



# Pension & Benefits Quarterly

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December 2020



## Qualified Retirement Plans Updates

By Ami Givon | GCA Law Partners LLP

**2021 Cost-of-Living Adjustments:** In Notice 2020-79, the Internal Revenue Service (IRS) announced the cost-of-living adjustments to the dollar limits that are effective in 2021 on a wide variety of tax-favored benefits.

Key 2021 adjustments for plans are:

- The contribution limitation for defined contribution plans under Internal Revenue Code (Code) section 415(c)(1)(A) is increased from \$57,000 to \$58,000.
- The annual compensation limit under Code sections 401(a)(17), 404(l), 408(k)(3)(C), and 408(k)(6)(D)(ii) is increased from \$285,000 to \$290,000.

“ I’ve spent a good deal of time reflecting on what a unique year we’ve all been living through both personally and professionally. I think our future selves will look back on 2020 and wonder how we got through it all.”

**Karen Mack,**  
*Gallagher*

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## President's Letter

Greetings and welcome to our second newsletter for the 2020-2021 program year!

I hope that everyone has had a safe and healthy Fall and Thanksgiving holiday. As we near the holidays and year-end, I've spent a good deal of time reflecting on what a unique year we've all been living through both personally and professionally. I think our future selves will look back on 2020 and wonder how we got through it all. For me, it's been through my personal network of family and friends, as well as my professional network of co-workers, clients and professional colleagues. Serving clients and serving our business community as your President has allowed me to feel connected and engaged and I'm sincerely grateful for the opportunity.

As an organization and Board of Directors, we had a very productive Fall season:

We kicked off the program year on September 29th with an exciting session featuring one of our famous local San Francisco employers – Twitter! **Nancy Kobs**, Head of Global Equity Programs and Shareholder Services at **Twitter** was joined by **Jennifer George, J.D.** who is a Partner in **PwC's** People & Organization Tax Group. Nancy and Jennifer held an engaging discussion on Twitter's benefit program that their employees (affectionately known as "tweeps" receive). They took us through the changes and processes they've employed during the pandemic and the innovative approaches utilized to support and communicate to their diverse employee population.

This session was followed by a Halloween favorite on October 30th with a session aptly titled "Nightmare on Benefits Street." **Karen Casillas** of **CAPTRUST**, **Crystal Coleman** of **CliftonLarsonAllen**, and **Joseph Faucher** of **Trucker Huss**

*The Board decided that we would make a charitable donation to the San Francisco Food Bank, in lieu of our membership event.*

gave example after example of cautionary tales. Those of us who attended were not sure which was better – the vivid Halloween graphics or the real-life examples of compliance challenges that led to litigation so we could all the red flags in advance next time to avoid the pitfalls.

Finally, on November 17th, we hosted a lunchtime webinar on the New Department of Labor (DOL) Environmental, Social and Governance (ESG) Ruling. **Michael Davis**, Head of Defined Contribution Plan Specialists for the Americas division for **T. Rowe Price** and former deputy to **Phyllis Borzi**, and **Margaret Raymond**, managing counsel, of **T. Rowe Price**. Michael and Margaret walked us through the financial and objective factors of ESG funds, fiduciary obligations, and an insider's perspective on how the rule evolved to its current form.

This is the time of year when we would normally hold a membership appreciation holiday party to celebrate in person and network with our members. Unfortunately, we are still not able to host in-person events due to the pandemic. The Board decided that we would make a charitable donation to the **San Francisco Food Bank**, in lieu of our membership event. We look forward to meeting in person when it is safe and our membership is comfortable doing so.

Thanks to our dedicated Board who has been working hard behind the scenes on behalf of our organization. The leadership team for 2020-2021 includes Victoria Fung as Vice President, Brad Wall as Treasurer and Michon Caton as Secretary. Our Board members include Bill Berry, Karen Casillas, Ami Givon, Matt Gouaux, Robert Gower, Lori McKenzie, Sandy Purdy, and Alison Wright. Our Program committee is co-chaired by Karen Casillas and Yana Johnson, the Brown Bag coordinator is Sandy Purdy, and Robert Gower is our Membership Board Liaison working with the committee leadership and the newsletter editor is Sarah Kanter.

Thank you and here's to a safe and healthy New Year and successful remainder to the FY20-21 program year!

**Karen Mack, FSA, EA, MAAA**  
**Gallagher**

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## Gallagher - Thought Leadership

### Can fiduciaries continue to allow ESG funds in a plan's investment line-up?

On October 30, 2020, the Department of Labor (DOL) finalized its investment duties regulations under ERISA. The final regulations require plan fiduciaries to select investments and investment courses of action based solely on financial considerations relevant to the risk-adjusted economic value of a particular investment or investment course of action. While the proposed version of the regulations focused specifically on environmental, social and corporate governance (ESG) investing, the final version has removed any reference to ESG terminology. Instead, the final regulation sets forth fiduciary standards for selecting and monitoring investments held by ERISA plans and addresses the scope of fiduciary duties surrounding non-pecuniary issues.

Interest in socially responsible investments – both by retirement plans and individual investors – has grown significantly in recent years. The DOL's final regulations might serve to give retirement plan fiduciaries some pause in using these investments going forward. Decisions allowing funds that consider ESG factors will require careful deliberation and documentation. But under these rules, ESG factors can continue to have a role in fiduciary investment decisions, as long as that role is strictly pecuniary in nature. Additionally, the DOL's view on ESG factors has tended to shift upon changes in presidential administrations and the Biden administration may offer future guidance giving fresh view on the issue.

Following is an information article exploring additional details of this issue:

<https://www.ajg.com/us/news-and-insights/2020/nov/dol-finalizes-regulation-investment-duties/>

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THURSDAY, JANUARY 14, 2021

12:00 PM - 1:30 PM

SPEAKER

MIKE TOWNSEND, VICE PRESIDENT

LEGISLATIVE AND REGULATORY AFFAIRS

CHARLES SCHWAB

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## Member Profile: Christine Carolan

**Company:** T. Rowe Price Retirement Plan Services

**Title:** Director, Consultant Relations

**Education:** Bachelor of Arts Degree, Economics, Fairfield University, Fairfield, CT

**Years in the industry:** 28

**Please tell us about your first “real” job:** My first job out of college was in Marketing at IBM. I was part of the division that sold PCs at the time, based in New Jersey. I had a great boss who offered me the opportunity to transfer to the San Francisco branch office and go to IBM Sales School. I accepted the job in the San Francisco office sight unseen. I had never been here before, but I knew instinctively that I would love it!



### BUSINESS BACKGROUND

**Nature of your work:** I am the Director of Consultant Relations for T. Rowe Price’s Retirement Plan Services (recordkeeping) division.

**How you got into the field:** Early in my career I had a good friend who worked as an actuary for a large benefits consulting firm in San Francisco and she convinced me to interview for a sales position there. I got the job and quickly decided that the Defined Contribution practice was where I wanted to focus. It was a fantastic learning experience and I continue to work with many fellow alumni from that firm today.

**What you like about the field:** Every day I get to work with great people who are passionate about helping participants meet their retirement goals. The retirement landscape has evolved so much over the decades that I’ve been in the business – through legislation, technology, and investment trends – and I am constantly learning.

### PERSONAL

**Ways you spend free time:** Golfing, biking, skiing, running, and (in non-COVID times) lots of traveling with my husband.

**Guiding philosophy:** Kindness matters...especially in 2020.

**Favorite charities:** Larkin Street Youth Services, San Francisco-Marin Food Bank.

**Last books read:** “Educated” by Tara Westover; and based on recommendations from several colleagues, I just started “Bad Blood: Secrets and Lies in a Silicon Valley Startup” by John Carreyrou.

**Restaurant recommendations:** With the COVID shutdown, it’s all about take-out comfort food! Some favorites are Dragon Well for Chinese food, Longboard for pizza, and Brickhouse Café for burgers.

**What will you do when you retire:** Travel, bike, golf, volunteer work and most of all, spend more time with loved ones.

## Qualified Retirement Updates, continued

- The dollar amount under Code section 409(o)(1)(C)(ii) for determining the maximum account balance in an employee stock ownership plan subject to a five-year distribution period is increased from \$1,150,000 to \$1,165,000, while the dollar amount used to determine the lengthening of the five-year distribution period remains at \$230,000.
- The compensation amount under Code section 408(k)(2)(C) applicable to simplified employee pensions is increased from \$600 to \$650.
- The threshold used to determine whether a multiemployer plan is a systemically important plan under Code section 432(e)(9)(H)(v)(III)(aa) is increased from \$1,135,000,000 to \$1,176,000,000.
- For a participant who separated from service before January 1, 2021, the limitation under Code section 415(b)(1)(B) is computed by multiplying the participant's compensation limitation, as adjusted through 2020, by 1.0122.

The following limitations will remain at their 2020 levels for 2021:

- The elective deferral exclusion limitation under Code section 402(g)(1) (for elective deferrals under Code section 401(k), 403(b) and 457(b) arrangements) remains at \$19,500.
- The dollar limitation under Code section 414(v)(2)(B)(i) (other than for a plan described in Code sections 401(k)(11) or 408(p)) for "catch-up contributions" for individuals age 50 and older remains at \$6,500.
- The defined benefit plan annual benefit limitation under Code section 415(b)(1)(A) remains at \$230,000.
- The dollar threshold under Code section 416(i)(1)(A)(i) in determining whether an officer is a key employee under the top-heavy rules remains at \$185,000.
- The limitation used in the definition of highly compensated employee under Code section 414(q)(1)(B) remains at \$130,000.
- The elective deferral limitation under Code section 408(p)(2)(E) for SIMPLE retirement accounts remains at \$13,500.
- The dollar limitation under Code section 414(v)(2)(B)(ii) for catch-up contributions to an applicable employer plan described in Code sections 401(k)(11) or 408(p) for individuals age 50 and older remains at \$3,000.
- The limit on annual contributions to an individual retirement account ("IRA") remains at \$6,000. (The additional "catch-up contribution" limit for individuals age 50 and over is not subject to an annual cost-of-living adjustment and remains at \$1,000.)

Notice 2020-79 also lists the adjusted gross income limitations applicable in 2021 under Code section 25B(b) for determining the retirement savings contribution credit, the applicable dollar amount under Code section 219(g)(3) for determining the deductible amount of an IRA contribution, and the applicable dollar amount under Code section 408A(c)(3)(B)(ii)(I) for determining the maximum Roth IRA contribution amount.

**Increase in Social Security Wage Base:** The Social Security Administration has announced that the wage base for computing the Social Security tax (OASDI) in 2021 will be \$142,800, up from \$137,700 for 2020.

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## Qualified Retirement Updates, continued

### **Guidance Regarding Miscellaneous Changes Under the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) and the Bipartisan American Miners Act of 2019 (Miners Act):** In

Notice 2020-68, the IRS issued additional guidance with respect to certain provisions of the SECURE Act and Miners Act. Among the points covered are:

- IRA trustees and custodians are not required to accept contributions after age 70½, which the SECURE Act permits for years after 2019. Trustees and custodians accepting such contributions must amend their IRA contracts by December 31, 2022 (or any later date prescribed by the IRS). The IRS expects to issue revised model IRAs and prototype language addressing SECURE Act changes affecting IRAs.
- Although the SECURE Act's requirement that employees who have completed at least 500 hours of service in at least three consecutive 12-month periods be eligible to participate in the employer's 401(k) plan need to take into account only post-2020 periods for eligibility purposes, all years of service must be taken into account in determining those employees' vested percentage in employer contributions.
- The rules regarding penalty-free "qualified birth or adoption distributions" that the SECURE Act permits to be made from and repaid to applicable qualified plans and IRA are clarified. Each parent may receive such a distribution of up to \$5,000 for the same child or adoptee, and separate distributions may be made for multiple births and adoptions. Plans are not required to permit these distributions.
- The Miners Act's provision lowering the minimum age at which in-service distributions may be made from pension plans and governmental Code section 457(b) plans from 62 to 59½, is not required to be provided by those plans. Also, the lowering is separate from the rules governing the permissible definition of normal retirement age.

Notice 2020-68 also addresses questions regarding new Code section 45T, which provides a tax credit for an eligible employer that establishes an eligible automatic contribution arrangement under a qualified plan; the inclusion of "difficulty of care" payments as compensation for certain Code provisions; and the deadlines for amending plans to reflect applicable provisions of the SECURE Act and Miners Act.

### **New Life Expectancy and Distribution Period Tables for Calculating Required Minimum Distributions (RMDs):**

On November 10, 2020, the IRS issued final regulations updating life expectancy and distribution period tables that are used to calculate RMDs from qualified plans, IRAs and certain other tax-favored retirement arrangements. The final regulations apply to distribution calendar years beginning on or after January 1, 2022.

The life expectancy tables and applicable distribution period tables in the final regulations generally reflect longer life expectancies than the tables in formerly applicable Treasury Regulations section 1.401(a)(9)-9. For example, a 72-year-old IRA owner who applied the Uniform Lifetime Table under formerly applicable section 1.401(a)(9)-9 to calculate RMDs used a life expectancy of 25.6 years. Applying the new Uniform Lifetime Table, a 72-year-old IRA owner will use a life expectancy of 27.4 years instead.

**Withholding and Reporting Requirements With Respect to Payments to State Unclaimed Property Funds:** In Revenue Ruling (Rev. Rul.) 2020-24, the IRS concluded that payments from a Code section 401(a) plan that does not include designated Roth accounts, hold employer securities, or provide benefits described in Code section 104 (compensation for injuries or sickness) or Code section 105 (amounts received under accident and health plans) of the accrued benefits of an individual U.S. taxpayer was subject to the withholding requirements of Code section 3405 and the reporting requirements of Code section 6047.



## Qualified Retirement Updates, continued

**Expansion of Deadlines to Adopt Discretionary Amendments to Pre-approved Plans:** In Revenue Procedure (Rev. Proc.) 2020-40, the IRS modified Rev. Proc. 2016-37 and Rev. Proc. 2019-39 so that discretionary amendments to pre-approved Code section 401(a) and 403(b) plans also will be considered to have been timely adopted if done so according to a statutory provision or guidance providing for a deadline that is later than an otherwise-applicable deadline.

**Due Dates for Minimum Required Contributions to Defined Benefit Plans Delayed Under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and for Reporting and Paying Related Excise Taxes:** In Notice 2020-61, as modified by Notice 2020-82, the IRS announced that a contribution to a single-employer defined benefit pension plan with an extended due date pursuant to section 3608(a)(1) of the CARES Act will be treated as timely made if done so by January 4, 2021. In Announcement 2020-17, the IRS postponed until January 15, 2021 the due dates for reporting and paying the excise taxes under Code sections 4971(a)(1) and 4971(f)(1) with respect to contributions to which the extended due date applies.

**Self-certification for Eligibility for Waiver of 60-day Rollover Requirement:** In Rev. Proc. 2020-46, the IRS modified and updated Rev. Proc. 2016-47, which provides a list of permissible reasons for self-certification of eligibility for a waiver of the 60-day rollover requirement, by adding a distribution paid to a state unclaimed property fund as a new permissible reason.

**Change to Default Withholding Pension Withholding Provisions:** On and effective October 1, 2020, the IRS adopted its final regulation changing the default federal income tax withholding rules on certain periodic plan and annuity payments to implement an amendment made by the Tax Cuts and Jobs Act of 2017. Under the change, the “married with three exemptions” default provision under Code section 3405(a)(4) is replaced by “under rules prescribed by the Secretary,” which will be included in an updated form W-4P when finalized.

**Distribution of Individual Custodial Accounts Upon Termination of a 403(b) Plan:** In Rev. Rul. 2020-23, the IRS provided guidance regarding the distribution of individual custodial accounts from a terminated Code section 403(b) plan and whether distributions in connection with the termination are includible in gross income.

**Increase in Federal Thrift Savings Plan Automatic Enrollment Percentage:** The Federal Retirement Thrift Investment Board on September 16, 2020, amended its regulations to increase the automatic enrollment percentage from three percent to five percent of basic pay for all participants who are automatically enrolled in the Thrift Savings Plan (TSP) on or after October 1, 2020 and for Blended Retirement Service participants who are automatically re-enrolled in the TSP on or after January 1, 2021.

**Department of Labor (DOL) Final Regulation Regarding Investment Duties:** The DOL has issued its final amendment to DOL regulations section 2550.404a-1 that confirms that ERISA requires plan fiduciaries to select investments and investment courses of action based on pecuniary factors (defined as factors that the fiduciary determines are expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan’s investment objective and funding policy). Unlike the proposed version of the regulation, the final version does not make reference to environmental, social and governance factors, the consideration of which was to be restricted in the making of investment decisions. Instead, the final rule permits (except in the selection of a “qualified default investment alternative” (QDIA)) the fiduciary to choose between or among investments that the fiduciary cannot distinguish based on pecuniary factors alone, subject to certain analysis and documentation requirements.

The final rule is effective and applies to investments and investment courses of action taken on or after January 12, 2021. Fiduciaries are not required to divest or cease any existing investment, investment course of action, or

*Continued pg 10*

## Qualified Retirement Updates, continued

designated investment alternative prohibited by the final rule. An exception applies to QDIAs, which must be changed by April 30, 2022, as needed to comply with the final rule.

### ***DOL Proposed Amendment to Regulation Addressing Fiduciary Duties Regarding***

***Proxy Voting and Shareholder Rights:*** On September 4, 2020, the DOL proposed an amendment to its “investment duties” regulation to address the application of ERISA’s prudence and exclusive purpose requirements to the exercise of shareholder rights, including proxy voting. The proposal states that Interpretive Bulletin 2016-01 no longer represents the DOL’s view regarding these duties.

The proposal restates that fiduciaries must act prudently and solely in the interests of plan participants and beneficiaries in deciding whether and how to exercise shareholder rights, including the voting of proxies. It details how only the economic interests of the plan and its participants and beneficiaries are to be considered, the duties fiduciaries have regarding investigation, use of proxy advisory firms or other service providers, and recordkeeping in the exercise of shareholder rights.

The proposed amendment also provides guidance to investment managers of pooled investment vehicles that hold assets of more than one plan who may be subject to conflicting investment policy statements.

***Registration Requirements for Pooled Plan Providers (PPPs):*** The DOL issued its final regulations regarding the registration of PPPs who can offer “pooled employer plans” under ERISA sections 3(43) and 3(44) beginning on January 1, 2021. The final rule requires organizations who wish to serve as PPPs to electronically file new EBSA Form PR at least 30 days before beginning operations. (For the period of November 25, 2020, to January 31, 2021, the 30-day requirement is waived, provided registration occurs no later than the start of the plan.) The PPP must also submit supplemental filings regarding reportable events specified in the final rule as well as a final filing after its last pooled employer plan has been terminated and has ceased operations.

***Lifetime Income Illustrations:*** The DOL’s interim final regulation regarding the information that must be provided on pension benefit statements required by ERISA section 105, as amended by the SECURE Act, was published in the Federal Register on September 18, 2020. The interim final regulation requires, when applicable, plan administrators of ERISA defined contribution plans to express a participant’s current account balance both as a single life annuity and a qualified joint and survivor annuity income stream. The effective date of the interim final regulation, previously reported to be August 2021, is now September 18, 2021.

***Pension Benefit Guaranty Corporation (PBGC) Developments:*** On September 9, 2020, the PBGC adopted its final rule, effective January 1, 2021, (1) adopting the interest and mortality assumptions of Code section 417(e)(3) for purposes of determining de minimis lump sum benefits in PBGC-trusted terminated single-employer defined benefit plans, and (2) discontinuing the monthly publication of its lump sum interest rate assumptions.

Guarantee limits for single-employer plans that fail in 2021 will be 3.81% greater than the 2020 limits.

Premium rates for 2021 will be \$86 (up from \$83 for 2020) per participant for flat-rate premiums for single-employer plans; \$46 (up from \$45) per \$1,000 unfunded vested benefits with a \$582 (up from \$561) per participant cap for variable-rate premiums for single-employer plans; and \$31 (up from \$30) per participant flat rate for multiemployer plans.

In its Technical Update 20-2, the PBGC extended until January 1, 2021, the deadline for premium filings due on or after March 1, 2020, and before January 1, 2021, the date by which prior year contributions must be received by the plan to be included in plan assets under PBGC’s premium rates regulations. The relief does not affect premium due dates and does not permit a premium filing to reflect a contribution that has not been made.

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## Gallagher

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## Member Profile: Crystal Coleman

**Company:** CLA (CliftonLarsonAllen LLP)

**Title:** Principal, Employee Benefit Plans

**Education:** Bachelor of Arts Degree, Cal Poly, San Luis Obispo; Master of Business Administration, California State University, Sacramento and Master of Science, Accountancy, California State University, Sacramento

**Years in the industry:** 20+

**Please tell us about your first “real” job:** I was a mystery shopper for a beverage company at the young age of 13, so most people never suspected me of being the mystery shopper! I thought it was great as I was assigned locations to visit and then filled out a report about the location and whether I was offered a specific type of beverage when I purchased a food item (typically popcorn or a soft pretzel). I loved popcorn, so I thought this was the best job ever (yes, I was also paid), but after a summer of endless consumption of popcorn, I needed to move on. What I learned in this job and my next two jobs (waitress at a small café and housekeeping at a historic bed and breakfast) was the importance of customer service and the customer experience – I have carried that knowledge with me to this day and it is integral to how I operate as a professional.



### BUSINESS BACKGROUND

**Nature of your work:** In my role at CLA, I oversee the ERISA audit practice in California, Nevada and Utah. I personally serve about 75 clients and audit both retirement plans and health and welfare plans. I enjoy working directly with clients and also helping my fellow colleagues with building relationships with their clients.

**How you got into the field:** I worked in private industry for about 10 years before entering public accounting, so this was the reverse of a typical career path. In my first year with the firm, I worked on a 401(k) plan audit and really enjoyed the work, so I offered to take on more of this work for our firm and built our practice in Northern California from the ground up. I spent many years immersing myself in this technical area and still learn new things every year, so it has been a great fit for me as I don't like to be bored!

**What you like about the field:** I like that things are always changing – continuous learning is required to be considered a professional in this field and I enjoy the role that WP&BC plays in helping us not only to stay current, but also to be looking ahead to what might be coming next. I also enjoy taking complex subject matter and explaining it to clients in easy to understand language they can use in their day-to-day management of their benefits.

### PERSONAL

**Ways you spend free time:** During COVID, I have been spending more time reading and cooking; while before COVID, I enjoyed travelling internationally and have been able to visit all 7 continents. I am still keeping a list of locations for my next adventure and enjoy researching destinations while we are “on hold” for a bit longer (I hope!).

*Continued pg 13*

## Member Profile continued: Crystal Coleman

**Guiding philosophy:** A primary differentiator in professional services is not the end product you deliver, but the experience of working with you.

**Favorite charities:** I have always had a passion for education and support students at both University of California Davis and CSU Sacramento through an endowment I worked to fund over the past several years. I have sponsored several young people in Zambia (Africa) both for high school and three through college or technical training. I have been fortunate to be able to visit a few times to see how they are doing in their programs.

**Last books read:** "The Best of Me" by David Sedaris and "Where the Crawdads Sing" by Delia Owens.

**Restaurant recommendations:** In the Bay Area, I love Wayfair Tavern, Tadich Grill and Boulevard and I am always up for fresh oysters and sea urchin at Swan's Oyster Depot.

**What will you do when you retire:** So many possibilities! A few ideas include taking a seasonal contract position running a safari game lodge in Southern/Eastern Africa, living in a foreign country for two or three months and doing some multi-day treks in Bhutan, Nepal or New Zealand. I also think it could be fun to fly around doing 401(k) participant enrollment meetings to make sure people save for THEIR retirement!



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## Health and Welfare Regulatory Update

Brian Patton and Elizabeth Harris  
Orrick, Herrington & Sutcliffe LLP

### **The Affordable Care Act Appears Likely to Withstand its Most Recent Challenge Based on Oral Arguments for California v. Texas and other Political and Economic Developments**

On October 10, 2020, the U.S. Supreme Court held oral arguments for California v. Texas. The issue in the case, is whether reducing the penalty to zero in the provision of the Affordable Care Act (ACA) covering the individual mandate renders such provision unconstitutional and if that is the case, whether the individual mandate is severable from the rest of the ACA, so the remainder of the major health care law can stay intact. This article analyzes whether the ACA will survive its latest challenge based on the oral arguments in California v. Texas and recent developments, such as the appointment of Justice Amy Coney Barrett, the election of Joe Biden, to the U.S. Presidency and the ongoing COVID-19 pandemic.

The ACA (colloquially known as Obamacare), comprehensively reformed the U.S. health care system and employed a “carrot-and-stick” approach to incentivize Americans to be covered by health insurance. The Affordable Care Act’s “carrot” is a number of health-related provisions that have the primary aim of making affordable health insurance available to more Americans by providing subsidies in the form of premium tax credits that reduce health care costs for lower income households and by expanding the Medicaid program to more Americans below the federal poverty level. The Affordable Care Act had a “stick” for plan years 2014-2018, through its individual mandate that imposed a financial penalty on any taxpayer upon filing their federal income tax return, if they could have afforded health coverage but chose not to purchase it. The Affordable Care Act’s “carrot” provisions remain intact. While, the “stick” has essentially been removed, as the individual mandate’s penalty for foregoing health insurance has been reduced to zero for any plan year starting after 2018.

In 2012, the Affordable Care Act survived a Supreme Court challenge in NFIB v. Sebelius (Sebelius) by a 5-4 vote. A block of four Democratic nominated justices voted to uphold the ACA, while a block of four Republican nominated justices found that Congress did not have the power under the Constitution to enact the individual mandate. Chief Justice Roberts, a Republican nominated justice served as the necessary “swing vote” in favor of the ACA and held that the individual mandate’s penalty functions as a “tax,” and therefore such penalty is a valid exercise of Congress’s taxing power under Article 1, Section 8 of the Constitution, which grants Congress the authority to “lay and collect taxes.” In California v. Texas, the challenging party, a Texas-led coalition of Republican-leaning states backed by President Trump’s administration, argued that because the individual mandate’s penalty was zeroed out, it no longer functioned as a tax and was therefore unconstitutional.

Since the Supreme Court granted writ of certiorari in California v. Texas back in March of 2020, on appeal by 21 states led by California, Justice Ruth Bader Ginsburg’s seat on the Supreme Court (who voted to uphold the Affordable Care Act in Sebelius) has been filled by Amy Coney Barrett, a justice appointed by President Trump. Amy Coney Barrett, who was publicly declared her opposition to the Court’s decision in Sebelius to uphold the Affordable Care Act, would appear to strongly increase the likelihood that the health care law will not survive California v. Texas. There are now only three Democratic appointed justices on the Court and thus it appears these Justices will have to find at least one additional “swing voter” other than Chief Justice Roberts to uphold the Affordable Care Act. Further, challengers to the Affordable Care Act are hopeful that Chief Justice Roberts will change his position on the health care law based on the challengers’ arguments that the individual mandate no longer functions as a tax due to its penalty being zeroed out.

Despite Justice Barrett’s confirmation, the bulk of the Affordable Care Act, including its provisions providing for premium tax credits and the expansion of the Medicaid program should survive the California v. Texas. Based on



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the case's oral arguments, Chief Justice Roberts and Justice Kavanaugh appear unwilling to strike down the entire the law, even if they determine the individual mandate is unconstitutional. Therefore, following the oral arguments, it currently seems that Chief Justice Roberts will remain on the side of the three Democratic appointed SCOTUS justices with respect to the Affordable Care Act's constitutionality (at least for every provision but its individual mandate) while Justice Kavanaugh will serve as the requisite additional "swing vote" (made potentially necessary by Justice Barrett's confirmation).

During the oral arguments for *California v. Texas*, Chief Justice Roberts told Texas Solicitor General Kyle Hawkins "it's hard for you to argue that Congress intended the entire act to fall if the mandate were struck down when the same Congress that lowered the penalty to zero did not even try to repeal the rest of the Act." Justice Kavanaugh similarly stated to Donald Verrilli, who was defending the ACA, "I tend to agree with you that it's a very straightforward case for severability under our precedents, meaning that we would excise the mandate and leave the rest of the Act in place, reading our severability precedents."

Additionally, the recent election of Joe Biden could help protect the Affordable Care Act, as once Biden is sworn in as president on January 20, 2021, he could push Congress to resurrect the individual mandate's penalty and therefore make *California v. Texas* moot. Biden, unlike President Trump, has stated he wants to protect the ACA and build upon it. Because *California v. Texas* will likely not be decided until late spring or early summer of 2021, Biden would have time to push for such protective legislation.

While time is on Biden's side, finding the necessary congressional support could be more challenging. The Democrats have retained a majority in the House of Representatives but currently face long odds to gain control of the Senate from the Republicans. To win control of the Senate, the Democrats need to win both of Georgia's Senate seats that will be decided by a January 5, 2021, runoff election. According to oddsmakers, Kelly Loeffler of the Republican Party is a slight favorite to defeat Raphael Warnock of the Democratic Party, while David Perdue of the Republican Party is a solid but not overwhelming favorite to defeat Jon Ossoff of the Democratic Party.

### **California Has Passed a New State Law to Supplement the Paid Sick Leave Provided in the Federal Families First Coronavirus Response Act**

On September 9, 2020, California enacted Labor Code section 248.1, which is designed to provide workers with COVID-19 supplemental paid sick leave who are not covered under federal law through the Families First Coronavirus Response Act (FFCRA). The FFCRA applies to only private employers with fewer than 500 employees and to government employers (though certain federal government employees are excluded). This article will summarize the key requirements an individual must satisfy to be eligible for COVID-19 supplemental paid sick leave under Labor Code section 248.1 (such leave, "CSP sick leave") and other primary components of this state law, such as how much CSP sick leave is available and the rate of pay California workers can receive while taking CSP sick leave.

#### **Covered Employers**

Since Labor Code section 248.1 is intended to provide CSP sick leave to those California workers not covered under the FFCRA, this state law applies to:

- (i) any private employer that has 500 or more employees in the U.S.; or
- (ii) health care providers and emergency providers of any size that have elected to exclude their employees from emergency paid sick leave under the FFCRA (any employer described in (i) and (ii), a "Covered Employer").

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### **Covered Workers**

To be eligible for CSP sick leave, a worker must be required to leave their home or other place of residence to perform work for or through their Covered Employer. Thus, if an employee works 100% remotely, they are ineligible for CSP sick leave. Moreover, individuals working as independent contractors for a Covered Employer are not eligible for CSP sick leave unless they perform work in the food-sector.

A California worker of a Covered Employer that is not ineligible for CSP sick leave due to the reasons described in the paragraph directly above (such worker, a "Covered Worker") may take CSP sick leave for any of the following reasons:

- (i) the Covered Worker is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- (ii) the Covered Worker is advised by a health care provider that they self-quarantine or self-isolate due to concerns related to COVID-19; or
- (iii) the Covered Worker is prohibited from working by their Covered Employer due to health concerns related to the potential transmission of COVID-19.

Notably dissimilar to the FFCRA, a Covered Worker may not receive CSP sick leave because they must either:

- (i) care for someone else who is experiencing COVID-19 symptoms or who is quarantined or (ii) provide child care to a child whose school or place of child care is shut-down due to COVID-19.

### **Allowed Amount of CSP sick leave for Covered Workers**

A Covered Worker is entitled to up to 80 hours of CSP sick leave, if the Covered Worker meets either one of the following two conditions:

- (i) the Covered Employer considers the Covered Worker to work "full time"; or
- (ii) the Covered Worker worked or was scheduled to work, on average, at least 40 hours per week for the Covered Employer during the two weeks immediately before the date the Covered Worker took CSP sick leave.

A Covered Worker that is not entitled to take up to 80 hours of CSP sick leave (i.e., a part-time employee) but works a normal schedule may take the total number of hours the Covered Worker is normally scheduled to work for their Covered Employer over two weeks.

A Covered Worker that works a variable number of hours and who is not entitled to take up to 80 hours of CSP sick leave (i.e., a variable and part-time employee), can generally take an amount of CSP sick leave equal to 14 times the average number of hours the Covered Worker worked each day for their Covered Employer in the six months immediately before the date the Covered Worker took CSP sick leave. But if a Covered Worker that is a variable and part-time employee has worked less than six months but more than 14 days for their Covered Employer, this calculation is instead made over the entire period this Covered Worker has worked for their Covered Employer. Further, if a Covered Worker who is a variable and part-time employee has worked for 14 days or fewer for their Covered Employer, this Covered Worker is entitled to take an amount of CSP sick leave equal to the total number of hours they have worked for their Covered Employer.

### **Pay Rate**

While a Covered Worker is taking CSP sick leave, their Covered Employer will be required to pay the worker at a rate equal to the highest of the following (but at an amount not exceeding \$511 per day or \$5,110 for the entire period such Covered Worker takes CSP sick leave):

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- (i) the Covered Worker's regular rate of pay for the Covered Worker's last pay period;
- (ii) the California state minimum wage rate; or
- (iii) the local minimum wage rate to which the Covered Worker is entitled to.

### ***Offset for Prior COVID-19 Paid Leave and Other Leave/PTO/Overtime***

A Covered Employer may offset paid leave they previously provided to a Covered Worker against the amount of CSP sick leave they would otherwise be required to provide the Covered Worker under Labor Code Section 248.1, if such previously provided paid leave satisfies the following two conditions:

- (i) the leave was provided for any of the COVID-19 related reasons described in the "Covered Workers" section of this Article; and
- (ii) they compensated the Covered Worker at an amount equal to or exceeding the amount they would have been entitled to while taking CSP sick leave.

However, a Covered Employer, may not require a Covered Worker to use any of their other paid or unpaid leave, paid time off, or vacation time they provide to the Covered Worker before such Covered Worker uses CSP sick leave or in lieu of CSP sick leave.

### ***Effectiveness***

Covered Employers will be required to provide CSP sick leave to Covered Workers from September 19, 2020, until the later of the date the FFCRA expires or December 31, 2020. Moreover, if Labor Code section 248.1 expires while a Covered Worker is taking CSP sick leave, the Covered Worker will be allowed to finish taking the amount of CSP sick leave they are entitled to receive.

### ***The IRS Announces Annual Cost-of-Living Adjustments for Applicable Dollar Limits in the Internal Revenue Code for Health and Welfare Plans***

The Internal Revenue Service through various publications has recently announced the annual cost-of-living adjustments (if any) to the dollar limits in the Internal Revenue Code of 1986, as amended (the "Code"), for the following health and welfare plans: cafeteria plans, qualified transportation fringe benefits, Health Savings Accounts (HSAs) and High Deductible Health Plans (HDHPs) and expected benefit health reimbursement arrangements. This article states what the dollar limits will be for each of those health and welfare plans in 2021 and whether such amounts increased from 2020 due cost-of-living adjustments.

### ***The Dollar Limits for Cafeteria Plans and Qualified Transportation Benefits (Announced in Rev. Proc. 2020-45)***

The dollar limitation placed under the Code for the amount an employee can voluntarily contribute to their employer's health flexible spending arrangement (a "cafeteria plan") will remain at \$2,750 for taxable year 2021. The maximum unused amount from a cafeteria plan that can be carried over has increased from \$500 to \$550 for taxable year 2021.

For taxable year 2021, the monthly limitation under the Code with respect to the aggregate fringe benefit exclusion amount for transportation in a commuter highway vehicle and any transit pass will be remain at \$270. The monthly limitation under the Code with respect to the fringe benefit exclusion amount for qualified parking will also remain at \$270 for taxable year 2021.

### ***The Dollar Limits for HSAs and HDHPs (Announced in Rev. Proc. 2020-32)***

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## Health and Welfare Updates, continued

For calendar year 2021, with respect to HSAs, the annual contribution limits under the Code will increase from \$3,550 to \$3,600 for individuals with self-only coverage under a health plan and increase from \$7,100 to \$7,200 for individuals with family coverage under a health plan.

Individuals can only contribute to an HSA if they are enrolled in a HDHP. For calendar year 2021, a health plan will be considered a HDHP, if it has an annual deductible of \$1,400 or greater for self-only coverage (the same amount as 2020) and \$2,800 or greater for family coverage (the same amount as 2020) and annual out-of-pocket expenses (deductibles, co-payments and other amounts, but not premiums) do not exceed \$7,000 for self-only coverage (up from \$6,900 in 2020) or \$14,000 for family coverage (up from \$13,800 in 2020).

### ***The Dollar Limit for Expected Benefit Health Reimbursement Arrangements (Announced in Rev. Proc. 2020-43)***

The maximum amount allowed to be newly made available under the Code for plan years beginning after the end of 2020 and before the start of 2022, for expected benefit health reimbursement arrangements will remain at \$1,800.

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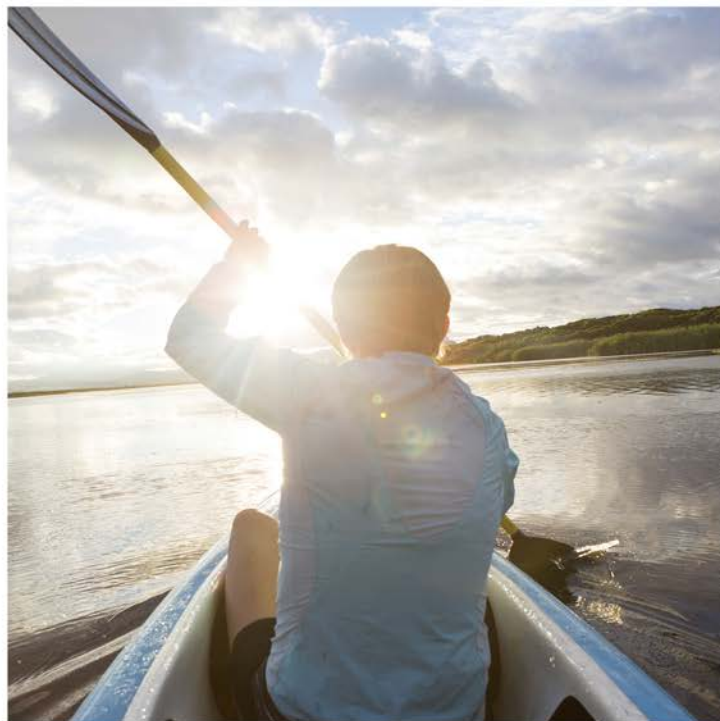
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The Newsletter welcomes contributions from its members. If you would like to submit a topical benefits-related article for an upcoming issue, please contact the chapter at [info@wpbcfsf.org](mailto:info@wpbcfsf.org).

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

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