Major Employee Benefit Reforms Included in COVID-19 Stimulus Package

In addition to $600 checks for most Americans, the year-end COVID-19 stimulus package signed by the President on December 27, 2020, includes a new round of changes that employers will need to track for their employee benefit plans. The Consolidated Appropriations Act, 2021 (H.R. 133) (the "Act") is the fourth major legislative attempt to provide relief to businesses and individuals facing economic hardship due to the COVID-19 pandemic. Although lacking a catchy acronym (like the "CARES" and "SECURE" Acts), this legislation makes the most significant changes to health plans since the Affordable Care Act, offers employers and employees additional flexibility for cafeteria plan benefits, and provides additional retirement plan relief.

HEALTH PLANS

The Act builds upon the separate final regulations issued earlier in December by the Departments of Treasury and Labor and the Centers for Medicare and Medicaid Services that require health plans and health insurance issuers to provide greater transparency about the cost of services. In addition to those regulations, which become effective in 2022, the Act imposes new restrictions on so-called "surprise" medical bills, requires health plan consultants and brokers to provide new disclosures about their fees and services, and requires new reporting to document compliance with mental health parity rules.

Surprise Medical Billing and Transparency

Effective for plan years beginning in 2022, health plans and insurers will face new limits on cost-sharing and other restrictions they can impose on non-network providers. These provisions are intended to protect consumers from unexpected medical bills for services they receive from certain non-network professionals and facilities, air ambulance services, and emergency room providers. The Act imposes different rules for services provided on an emergency and non-emergency basis. Generally, non-network providers may not balance bill the participant unless the provider gives the participant advance notice and the participant consents. However, if a plan covers emergency services in an emergency department, it must cover non-network emergency services without prior authorization and subject to in-network cost-sharing rules. Plans and insurers must make initial payments or issue denial notices to providers within tight time frames (generally 30 days from the date of service).

The Act imposes many other new requirements on group health plans and health insurers. Plans must issue an advance explanations of benefits for certain scheduled services; include specific information on participant identification cards; provide 90 days of continued, in-network care for individuals undergoing treatment for serious or complex conditions even after their provider leaves the network; and maintain a price comparison tool that allows participants and providers to compare cost sharing for services.

Expanded ERISA Section 408(b)(2) Disclosures for Health Plan Consultants

Although retirement plan service providers have been required to give plan fiduciaries special disclosures that describe the services that they perform and the fees that they receive for those services (both directly and indirectly) since 2012, service providers for health and welfare plans have been exempt from those requirements. The Act removes that exemption. Beginning in late 2021, any person or entity that expects to receive $1,000 or more in direct or indirect compensation annually for providing brokerage or consulting services to a health plan must provide the appropriate plan fiduciaries with an ERISA Section 408(b)(2) notice. The notice must describe (i) the services that the broker or consultant will provide, and (ii) the compensation that the broker or consultant reasonably expects to receive, and the way that compensation will be paid. These notices must be provided *before* the consultant or broker enters into, or renews, a service agreement with the plan. This new disclosure requirement will apply to consulting or brokerage contracts executed or renewed on or after December 27, 2021 (the one-year anniversary of the Act's passage).

Mental Health Parity Standards

The Act imposes new reporting requirements on health plans and insurers that will better enable the Departments of Labor and Health & Human Services to enforce existing mental health and substance use disorder parity standards. Health plans and insurers that impose a nonquantitative treatment limitation ("NQTL") on mental health or substance use disorder benefits (such as a restriction based on the type of facility at which services are provided) must perform, document, and make available to federal regulators a comparative analysis of the NQTL's design and application. Plans and insurers must begin to conduct these analyses within 45 days after the Act's enactment.

CAFETERIA PLAN AND FLEXIBLE SPENDING ACCOUNT RELIEF

The Act extends into 2021 and 2022 the optional (and temporary) relief made available under the CARES Act to employers who sponsor cafeteria plans or other arrangements that include flexible spending accounts. Although employees will appreciate the added flexibility to make election changes and use flexible spending account ("FSA") balances, these changes are *optional* for employers. Like the CARES Act cafeteria plan relief, employers can choose to adopt all, some, or none of the relief. To the extent that they do, however, plan documents must be modified to reflect the changes by the end of the first calendar year beginning after the plan year in which the changes take effect, and the plan must be administered consistently in accordance with the modified provisions in the meantime.

FSA Carryovers and Grace Periods

Employers may modify their health FSA and/or dependent care reimbursement accounts to permit unused amounts remaining in those accounts from a plan year ending in 2020 to be carried over to 2021, and to permit unused amounts from a plan year ending in 2021 to be carried over to 2022 (not limited to the normal $550 carryover maximum).

Plans that include a grace period permitting participants to use amounts remaining in a health or dependent care FSA for the first 2 ½ months of the next plan year may extend an existing grace period that ends in 2020 or 2021 for 12 months after the end of the plan year.

Election Changes

Employers may permit cafeteria plan participants to prospectively modify their health or dependent care FSA elections for plan years ending in 2021, even if they would not otherwise be permitted to make such changes under the standard change-in-status rules.

Extended Coverage for Terminated Employees

Employers may permit employees (and their dependents) who ceased participation in the employer's health FSA in 2020 or 2021 (for instance, because of a termination of employment) to continue receiving reimbursements for covered expenses from the FSA through the end of the plan year in which participation ceased (including the grace period).

Extended Age for Dependent Care Reimbursement Account Eligibility

Dependent care reimbursement accounts may be modified to extend the maximum age of eligible dependents on whose behalf expenses may be reimbursed, from 13 to 14 years old. This rule is effective for dependents who aged out of eligibility during the last plan year with a regular enrollment period ending on or before January 31, 2020.

As noted above, employers that choose to adopt any of these permissive changes *must* adopt conforming plan amendments by the end of the plan year following the plan year in which the change is effective. Thus, plans that adopt changes effective in 2021 must be amended by the end of the 2022 plan year. All of the other rules applicable to cafeteria plans and FSAs (such as the prohibition on cash-outs of unused contributions) remain in effect.

OTHER WELFARE PLAN RELIEF

Student Loan Repayments

The Act extends relief first promulgated under the CARES Act for qualified educational assistance programs under Code Section 127. That relief allows employers to repay qualified educational loans incurred by their employees for their own education, up to the $5,250 annual limit for educational assistance program benefits. Under the CARES Act, this temporary change was set to expire on January 1, 2021. The Act extends the relief to amounts paid before January 1, 2026.

Income Tax Deduction

Medical expenses in excess of 7.5% of a taxpayer's adjusted gross income are once again deductible. The Affordable Care Act had increased the deduction threshold to 10%, but the Act reinstates the old threshold.

RETIREMENT PLAN RELIEF

Although most of the benefit plan relief afforded through the Act applies to health and welfare arrangements, Congress did not forget about retirement plans. While the Act does not extend the now-expired coronavirus-related distribution and loan provisions of the CARES Act, it does help employers that were forced to make pandemic-driven layoffs avoid partial terminations of their plans. The Act also offers a limited extension of the disaster distribution rules.

Partial Termination Relief

Employer-initiated layoffs and other actions that result in a substantial (*i.e.*, 20% or more) decrease in the number of participants in an employer's defined contribution plan over a specified period can trigger a partial termination of the plan. A partial termination requires the plan to fully vest all participants who were terminated during the period, which can cause a loss of forfeitures and can require the plan sponsor to make additional contributions to the plan in order to restore previously forfeited amounts. Many employers that laid off employees in response to the pandemic have been forced to determine whether those layoffs caused a partial termination.

The Act affords a temporary safe harbor from the partial termination rules that should help many employers in this situation. Under this safe harbor, if the number of active participants in an employer's plan on March 31, 2021, is at least 80% of the number of active participants in the plan on March 13, 2020 (when the COVID-19 national emergency was declared), the plan will be deemed *not* to have suffered a partial termination. This relief applies to any plan year that includes the period beginning on March 13, 2020, and ending on March 31, 2021.

Qualified Disaster Distributions

The Act allows employers to add special, disaster-related distribution and loan options to their defined contribution plans. Similar to the disaster distribution rules afforded under the SECURE Act, these options would be available for a limited time. If an employer elects to add them, they would permit participants who are affected by a FEMA-declared disaster occurring between January 1, 2020, through February 25, 2021 (*other* than COVID-19) to request a qualified disaster distribution or loan of up to $100,000, without being subject to the 10% penalty on early distributions. Like coronavirus-related distributions under the CARES Act, these qualified disaster distributions could be repaid within three years without tax consequences for the recipient. This relief is only available for distributions made within 180 days after the Act was effective (*i.e.*, through June 25, 2021).

NEXT STEPS FOR EMPLOYERS

Like the SECURE and CARES Acts, the Consolidated Appropriations Act will require employers to make some quick decisions and coordinate carefully with their benefit plan vendors. Action steps for employers include:

- Coordinate with insurers and/or third-party administrators of health plans to ensure compliance with the surprise billing rules;
- Request ERISA Section 408(b)(2) disclosures from health plan brokers and consultants, and review those disclosures for reasonableness when they are made available;

- Decide whether to offer some or all of the cafeteria plan and FSA relief, and if so, determine responsibility for, and timing of, required plan amendments;
- Evaluate whether layoffs implemented during the pandemic caused a partial plan termination; and
- Decide whether to offer a qualified disaster distribution or loan option.

This Client Alert was prepared by Greg Ash, an attorney in the Spencer Fane Overland Park, Kansas office. Our Employee Benefits team is ready to help you with these decisions. For more information, click here.