in-person program events, in-person brown bags, many of us would have attended the annual jointly run WP&BC/NIPA NAFE forum that had been scheduled for August 2020 in Nashville, as well as looking forward to our membership appreciation event typically held in early June. The "normal" springtime routine has been up-ended so we adapted like the rest of the world.

We focused on what we could do immediately to respond to our community. We pulled together a series of lunchtime webinars, free to members, which could act as forum for information sharing as well as community building.

Here's a brief recap of the sessions we offered:

On April 16th, **Yana Johnson** of **Jackson Lewis** and **Elizabeth Groenewegen** of **Aon** spoke about issues they are seeing with clients around the CARES Act and 401(k) plans, health and welfare issues, and Deferred Compensation.

On April 23rd, **Asawari Sathe** from **Vanguard's Investment Strategy Group** spoke about the market downturn and what they are seeing for recovery and macro-economic factors. This session was moderated by **Victoria Fung** from **T. Rowe Price**.

On April 30th, we were delighted to listen to a panel consisting of **Lori McKenzie** of **Schwab**, **Jennifer Scheussler** of **Empower** and **Byron Treichler** from **Fidelity**. They each shared trends they are seeing from their respective firms about participant and plan sponsor behavior related to the CARES Act provisions, and how the pandemic is affecting participants' transactions, communication, and financial planning.

On May 7th, **Karen Casillas** of **CAPTUST** and **Virginia Krieger-Sutton** of **Johnson & Dugan Insurance Services** discussed the advisor perspective during the pandemic, including plan sponsor questions, implementation, and guidance regarding the CARES Act, and employer workforce changes.

On May 14th, we had **Brad Wall** of **Moss Adams** and **Crystal Coleman** of **CliftonLarsonAllen** who discussed many aspects of plan audits and what plan sponsors should do now to make sure the audits will go smooth later. They also covered topical issues related to the pandemic, including furloughed staff and institutional knowledge.

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President's Letter - continued

Finally, on May 21st, **Marc Fosse** of **Trucker Huss** spoke on the design and implementation of Severance Benefit Plans, including the complex compliance issues under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code).

Many thanks to the Program Committee led by **Karen Casillas** and **Yana Johnson** and the Brown Bag Committee led by **Sandy Purdy** of **Lindquist**. The Program Committee members are as follows: **Elizabeth Groenewegen** of **Aon**, **Frank Pyles** of **Vanguard**, **Marc Fosse** of **Trucker Huss**, **Joey Kennedy** of **CliftonLarsonAllen**, **Byron Treichler** of **Fidelity**, **Virginia Krieger-Sutton** of **Johnson Dugan Insurance Services**, **Angel Garrett** of **Trucker Huss** and **Cathey Le Hudson** of **NWK Group**. Great job pulling together a wonderful series in short order!!

As someone who attended each session, I can attest that I welcomed the break from the week's work and to see my WP&BC colleagues on the Zoom meeting. We will have three more over the summer to help continue the tradition so please stay tuned to your emails for more information!

This is our last newsletter of the 2019/2020 program year. I want to take this time to thank **Sarah Kanter** of **Trucker Huss**, the Newsletter Editor for her many efforts in producing a wonderful newsletter each quarter. I also want to thank all other contributors to the newsletter.

Finally, my first (of two) years as president is coming to an end. I am really proud to represent such a wonderful organization and am optimistic about next year. Whatever the challenges, we will have a dedicated board, committees, and members and will continue to come together in whatever form we are able to for another great year.

Stay healthy and I hope to see you at our next Zoom webinar and in person when we are able to!

Karen Mack, FSA, EA, MAAA
Altman & Cronin Benefit Consultants



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PRESIDENT'S LETTER

Connecting Our Community During COVID-19

The COVID-19 pandemic has challenged the way we “gather” and communicate. At the same time, we were learning to adjust to a new normal, Congress was swift to enact COVID-19 related legislation directly impacting our industry.

In order to facilitate much needed education and discussion surrounding industry changes for our members, our Chapter commenced a series of interactive lunchtime webinars using video conferencing.

With topics ranging from the logistics of administering benefit plans during the pandemic to interpreting market volatility, attendees asked insightful questions and shared experiences and recommendations.

While we all look forward to being able to meet in person again someday soon, the lunchtime series has helped us remain connected and well informed.

We look forward to resuming the series this Fall.

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Lunch Webinar Recap

Topic: DOL's New Default Safe Harbor Electronic Disclosure Rules

Speaker: Bill Berry, Compensation and Benefits Senior Counsel, Orrick

On Thursday, June 11, 2020, **Bill Berry**, Compensation and Benefits Senior Counsel at **Orrick**, gave a presentation at the WP&BCs Lunch Webinar on the Department of Labor's (DOL) new default safe harbor electronic disclosure rules (the "Electronic Disclosure Safe Harbor"), which allows plan sponsors to post retirement plan disclosures online or deliver them to workers by email as a default. Bill began the presentation by giving a brief overview of the legal requirements of the Electronic Disclosure Safe Harbor. Bill explained that given the widespread use of electronic communication and the fact that many plan sponsors currently utilize electronic delivery for its active employees, the DOL issued the Electronic Disclosure Safe Harbor to make disclosures more readily accessible and useful to retirement plan participants and to ease the administrative burden for plan sponsors.

Next, Bill described in detail some of the specific legal requirements under the final rules that plan sponsors must comply with in order to be able to take advantage of the Electronic Disclosure Safe Harbor, such as the requirement that plan communications be written in a manner that would be understood by the average plan participant. Bill concluded his presentation by noting that the Electronic Disclosure Safe Harbor does not apply to retirement plan disclosures within the jurisdiction of the Internal Revenue Service (IRS), but he believes that the IRS will soon give plan sponsors permission to rely on the DOL's Electronic Disclosure Safe Harbor with respect to such communications.

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Qualified Retirement Updates, continued

Katrina Emergency Tax Relief Act of 2005), to the extent the provisions of section 2202 are substantially similar to Notice 2005-92. Section 222, as supplemented by the FAQs, provides:

Special Distribution Options: Employers may, but are not required to, permit “coronavirus-related distributions” (CRDs) from their plans to “qualified individuals” at any time during 2020. A “qualified individual” also may receive a CRD from an individual retirement account or annuity during 2020. The aggregate amount of CRDs an individual may take from all sources is \$100,000.

A “qualified individual” is one (a) who has been diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention, (b) whose spouse or dependent has been so diagnosed or (c) who due to SARS-CoV-2 or COVID-19 has experienced adverse financial consequences as a result of being quarantined, being furloughed or laid off, having work hours reduced, being unable to work due to lack of child care or as a result of closing or reducing hours of the business one owns or operates. A plan administrator may make a CRD in reliance on the individual’s certification that he or she is a “qualified individual,” unless the administrator has actual knowledge to the contrary.

A CRD will be treated as meeting the distribution restrictions for an Internal Revenue Code (Code) section 401(k) plan, Code section 403(b) plan or governmental Code section 457(b) plan. For example, a 401(k) plan may permit in-service CRDs to be made from a salary deferral account even before an otherwise permitted distributable event (such as severance from employment, disability or attainment of age 59½).

CRDs are not subject to the 10% additional tax that generally applies to pre-age 59½ distributions and CRDs from plans are not subject to mandatory federal income tax withholding that applies to distributions not directly rolled over to an eligible retirement plan. CRD amounts are included in gross income ratably over a three-year period, starting with the year of distribution, unless the individual chooses to include the entire distribution amount in gross income for the year of distribution. In addition, CRDs may be repaid, in whole or in part, within three years of the date of distribution to a plan or account that is eligible to receive rollover contributions.

Modified Loan Provisions: Employers may increase the maximum amount of plan loans made to a qualified individual between March 27, 2020, to September 22, 2020 to the lesser of \$100,000 (minus the individual’s outstanding plan loans) or the individual’s vested benefit under the plan. Also for qualified individuals who have loan payment due dates between March 27, 2020, and December 31, 2020, such loan payments may be postponed for one year, with the postponement period disregarded in determining the general five-year loan repayment period under Code section 72(p)(2)(B). Postponed payment amounts must be adjusted to reflect the payment delay and the interest accrued during the postponement period.

Waiver of Required Minimum Distributions (RMDs): RMDs from defined contribution plans, annuity plans described in Code sections 403(a) and (b), individual retirement accounts and annuities, and governmental 457(b) plans that are otherwise due in 2020 are waived (except if the RMD was paid before 2020 in the case of an individual whose required beginning date is in 2020). Also, the 2020 calendar year is disregarded in determining the five-year payment period under Code section 401(a)(9)(B)(ii) (for post-death payments not made over life expectancies).

Plan Amendment Deadline: Plans must be amended to conform to provisions applicable to them by the last day of the plan year that begins on or after January 1, 2022 (2024 for governmental plans).

Agencies’ Relief in Response to COVID-19 Pandemic: Treasury, the IRS, the Department of Labor (DOL) and the Employee Benefits Security Administration (EBSA) (collectively, the Agencies) have extended deadlines and provided other relief in response to the COVID-19 pandemic.

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Qualified Retirement Updates, continued

Extensions Granted by Treasury and the IRS: In Notices 2020-18, 2020-20, 2020-23 and 2020-35, Treasury and the IRS extended the deadlines for the performance of certain actions required by the Code to be performed by a specified date. An individual or entity does not need to be impacted by the COVID-19 pandemic to be afforded these extensions. These Notices, as supplemented by FAQs issued by the IRS, extend until July 15, 2020, the deadline for performing the following actions if they were required to be performed (originally or pursuant to a valid extension) on or after March 30, 2020, and July 15, 2020:

- Filing Form 5500 series returns;
- Making contributions to individual retirement plans for 2019;
- Paying the 10% additional tax for pre-age 59½ distributions made in 2019;
- Making deductible plan contributions for 2019;
- Applying for a funding waiver under Code section 412(c) for a defined benefit plan that is not a multiemployer plan;
- For multiemployer defined benefit plans and cooperative and small employer charity (CSEC) plans, taking certain actions to be performed under Code sections 432 and 433, respectively;
- Filing Form 5330 and paying associated excise taxes. The period of postponement will be disregarded in the calculation of any interest or penalty for the failure to file or pay;
- Requesting a substitute mortality table under Code section 430(h)(3)(C); and
- Implementing corrective actions, including adopting correction amendments, required by a compliance statement issued under the Employee Plans Compliance Resolution System's (EPCRS) Voluntary Correction Program.

Notice 2020-35 also provides:

- With respect to the remedial amendment period and plan amendment rules for Code section 403(b) plans, the deadline for actions that are otherwise required to be performed on or before March 31, 2020, with respect to form defects or plan amendments, is postponed to June 30, 2020;
- For pre-approved defined benefit plans, the deadline is extended until July 31, 2020, for the adoption of a pre-approved plan that was approved based on the 2012 Cumulative List; submission of a determination letter application under the second six-year remedial amendment cycle; and actions that are otherwise required to be performed with respect to disqualifying provisions during the remedial amendment period that would otherwise end on April 30, 2020;
- The due date for filing and furnishing Form 5498 series is postponed to August 31, 2020. The period of postponement will be disregarded in the calculation of any interest or penalty for the failure to file; and
- As to Code provisions for which there are parallel provisions in ERISA, the extension relief also applies for purposes of those ERISA provisions.

DOL and EBSA Relief: In EBSA Disaster Relief Notice 2020-01, issued on May 1, 2020, the DOL and EBSA issued guidance and relief for employee benefit plans due to the COVID-19 outbreak. Portions of the notice applicable to retirement plans are:

>Extension of Deadlines: Pursuant to its authority under the Employee Retirement Income Security Act of 1974, as amended (ERISA) section 518, as amended by section 3607 of the CARES Act, the DOL has extended

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Qualified Retirement Updates, continued

the deadlines for furnishing required notices, disclosures and other documents required by Title I of ERISA over which the DOL has interpretive and regulatory authority, except for those notices and disclosures extended by the Agencies in their joint May 4, 2020 notice, discussed below. Subject to the one-year extension limit imposed by section 518, an employee benefit plan and its responsible plan fiduciary will not be in violation of ERISA for a failure to timely furnish a notice, disclosure or document required to be furnished between March 1, 2020, and 60 days after the announced end of the COVID-19 national emergency declared by the President on March 13, 2020, if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure or document as soon as administratively practicable under the circumstances. Good faith acts include use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites.

>Plan Loans and Distributions -- Verification Procedures: The DOL will not treat the failure of a retirement plan to follow procedural requirements for plan loans or distributions imposed by the plan's terms as a violation of the ERISA requirement that a plan be operated in accordance with its terms, if the failure is solely attributable to the COVID-19 outbreak, the plan administrator makes a good-faith diligent effort under the circumstances to comply with those requirements, and the plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively practicable. This relief is limited to verification requirements required under Title I of ERISA that are within the interpretive and regulatory authority of the DOL (e.g., it does not extend to spousal consent requirements under the jurisdiction of Treasury or the IRS).

>Plan Loans under the CARES Act: The DOL will not treat any person as having violated the provisions of Title I of ERISA, including the adequate security and reasonably equivalent basis requirements in ERISA section 408(b)(1) and 29 CFR section 2550.408b-1 solely because (1) the person made a plan loan to a qualified individual (described above) during the loan relief period in compliance with the CARES Act and the provisions of any related IRS notice or other published guidance, or (2) a qualified individual delayed making a plan loan repayment in compliance with the CARES Act and the provisions of any related IRS notice or other published guidance.

>Certain Plan Amendments Related to the COVID-19 Outbreak: If a plan is amended to provide the relief for plan loans and distributions under the CARES Act, the DOL will treat the plan as being operated in accordance with the terms of such amendment prior to its adoption if (1) the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2022, or such later date prescribed by Treasury, and (2) the amendment meets the conditions of the CARES Act.

>Participant Contributions and Loan Repayments: The DOL will not take enforcement action with respect to a temporary delay in forwarding participant contributions or loan repayments to the plan beyond the time required by applicable DOL regulations, provided the delay is attributable solely to the COVID-19 outbreak and employers and service providers act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances. This relief applies for the period beginning March 1, 2020 and ending 60 days after the announced end of the national emergency related to the COVID-19 outbreak.

>Blackout Notices: DOL regulations generally require the administrator of an individual account plan to provide 30 days' advance notice to participants and beneficiaries whose rights under the plan will be temporarily suspended, limited, or restricted by a blackout period. The advance notice requirement is excused when the

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QUALIFIED RETIREMENT UPDATES

Qualified Retirement Updates, continued

inability to provide the notice is due to events beyond the reasonable control of the plan administrator and a fiduciary so determines in writing.

The DOL has clarified that its extension of deadlines under section 518 of ERISA, discussed above, applies to blackout notices, including those required to be provided after the blackout period ends. A written determination by a fiduciary will not be required, because pandemics are by definition beyond a plan administrator's control.

>Form 5500 and Form M-1 Filing Relief: Form 5500 Annual Return/Report filing relief is provided in accordance with the relief provided by Treasury and the IRS, discussed above. Form M-1 filings required for multiple employer welfare arrangements (MEWAs) and certain entities claiming exception (ECEs) are provided relief for the same period of time as the Form 5500 Annual Return/Report filing relief.

>General ERISA Fiduciary Compliance Guidance: In recognition that affected plan participants and beneficiaries may encounter problems due to the COVID-19 outbreak, the notice states that the guiding principle for plans must be to act reasonably, prudently, and in the interest of the covered workers and their families who rely on plan benefits for their physical and economic wellbeing. Accordingly, plan fiduciaries are directed to make reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments and attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes.

Acknowledging that there may be instances when plans and service providers may be unable to achieve full and timely compliance with claims processing and other ERISA requirements, the DOL will emphasize compliance assistance and include grace periods and other relief where appropriate, including when physical disruption to a plan or service provider's principal place of business makes compliance with pre-established timeframes for certain claims' decisions or disclosures impossible.

Agencies' Joint Notice -- Extension of Claims-related Deadlines: On May 4, 2020, the Agencies issued a joint notice extending certain timeframes applicable to group health plans, disability and other welfare plans, pension plans, and their participants and beneficiaries under ERISA and the Code.

For pension plans subject to Title I of ERISA, the notice extended the following claim-related deadlines from March 1, 2020 until 60 days after the announcement of the end of the COVID-19 national emergency or such other date announced by the Agencies:

- Filing a benefit claim or appeal of an adverse benefit determination under a plan's claims and appeals procedures pursuant to 29 CFR section 2560.503-1 and 29 CFR section 2560.503-1(h);
- Requesting external review of an adverse benefit determination or final internal adverse benefit determination under a medical plan pursuant to 29 CFR section 2590.715-2719(d)(2)(i) and 26 CFR section 54.9815-2719(d)(2)(i); and
- Filing information to perfect a request for external review pursuant to 29 CFR section 2590.715-2719(d)(2)(ii) and 29 CFR section 54.9815-2719(d)(2)(ii).

2020 Cumulative List of Changes in Plan Qualification Requirements for Pre-Approved Defined Benefit Plans:

In Notice 2020-14, released in March 2020, the IRS set forth the 2020 Cumulative List of Changes in Plan Qualification Requirements for Pre-Approved Defined Benefit Plans (2020 Cumulative List). The 2020 Cumulative List identifies changes in the Code's tax-qualification requirements that are required to be taken into account in a pre-approved defined benefit plan document submitted under the IRS pre-approved plan program during the third

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Qualified Retirement Updates, continued

six-year remedial amendment cycle (beginning May 1, 2020, and ending January 31, 2025). Defined benefit plans may be submitted for approval during the on-cycle submission period, which begins August 1, 2020, and ends July 31, 2021.

Postponement of CalSavers Registration Deadline for Large Employers: In response to the COVID-19 pandemic, CalSavers has postponed the registration deadline for employers with more than 100 employees from June 30, 2020, to September 30, 2020. The June 30, 2021 registration deadline for employers with more than 50 (but less than 100) employees, and the June 30, 2022 registration deadline for employers with at least five (but less than 50) employees, has not been postponed.

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QUALIFIED RETIREMENT UPDATES



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Health and Welfare Updates

By Brian Patton and Elizabeth Harris
Orrick, Herrington & Sutcliffe LLP

DEPARTMENT OF LABOR PROVIDES COVID-19 RELIEF AND COMPLIANCE GUIDANCE FOR EMPLOYEE BENEFIT PLANS

The recent COVID-19 outbreak, which has been declared a public health emergency by the Secretary of Health and Human Services (the COVID-19 public health emergency), has made it more difficult for both plan sponsors and plan participants to comply with the myriad requirements and deadlines imposed on employee benefit plans by various federal laws. In response to the compliance difficulties caused by the COVID-19 public health emergency, on April 29, 2020, the Department of Labor (DOL) issued COVID-19 relief and compliance guidance for retirement, health, and welfare plans in the form of two notices. One of the notices was issued jointly with the Department of Treasury (the Joint Notice). The Joint Notice provides participants and beneficiaries of group health plans and other employee benefits plans additional time to comply with certain deadlines. The other DOL notice provides additional extensions, while also providing compliance guidance on plan loans and distributions, participant contributions and loan repayments (the EBSA Disaster Relief Notice 2020-01) (the impact of this notice on retirement plans is described in the Qualified Retirement Plans Update). This article focuses on the impact each of these notices will have on health and welfare plans.

Deadline Relief Provided by the Joint Notice

Deadline Relief Provided for Plan Participants and Beneficiaries: For up to one year, all group health plans, disability and other employee welfare benefit plans and pension benefits plans subject to ERISA, must disregard the period from March 1, 2020 until 60 days after the end of COVID-19 National Emergency (or other date announced by the DOL and IRS in future notification) (the Outbreak Period) for all plan participants, beneficiaries, qualified beneficiaries, or claimants with regard to determining the following periods and dates:

- The 30-day period (or 60-day period, if applicable) an individual has to request special enrollment in a group health plan outside of such plan's annual enrollment period upon loss of health care coverage or other life event triggering the right to request special enrollment (such as birth, marriage, adoption, or placement for adoption).
- The 60-day election period to choose whether or not to elect COBRA continuation coverage.
- The date for making both initial and subsequent monthly COBRA premium payments.
- The date for individuals to notify their group health plan of a COBRA qualifying event or a determination of disability by the Social Security Administration (SSA).
- The date within which participants and beneficiaries may file a benefit claim under the employee benefit plan's claim procedure.
- The date within which claimants may file an appeal of an adverse benefit determination under the employee benefit plan's claim procedure to a named fiduciary of the plan.
- The date within which claimants may file a request for an external review after receipt of an adverse benefit determination or final internal adverse benefit determination.
- The date within which a claimant may file information to perfect a request for external review upon finding that such request was not complete.

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Health and Welfare Updates, continued

Deadline Relief Provided for Group Health Plans: For group health plans and their sponsors and administrators, the COVID-19 Outbreak Period will be disregarded when determining the date they must provide covered employees and their families with specific notices explaining their COBRA rights.

Deadline Relief Provided by EBSA Disaster Relief Notice 2020-01

Deadline Relief for Required Notices and Disclosures:

- EBSA Disaster Relief Notice 2020-01 provides an extension of deadlines for furnishing required notices or disclosures and other documents that are both required by Title I of ERISA and within the jurisdiction of the DOL, except for those notices and disclosures addressed in the Joint Notice (DOL Notices and Disclosures).

- For a period up to one year, an employee benefit plan and the responsible plan fiduciary will not be in violation of ERISA for a failure to timely furnish DOL Notices and Disclosures during the COVID-19 Outbreak Period, as long as the plan and responsible fiduciary act in good faith to furnish the DOL Notices and Disclosures as soon as administratively practicable under the circumstances.

- Plan fiduciaries may use electronic means of communication, such as email, text messages and continuous access websites to furnish DOL Notices and Disclosures, as long as plan fiduciaries reasonably believe plan participants and beneficiaries can effectively access such electronic means of communication.

Deadline Relief for Form M-1 Filings:

- The deadline for Form M-1 filings required for multiple employer welfare arrangements (MEWAs) and certain entities claiming exception was pushed back from March 1, 2020 to July 15, 2020.
 - The Form M-1 is an annual report that must be filed by MEWAs.
 - In general, MEWAs are arrangements that offer health and other benefits to employees of two or more different employers.
- Now the M-1 filing deadline tracks the deadline for filing a Form 5500, which was partially extended on April 9, 2020 by IRS Notice 2020-23.
 - IRS Notice 2020-23 pushed the deadline for retirement and welfare plans with a Form 5500 deadline later than March 31, 2020 but before July 15, 2020 to July 15, 2020.

HEALTH AND EMERGENCY LEAVE PROVISIONS IN THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA) was enacted on March 18, 2020 and became effective on April 1, 2020. The Secretary of Health and Human Services (HHS) has declared the recent COVID-19 outbreak a public health emergency (the COVID-19 public health emergency) and the FFCRA's health provisions will impact health plans until the COVID-19 public health emergency ends. Moreover, under the FFCRA's emergency leave provisions, certain employers will have to provide leave to employees who are unable to work because of the COVID-19 public health emergency. This article summarizes both the health and emergency leave provisions in the FFCRA.

Recently, the FFCRA was amended by the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), that was enacted on March 27, 2020. This article also covers the most significant amendments made to the FFCRA by the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act).

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Health and Welfare Updates, continued

Health Provisions

- **Coverage of COVID-19 Diagnostic Testing:** The FFCRA (as amended by the CARES Act) requires group health plans and health insurance issuers offering group or individual health insurance coverage (including grandfathered health plans) to provide coverage, and to not impose any cost sharing requirements or prior authorization or other medical management requirements, for the following tests, items and services furnished from March 18, 2020 until the COVID-19 public health emergency expires:
 - COVID-19 diagnostic tests that:
 - the developer has requested, or intends to request, emergency use authorization from the Food and Drug Administration (FDA), until the FDA authorization request has been denied or the developer fails to submit such request within a reasonable timeframe;
 - are developed in and authorized by a state that has notified the HHS of its intention to review tests intended to diagnose COVID-19; or
 - other tests that the HHS determines are appropriate.
 - FDA approved COVID-19 diagnostic testing products.
 - Items and services furnished to an individual during an in-person visit or telehealth visit to a health care provider's facility that result in the order or administration of a COVID-19 diagnostic testing product, but only to the extent the items and services relate to the administration of the product or to the evaluation of the individual for purposes of determining the need for such product.
- **Federal Government Coverage of COVID-19 Diagnostic Testing:** In general, the FFCRA requires the following federal government programs and agencies to cover COVID-19 diagnostic testing and related items and services and to waive any cost sharing requirements related to such testing, items and services from March 18, 2020 until the COVID-19 public health emergency ends: (i) Medicare; (ii) Medicare advantage plans; (iii) Medicaid; (iv) Children's Health Insurance Program; (v) Tricare; (vi) the Department of Veteran Affairs; (vii) Federal Employees Health Benefits Program; and (viii) the Indian Health Service.

State Level Coverage of COVID-19 Diagnostic Testing: the FFCRA permits states under Medicare to provide COVID-19 diagnostic testing and related services without cost sharing requirements to uninsured individuals during the COVID-19 Emergency Period.

- Moreover, the federal government will match 100% of the costs incurred by states associated with providing such testing and services.

Emergency Leave Provisions

The FFCRA provides paid leave to employees who are unable to work because of the COVID-19 public health emergency by: (i) temporarily expanding the Family and Medical Leave Act (the emergency FMLA provisions) and (ii) providing a new temporary paid sick leave law (emergency paid sick leave provisions) ((i) and (ii) together, the emergency leave provisions). The emergency leave provisions went into effect on April 1, 2020 and will expire at the end of 2020.

In general, the emergency leave provisions apply to: (1) employers that have fewer than 500 employees and (2) government employers. However, the Secretary of Labor has discretionary authority to exempt small businesses with less than 50 employees from the expanded FMLA provisions, when the imposition of their requirements "would jeopardize the viability" of the employer's "business as a going concern."

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Pursuant to DOL guidance, an employer may determine whether they have fewer than 500 or 50 employees by:

- conducting a headcount at the same time any of its employees will take a leave that qualifies under the emergency leave provisions;
- counting all categories of employees, including its employees who are fulltime, part-time, temporary and jointly employed by it and another employer and day laborers supplied by a temporary agency; and
- not counting those in its workforce that are classified under the Fair Labor Standards Act as independent contractors.

The Emergency FMLA Provisions

• Eligibility:

- Pursuant to the FFCRA, employees requesting leave from their employer under the emergency FMLA provisions must have been employed for at least 30 days prior to the request.
- Yet, the CARES Act also extends eligibility for leave under the emergency FMLA provisions to employees who were rehired under the following circumstances: (i) they were previously laid off from the employer on or after March 1, 2020, (ii) they had worked for the employer for at least 30 of the last 60 calendar days prior to being laid off, and (iii) they were rehired by this employer.

• **Leave Amount:** Eligible employees may take up to 12 weeks of job-protected leave under the emergency FMLA provisions for a “qualifying need related to a public health emergency.”

• **Qualifying Need:** Under the emergency FMLA provisions, the only “qualifying need related to a public health emergency” for an employee is being unable to work (or telework) due to a need for leave to care for their son or daughter under 18 years of age if such child’s school or place of care has been closed, or the child care provider of such son or daughter is unavailable because of the COVID-19 public health emergency.

• Paid Leave:

- The first 10 days of leave under the emergency FMLA provisions may be unpaid, but during this period employees can elect to substitute any accrued but unused vacation, personal or sick leave.
- For the remainder of such leave period, employees must be paid at least two-thirds of their regular rate of pay for the number of hours they would otherwise be normally scheduled to work.
- This required paid leave is capped at \$200 per day and \$10,000 in aggregate.
 - CARES Act Clarification: The CARES Act amended the FFCRA to make clear these caps on paid leave apply on a per employee basis.

The Emergency Paid Sick Leave Provisions

- **Eligibility:** The emergency paid sick leave provisions apply to all employees, and unlike under the emergency FMLA leave provisions, there is no requirement for an employee to be employed by their current employer for a certain amount of time.
- **Qualifications:** An employee qualifies for leave under the emergency paid sick leave provisions (in addition to any other leave their employer owes them) when they are unable to work due to one or more of the following reasons:

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- the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19 (reason #1);
 - the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 (reason #2);
 - the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis (reason #3);
 - the employee is caring for an individual subject to an order described in reasons #1-2 (reason #4);
 - the employee is caring for their son or daughter whose school or place of care has been closed, or child care provider is unavailable due to COVID-19 precautions (reason #5); or
 - the employee is experiencing any other substantially similar condition specified by the HHS in consultation with the Secretary of Treasury and the Secretary of Labor (reason #6).
- **Leave Pay Rate:** While employees take leave under the emergency paid leave provisions, their pay rate depends on how they qualified for such leave (subject to caps discussed below).
 - If the employee qualified for leave under the emergency paid leave provisions based on reasons #1-3, while they take such leave, their required pay rate will be the greater of: (i) their regular pay rate; (ii) the federal minimum wage (currently set at \$7.25 per hour); or (iii) the state or local minimum wage rate where the employee works ((i)-(iii) together, the applicable leave pay rates).
 - If the employee qualified for leave under the emergency paid leave provisions based on reasons #4-6, while they take such leave, their required pay rate will be two-thirds of the greater of the applicable leave pay rates.
 - Caps on Required Leave Pay: The amount an employer is required to pay an employee under the emergency paid leave provisions is also capped based on the reason the employee qualified for such leave.
 - If the employee qualified for leave under the emergency paid leave provisions based on reasons #1-3, their leave pay is capped at \$511 per day and \$5,110 in the aggregate;
 - If the employee qualified for leave under the emergency paid leave provisions based on reasons #4-6, their leave pay is capped at \$200 per day and \$2,000 in the aggregate.
 - CARES Act Clarification: The CARES Act amended the FFCRA to make clear that each of these caps on leave pay apply on a per employee basis.
 - **Leave Amount:** How an employer calculates the number of hours of leave they must pay an employee under the emergency paid leave provisions depends on the employee's work status with the employer.
 - Full-time employees are entitled to 80 hours of leave.
 - Part-time employees are entitled to an amount of leave equal to the number of hours that such employee works on average, over a two week period.
 - Part-time employees with irregular schedules will be entitled to an amount of leave over a two week period equal to:
 - the average number of hours that the employee was scheduled to work per day during the six month period immediately preceding the first day they take leave; or

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- if the employee has worked for less than six months for their current employer, the reasonable expectation of the employee at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

• **Prohibited Acts Clause:** Pursuant to a “prohibited acts” clause in the FFCRA, it is unlawful for employers to discharge, discipline, or in any other manner discriminate against an employee who:

- takes leave in accordance with the FFCRA; and
- has filed a complaint or instituted or caused to be instituted any proceeding under or related to the FFCRA (including a proceeding that seeks enforcement of this Act), or has testified or is about to testify in any such proceeding.

Tax Credits for the Emergency Leave Provisions

- Pursuant to the FFCRA, employers who are required to provide leave under the emergency leave provisions are entitled to receive a refundable tax credit against their 6.2% employer portion of Social Security taxes.
- Under the FFCRA, in each calendar quarter, employers may receive a refundable tax credit equal to 100% of the leave wages they are required to pay under the emergency leave provisions.
 - However, under the CARES Act an employer may receive these tax credits in advance, instead of having to wait to be reimbursed after the calendar quarter ends. The IRS has published guidance explaining how to obtain these tax credits in advance on its website.
 - Moreover, any penalties for failing to pay the employer portion of Social Security taxes is eliminated if the Department of Treasury determines such failure was due to the anticipation of a credit being allowed under the FFCRA.
- These tax credits are capped per employee at the same amounts as leave under the emergency leave provisions, but since they are refundable, employers will be reimbursed if their costs for providing such leave exceeds their tax liability.

THE HEALTH PROVISIONS IN THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT

On March 27, 2020, the CARES Act was signed into law by President Trump. The CARES Act provides roughly \$2 trillion in aid to businesses and individuals impacted by the recent COVID-19 outbreak, which has been declared a public health emergency by the Secretary of Health and Human Services (the COVID-19 public health emergency). This article summarizes the most significant health provisions in the CARES Act.

- **Reimbursement Rates for COVID-19 Diagnostic Tests:** The CARES Act provides that a group health plan or a health insurance issuer that covers an enrollee's COVID-19 diagnostic tests and related items without cost-sharing (as required under the Families First Coronavirus Response Act), must reimburse the provider of the COVID-19 diagnostic tests as follows:
 - If the health plan or issuer has a negotiated rate with such provider in effect before January 31, 2020 (the date the Secretary of Health and Human Services (HHS) declared the COVID-19 outbreak as a public health emergency) then the same negotiated rate must apply until the COVID-19 public health emergency ends.
 - If the health plan or issuer does not have a negotiated rate with such provider, then it must reimburse

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the provider in an amount equal to the cash price for the COVID-19 diagnostic test or related item as listed by the provider on a public internet website, or negotiate with the provider a lower rate than the publicly listed cash price.

The CARES Act ensures this reimbursement requirement can be effectively enforced by requiring providers to publish the cash price for a COVID-19 diagnostic test they would administer on their own public internet website or potentially face a civil fine of up to \$300 each day they do not comply with this publication requirement.

- **Rapid Coverage of Preventive Services and Vaccines for COVID-19:** The HHS, Secretary of Labor, and Secretary of Treasury will require group health plans and health insurance issuers offering group or individual health insurance to cover without cost sharing any “qualifying coronavirus preventive service.”
 - A “qualifying coronavirus preventive service” is an item, service, or immunization that is intended to prevent or mitigate COVID-19 and that is:
 - an evidence-based item or service that has in effect a rating of “A” or “B” in the current recommendations of the United States Preventive Services Task Force; or
 - an immunization that has in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved.
 - Effective Date: This requirement will take effect 15 business days after the date on which a recommendation is made relating to a qualifying coronavirus preventive service.
- **Safe Harbor for High Deductible Health Plans:** The CARES Act established a new temporary safe harbor for high deductible health plans (HDHPs) to cover telehealth services and other remote care without the annual deductible having been satisfied.
 - It accomplished this safe harbor by amending the Internal Revenue Code to provide that with respect to plan years beginning before 2022, a plan will not fail to be treated as a HDHP by reason of providing first dollar pre-deductible telehealth and other remote care services.

THE U.S. SUPREME COURT WILL HEAR A CASE THAT THREATENS THE FATE OF THE ACA

The U.S. Supreme Court (SCOTUS) has agreed to hear *Texas v. United States* (the ACA case) when SCOTUS’s next term begins this fall. SCOTUS will review the ACA case to determine whether the Affordable Care Act (the ACA) remains valid after its individual mandate fee was zeroed out. While this means SCOTUS could hear arguments for the ACA case as early as October 2020, they will not release a decision for this case until 2021.

The ACA (colloquially known as Obamacare), comprehensively reforms the health care system by including a number of health-related provisions designed to provide health insurance coverage to millions of uninsured Americans. For plan years 2014 through 2018, if an individual could have afforded health coverage but chose not to purchase it, they could be subject to the ACA’s individual mandate fee upon filing their federal income taxes. However, for the 2019 plan year, Congress eliminated the financial penalty for not having health coverage.

In *National Federation of Independent Business v. Sebelius* (a 2012 case challenging the constitutionality of the ACA), SCOTUS held that because the individual mandate fee functions as a “tax,” it is a valid exercise of Congress’s taxing power under Article 1, Section 8 of the Constitution which provides Congress the authority to “lay and collect taxes.” Challengers to the constitutionality of the ACA argue that because there is no longer an actual fee for forgoing health insurance, the individual mandate fee no longer functions as a tax. A Texas trial court agreed.

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On appeal, the Fifth Circuit Court of Appeals affirmed the lower court's decision in part, holding that the individual mandate fee is now unconstitutional. Nonetheless, it declined to answer whether the rest of the ACA can stand without the individual mandate fee and instead sent the ACA case back to the Texas trial court, so they could "provide additional analysis of the provisions of the ACA as they currently exist."

However, the ACA case will not be sent back to the Texas trial court for additional analysis, because SCOTUS has agreed to review the case. The ACA will remain effective for plan year 2020, as SCOTUS will not decide the ACA case until 2021. That said, the status of this major health care law for future plan years is uncertain.

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Member Profile: Michael Rom

Company: Pensionmark

Title: Managing Director

Education: Miami of Ohio, Oxford OH

Years in the industry: Stopped counting after 30+

Please tell us about your first “real” job: After graduating in 1985, I joined PNC Financial in Pittsburgh, PA and made my way to the cash management group where I sold those services to Fortune 1000 clients. It was a dynamic and exciting time in the industry, and I was fortunate to gain a tremendous front row experience working with large corporate clients and to engage with Treasury/Finance leaders. The travel perks and life on the road were attractive features as well.



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BUSINESS BACKGROUND

Nature of your work: Serving small/mid-size clients with 401(k) advisory and consulting services.

How you got into the field: In the late 1990's I was working on the institutional side and traveling 80% of the time. With two young children to raise, I made a decision to get off the road and apply my talents in a different way.

What you like about the field: I'm always learning and growing. It seems just when I think that I understand what I'm doing, something new comes along and it challenges my views and approach to how we might better serve our clients and the American worker.

PERSONAL

Ways you spend free time: Reading, biking, running, men's baseball, playing with my new puppy (Tahoe), tennis with Rhonda and travel (soon again?)

Guiding philosophy: It's about showing up – my life has been enriched by the people that have shown up at the best and worst of times. I hope that they feel the same about me.

Favorite charities: Leukemia Society, I'm working with Team In Training to ride in a Tahoe Century and raise money. Please be courteous of riders you pass on the road!

Last books read: “Grit” by Angela Duckworth and “Resilience: Hard-Won Wisdom for Living a Better Life” have given me some recent perspective and inspiration.

Restaurant recommendations: Almost anything in Downtown Pleasanton! In normal non-Covid times, we frequent them all.

What will you do when you retire? Full retirement may drive me nuts. I can foresee a phased approach that keeps me engaged and contributing but shifts the time/energy on other areas of my life.

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Sheltering In Place Q&A

We checked in with the San Francisco WP&BC Board of Directors with some questions to find out how they are adapting to sheltering in place. Below are their responses.

1) What is your new favorite app?

- Quibi
- Microsoft Teams is what we use at Lindquist and it's great to see my coworkers' faces in our video calls.
- Facebook Messenger for kids, I love using the funny filters when talking to my nephew.
- House Party, although I'm pretty sure it's an old app. So just new to me. Should I be embarrassed about that? And Zoom of course.
- Libby for free library books on Kindle or in audiobooks.
- Focus Timer. The pomodoro method keeps me on track while working from home.
- None. Trying to put phone away.

2) Favorite recipe?

- Chili Crisp
- I continue to enjoy Gobble gourmet meal preparation deliveries and have increased the number so eating a wide variety at least 5 days a week. I feel like I am dining out with these incredibly delicious recipes.
- Chicken Tikka Masala
- Filet mignon with truffle salt and cauliflower riced veggie side
- After six weeks I have finally found the best sourdough recipe and after three failed attempts at making my own starter I was given a good one that I am keeping alive.
- Tuna salad for lunch: tuna, carrots, asparagus, white beans, parsley, olive oil and lemon juice
- Anything with vodka.

3) Favorite alcoholic beverage?

- I am trying different brands of beer that I have not had before. Some good, some not.
- Fess Parker chardonnay and Caymus cabernet
- Cabernet (or most any red wine) from my Livermore wineries I belong to. Fortunately, I stocked up on a case sale at Stoney Ridge just before the pandemic hit.
- Oregon chardonnays and New Zealand sauvignon blancs.
- Boxed wine! Lol. I've decided to go for quantity over quality to get through the shutdown. The quality is surprisingly good though depending on which brand.
- Wine, wine & more wine
- Gin and tonic for the hot weather – but a jack and coke also hits the spot.

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Sheltering In Place Q&A - continued

4) Have you discovered any new TV shows?

- It's not new, but reruns of the original Law & Order series.
- World on Fire
- I am temporarily subscribing to CBS All Access and enjoyed Star Trek Picard among others.
- Upload on Amazon Prime and Frasier (not new, but I've enjoyed revisiting it, it holds up really well!)
- Little Fires Everywhere & Yellowstone
- Episodes and Space Force – both on Netflix
- Dead to Me on Netflix
- Upload, Amy Schumer Learns to Cook

5) Do you have any funny zoom meeting anecdotes?

- On a video call with nine executives, someone's dog barked. Then everyone's dogs started barking. We all laughed, it was silent for a quick moment, and then we heard a single loud meow.
- Watching someone start to nod off during a committee meeting, then shut the camera off. Cats and dogs in the background is always a good one.
- heard anecdotally about a dad on a conference call and the kids brought a live snake into the house – Dad freaked out in the middle of the call.

6) Favorite place to spend time outside?

- Zuma beach watching my daughter surf, and my backyard.
- Running around the open space in the early morning – great way to greet the day and energize me.
- Morcom Rose Garden in Oakland.
- Walking hills in our neighborhood in SF, up to Twin Peaks or over to Golden Gate Park.
- On my small garden deck, so fortunate to have a small place to sit outside.
- We have a deck with a killer view.
- Walking along the bay or the ocean.
- Spending more time at home with my partner and our dog.

7) Favorite restaurant to get take-out from?

- Wingstop
- Wood Ranch BBQ
- Mago on Piedmont Ave in Oakland.
- Za'atar, our friend's new Mediterranean food delivery service. We ordered two days in a row (the first was for friendship, the second b/c it was delicious).

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Sheltering In Place Q&A - continued

- Pizzetta on 22nd & Clement St. in SF.
- Szechwan Restaurant
- Blue Plate in SF Mission District

8) What has been something positive from this experience?

- My Chevron bill last month was \$30, typically its approximately \$200. Also saving \$\$ due to not eating out.
- Having my daughter home from college and spending so much time with her has been wonderful for me and my husband, but she really misses her friends, her college town, her professors, her study groups, her volleyball teammates, and her roommates.
- Learning to adjust. It's a positive and motivating factor to try new things, walking through parts of my neighborhood I never saw before (some have goats, donkeys and horses).
- I enjoy having my cats hanging out with me while working. It is purrrfect for all of us.
- Spending more time with my significant other, slowing down, and learning to be a better cook.
- Quality time with my sister, mother & daughter on long walks in the city.
- We have instituted a daily 9 am check in call and I feel closer to my colleagues because of it.
- Remembering how important the little things are and not being so busy all the time. Reaching out more to loved ones to tell them how much I care.

9) What are you most looking forward to doing when this is all over?

- Haircut
- Traveling!
- Wanting to know what work and the world will be like after all the changes we have made while sheltering in place.
- Dressing up again as the casual clothes are getting boring.
- Foreign travel.
- Seeing my friends!
- Going to the movies, the farmer's market and the coffee shop!
- The gym!
- Enjoying being in the company of other people without worry – be it at a restaurant, with a group of friends, at a Western Pension Program Meeting!

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The Newsletter welcomes contributions from its members. If you would like to submit a topical benefits-related article for an upcoming issue, please contact the chapter at info@wpbcsf.org.

Special thanks to Bryan Card for help in drafting and editing newsletter articles.

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1900 Point West Way, Suite 222
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WP&BC San Francisco Chapter
jenifer@wpbcsf.org

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terri@wpbcsf.org