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Coming Out of Quarantine: A Post-Pandemic Action Plan for Employee Benefit Plan Sponsors

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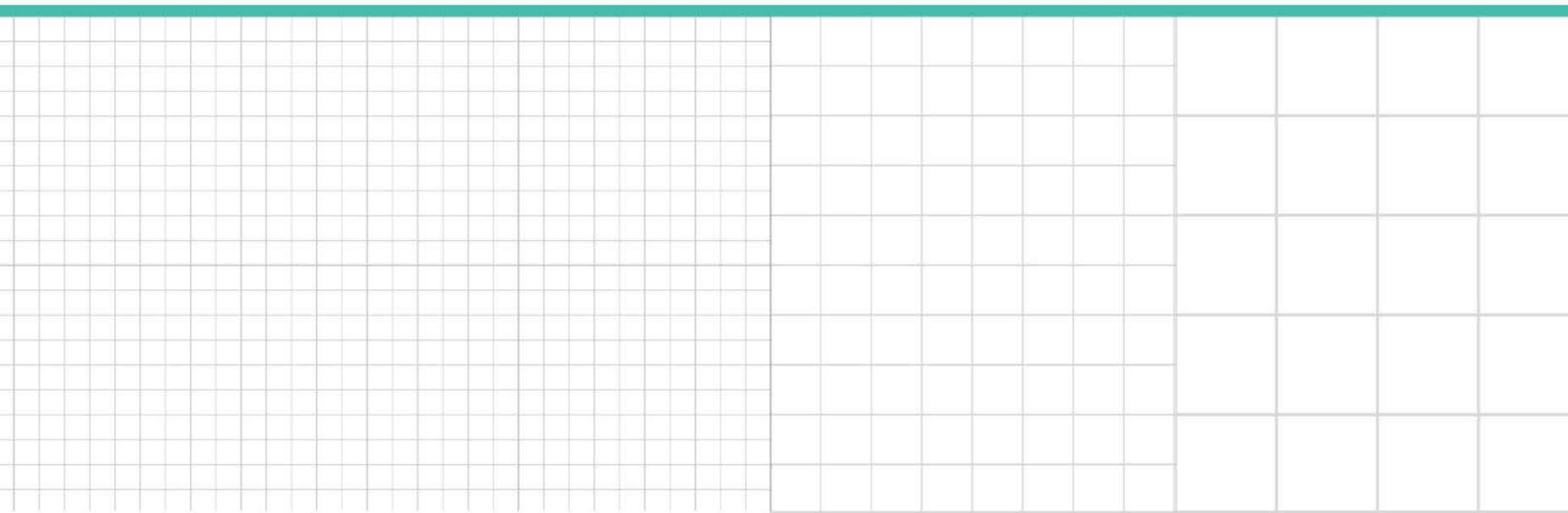

Coming Out of Quarantine: A Post-Pandemic Action Plan for Employee Benefit Plan Sponsors

Contributed by Greg Ash and Rob Browning, Spencer Fane LLP

It has been a tumultuous six months for employee benefit plan sponsors. Washington has churned out benefits-related legislation, regulations, and administrative guidance at a rate not seen in decades.

As employers now contemplate their reopening — or retrenching — options, it is important that they have a practical strategy for complying with the plethora of guidance that has already been issued and a clear understanding of the issues they may encounter in the weeks and months ahead.

Unfortunately, a one-size-fits-all action plan is impossible.

Employers have been affected differently (if at all) by the COVID-19-related relief, based on the benefits they offer, their approach to workforce issues, and whether they chose to opt into permissive benefit changes. In the rush to react to the crisis, decisions were made and benefits were altered on the fly, with the understanding that the details, such as participant notices and plan amendments, will be worked out later.

Nevertheless, someone must keep track of those decisions, and make sure that the details are, in fact, worked out.

A sound post-pandemic action plan includes three central components: (1) understanding and documenting benefit-related decisions that have already been made; (2) anticipating the implications of future workforce changes (such as re-hires or layoffs); and (3) monitoring compliance with notice and amendment requirements.

Part I: Health & Welfare Plans

Where Have We Been?

Post-pandemic planning first requires a clear picture of the regulatory path that plan sponsors have traversed over the past months. Sponsors may be forced to retrace their steps — and revisit some of their decisions — in the months ahead.

Benefit Mandates and HDHP Relief. Both the Families First Coronavirus Relief Act (FFCRA) and the Coronavirus Aid, Relief and Economic Security (CARES) Act imposed new benefit mandates for health plans related to COVID-19 diagnostic testing and preventive services. Those mandates were generally effective in March, and will eventually require conforming plan amendments.

In an effort to encourage remote care services, the Acts also lessened restrictions on high deductible health plans. HDHPs may offer COVID-19 testing and telehealth services without cost sharing, at least on a temporary basis.

Reporting and Disclosure Relief. The Department of Labor also has issued guidance providing temporary, coronavirus-related relief from many reporting deadlines and disclosure obligations under ERISA. This relief applies during the "Outbreak Period," which runs from March 1, 2020 (the date as of which President Trump declared a COVID-19 national emergency) to the date that is 60 days after the government announces the end of that national emergency (or such other date announced by the DOL). This relief gives plan sponsors additional time to respond to participant requests and to distribute certain notices.

The Outbreak Period relief also tolls certain deadlines that otherwise would occur during that Period. Claims and appeals deadlines, HIPAA special enrollment deadlines, and various COBRA notice, election, and premium payment deadlines that would expire during the Outbreak Period now will not expire until after that Period ends.

Cafeteria Plan Reform. Congress and the IRS gave employers that offer a cafeteria plan opportunities to make life a little easier for their participants. The CARES Act allows health flexible spending accounts, health reimbursement arrangements, and health savings accounts to reimburse expenses that participants incur for over-the-counter drugs and menstrual care products.

This change is permissive, and applies permanently. Employers that adopt it may need to amend their plan documents.

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In Notice 2020-29, the IRS afforded cafeteria plan sponsors additional flexibility to allow participants to make mid-year election changes (beyond the normal "change in status" events). That guidance also provides additional flexibility for participants to seek reimbursement from unused amounts in their health and dependent care flexible spending accounts. This additional cafeteria plan flexibility also is permissive, but it is temporary, expiring at the end of 2020.

Employers that add some or all of the new mid-year election change events or expanded FSA relief must adopt conforming amendments on or before December 31, 2021.

Where Are We Going?

The Post-Pandemic Action Plan. The uncertain road ahead — and the possibility of additional benefit-related COVID-19 relief from Washington — make it even more important for employers to keep track of the decisions they've made and actions they've taken so far. This will require careful coordination with benefit consultants and claims administrators, and a clear delineation of responsibility.

Keep Track of Notice and Amendment Requirements. Nearly all of the health and welfare benefit changes that employers have been required or permitted to make must eventually be reflected in plan amendments. All of them must be communicated to affected participants. The first step in a successful post-pandemic action plan is to establish a system to assign responsibility for those amendments and notices, and to ensure that they are adopted and distributed in a timely manner.

Although most amendment deadlines are delayed (or not yet established), plan sponsors have a more immediate requirement to notify affected participants of COVID-19-related changes.

Employers whose plans are subject to ERISA have a fiduciary obligation to provide meaningful notice of such changes to plan participants, so that they can take advantage of benefit enhancements. Ordinarily, plans must notify participants of a mid-year change to health benefits in a revised Summary of Benefits and Coverage (SBC) at least 60 days in advance of the change. Recognizing that such advance notice is impractical during the pandemic, however, the Departments of Labor, Health & Human Services, and Treasury adopted a temporary non-enforcement policy suspending the advance notice requirement, as long as the plan provides notice of the revised coverage as soon as possible through an updated SBC or separate communication.

An employer's post-pandemic action plan should determine who is responsible for preparing and distributing the appropriate notices and plan amendments. The responsible party could be the plan's insurer, claims administrator, third-party administrator, or someone within the employer's HR department. It is important to communicate that responsibility clearly, and make sure that all parties agree to the applicable deadlines.

Manage Outbreak Period Relief. By its very nature, the deadline and notice relief afforded during the Outbreak Period presents administrative challenges. The joint DOL/IRS rule announcing that relief does not specifically require plans to notify participants that deadlines (such as the date by which a COBRA qualified beneficiary must elect or pay for COBRA coverage, or the date by which a claimant must appeal a benefit denial) are disregarded during the Outbreak Period, but participants clearly could benefit from that information.

Failing to notify a health plan claimant that his or her deadline to appeal a denied benefit has been indefinitely extended increases the plan's litigation risk, including the risk that the plan administrator will lose the deferential standard of judicial review should the claimant sue.

Because the duration of the Outbreak Period is yet to be determined, and because the tolled deadlines can affect multiple plans, coordination with individual claims administrators to ensure consistent claims administration during the Outbreak Period is critical. Moreover, the final DOL/IRS rule suggests that the end of the Outbreak Period may vary by location. This will make compliance with these rules especially problematic for multi-state employers.

Employers should obtain compliance assurances from their insurers, third-party administrators, COBRA administrators, and flexible benefit plan administrators. Those service providers should monitor (and extend, as appropriate) claim submission deadlines, claim determination and appeal deadlines, COBRA deadlines, HIPAA special enrollment deadlines, and other affected deadlines that fall within the period from March 1, 2020, until the end of the Outbreak Period.

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Plan administrators should consider adding supplements describing the Outbreak Period relief to their COBRA notices and explanation of benefit forms to ensure that affected participants are aware of their rights.

Anticipate Future Workforce Issues. As we emerge from the first phase of the pandemic, some employers will welcome employees back to the workforce, while others may be forced to make layoffs or furloughs that they have so far avoided. Regardless of the circumstance in which the employer finds itself, planning ahead will make the transition from quarantine to work (and, perhaps, back to quarantine) more manageable.

Return-to-Work Issues. Many employers that open their doors to returning employees will insist that such employees undergo return-to-work COVID-19 testing. Guidance issued by the Department of Labor on June 23, 2020, clarifies that neither the FFCRA nor the CARES Act requires group health plans to cover the cost of such testing (though there may be other reasons for the employer, as opposed to the returning employee or the plan, to cover those costs).

Employees returning to the workforce from a furlough present different issues than those returning from a layoff. Generally, a furlough is a temporary period of leave (either paid or unpaid), whereas a layoff is considered a severance of the employment relationship. Some employers continued health and other benefits for employees who were furloughed during the first phase of the pandemic.

A return to the workforce for such employees should not affect benefit eligibility, although it may require coordination with the payroll provider to facilitate salary reductions for the employee's cost of coverage, especially if the employer covered that cost during the furlough. Employers should carefully review their pre-furlough communications to determine what, if any, promises were made, and to ensure that those promises are honored.

Individuals who return to the workforce following a layoff generally are treated as re-hired, or new, employees. Depending upon the length of their layoff, they may be required to requalify for benefit eligibility.

Employers should carefully review the terms of their health and welfare plans to determine when such individuals become eligible. Under rules introduced by the Affordable Care Act, employers may have the option to treat individuals who are rehired after a layoff, or who return to work from an unpaid leave of absence, as new hires who may be subjected to an additional non-assessment period of up to four months, if the absence was at least 13 consecutive weeks (26 weeks for educational organizations) or was at least four consecutive weeks and longer than the individual's prior period of employment.

Future Layoffs or Furloughs. Employers that have so far escaped layoffs or furloughs soon may be forced to make those challenging decisions, as infection rates spike and business activity slows. Employers should carefully evaluate the distinction between a furlough and a layoff, and the consequences of workforce reductions on COBRA rights.

This also is an ideal opportunity for plan sponsors to review and update their COBRA notices. A spate of putative class action lawsuits over the past 12 months challenging the sufficiency of COBRA notices, coupled with the potential for confusion over COBRA deadlines caused by the Outbreak Period relief, should motivate risk-averse employers to do so.

Provide Notice of Expiring Temporary Relief. Several of the benefit mandates and relief options afforded to health and welfare plans in the first months of the pandemic will expire almost as quickly as they were announced. For example, the requirement for health plans to cover COVID-19 diagnostic testing and related services ends when the public health emergency declaration issued by the Department of Health & Human Services expires. The option for HDHPs to cover telehealth and remote care services on a first-dollar basis generally ends on the last day of the 2021 plan year, and the optional mid-year election change rules for cafeteria plans are available only in 2020.

Plans that reverse some or all of those temporary changes must appropriately notify plan participants of the rollbacks. In addition, while the temporary SBC non-enforcement policy excused noncompliance with the 60-day advance notice requirement when these benefit enhancements were added, it does not give plan administrators a free pass when they later reverse those enhancements. Administrators must either have notified participants that the changes were time-limited when they provided the initial notice of the enhancements, or if they did not include that caveat in the initial notice, they must notify participants of the benefit rollbacks within a reasonable time in advance of the reversal.

Employers therefore should identify those benefit changes that will expire; adopt conforming plan amendments, if necessary; determine whether a notice of the benefit rollback must be provided; and prepare and distribute any required notice in advance of the change.

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Part II: Retirement Plans

As employees return to work, whether at home or at the workplace, their employers must make sure that they will be able to participate in benefit plans that are appropriate and affordable, for both the employee and the employer. Employers also must keep up with a steady stream of new guidance from the various government agencies that regulate employee benefit plans. This is equally true for retirement and deferred compensation plans as it is for health and welfare arrangements.

Where Have We Been (since the beginning of the year)?

SECURE Act. In December of 2019, Congress passed the Setting Every Community Up for Retirement Enhancement (SECURE) Act, one of the most significant pieces of pension legislation since the 2006 Pension Protection Act. The SECURE Act includes significant changes to the Tax Code and ERISA that affect both employer-sponsored retirement plans and individual retirement arrangements (IRAs).

Some of the changes that were effective on or before January 1, 2020, are mandatory, but many are optional. Mandatory changes include an increase in the required beginning date (RBD) for minimum distributions from age 70½ to age 72, new limits on the ability to "stretch" post-death minimum distributions over life expectancy for many non-spouse beneficiaries, and a prohibition on credit card participant loans.

CARES Act. As if those statutory changes were not enough, on March 27, 2020, in response to the COVID-19 pandemic, Congress passed the CARES Act. That legislation includes four optional provisions designed to give participants greater control over, and access to, their retirement funds. Three of the four retirement plan provisions are limited to "qualified individuals," defined in the statute to include participants (and, in some cases, their spouses or dependents) who are adversely affected by COVID-19 in particular ways.

One of the three CARES Act provisions allows plan sponsors to offer tax-favored "coronavirus-related distributions" (CRDs) to qualified individuals between March 27 and December 30, 2020. If the employer elects, such distributions may be made without regard to the withdrawal restrictions that otherwise apply to elective deferrals under 401(k), 403(b) and governmental 457(b) plans. CRDs are not subject to the 10% penalty on early withdrawals, may be taxed ratably over three years, and may be repaid to an eligible retirement plan within three years.

Even if the employer does not treat a distribution as a CRD, an eligible individual may elect to treat an otherwise eligible distribution as a CRD for federal income tax purpose.

The CARES Act also permits plan sponsors to increase the limits on participant loans to qualified individuals. Loans of up to $100,000 or 100% of the participant's account are allowed (but only through September 23). Plan sponsors also may suspend loan repayments that would otherwise be due from qualified individuals between March 27 and December 31, and extends the repayment period by up to one year. Generally, loan payments must resume in January of 2021, and must be re-amortized over the remainder of the extended loan period.

The final CARES Act provision, which is not limited to qualified individuals, waives all required minimum distributions (RMDs) for the 2020 plan year.

IRS and DOL Relief/Guidance. Even before it had an opportunity to issue much-needed guidance regarding the SECURE Act, the IRS had to address a myriad of issues related to the COVID-19 pandemic. The flurry of IRS guidance since the beginning of March includes seven Notices addressing extended tax filing deadlines, temporary relief from spousal consent requirements, CARES Act interpretations, and temporary relief for mid-year changes to safe-harbor plans.

In addition to the IRS guidance, the Department of Labor also has tried to address the needs of both plan sponsors and participants during the pandemic. Some of the guidance issued to date includes the Outbreak Period relief discussed above (which also applies to retirement plans) and regulations finalizing a new "safe harbor" for providing ERISA-required notices electronically.

Where Are We Going Now?

Keeping Track of It All. One of the challenges facing plan sponsors and administrators is simply keeping track of the statutory changes, the regulations, and the sub-regulatory guidance issued by the IRS and DOL. Plan sponsors must track (and eventually adopt, by the last day of the 2022 plan year) amendments required by the SECURE Act and the CARES Act.

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Plan sponsors may consider providing a summary of material modifications (or an updated summary plan description) now, rather than waiting until the plan is eventually amended. In addition, plan sponsors must determine who (employer, plan administrator, investment provider, or third-party administrator) is responsible for providing notices to participants and drafting plan amendments

Managing the "Outbreak Period" Relief. As noted above, although the DOL has provided limited relief from the requirement to timely provide certain notices and disclosures, plan administrators must make a "good faith" attempt to provide all required notices and disclosures on a timely basis (or as soon thereafter as is practicable). Employers may wish to consider electronic distribution when it is reasonable to do so.

Despite additional leeway on timing, employee contributions must still be remitted to the plan's trust "as soon as practicable." Plan sponsors must coordinate with the plan's claims administrator to make sure the plan is allowing participants additional time (based on the length of the Outbreak Period) to make and perfect claims and appeals under any ERISA-covered retirement plan.

In addition, plan sponsors should take steps to ensure that participants are aware of the extended time to bring and perfect such claims and appeals

Bringing Employees Back to Work. Employees returning to work, whether from leave/furlough or from layoff, raise a variety of issues for retirement plan administrators. Those returning from leave/furlough are generally eligible to participate on the first day back.

By contrast, employees returning from a layoff are subject to the plan's eligibility rules for rehires. Employers must keep in mind that, if 20% or more of the workforce was laid-off, the plan may have had a "partial plan termination," causing 100% vesting of the "laid-off" employees. Plan administrators must determine whether service while the individual was furloughed or laid off counts for purposes of eligibility, vesting or benefit accrual under the applicable plan provisions.

Once the employee re-enters the plan, the administrator must determine whether the employee's previous deferral election remains in place, or whether new elections are necessary. In addition, the plan administrator must determine whether the employee is subject to automatic enrollment upon rehire.

From an economic perspective, the plan sponsor must determine whether the plan may be (and if so, whether it will be) amended to reduce or suspend employer contributions.

Looking Ahead. As employers look ahead to the remainder of 2020, they must take note of certain deadlines, including temporary provisions that will expire over the next few months.

- Calendar year plans must file Form 5500 (or an extension) by July 31, 2020
- Relief for mid-year amendments to safe-harbor plans (under IRS Notice 2020-52) expires on August 31
- Additional time to rollover distributions taken before February 1 that would have been 2020 RMDs ends on August 31
- Increased loan limits under the CARES Act expire for loans taken after September 23
- Favorable tax treatment of coronavirus-related distributions ends on December 30
- Loan payments suspended under the CARES Act must resume on January 1 (reamortized over the extended loan period)
- The "Outbreak Period" will eventually expire (60 days after the end of the national emergency)

As plan sponsors look even further ahead to an uncertain 2021, they should consider the following:

- No advance notice is required for safe-harbor plans funded with nonelective employer contributions
- Plans now have additional time to elect safe-harbor status (if the safe-harbor is satisfied with nonelective employer contributions)

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- Safe-harbor matching contribution plans may want to include a “maybe not” provision in their safe-harbor notices (to preserve the right to reduce or suspend safe harbor contributions mid-year)
- Employers may want to use a “discretionary” contribution formula or add an “employment on the last day of the plan year” or “1,000 hour” allocation condition to facilitate mid-year changes to the plan's contribution formula

Plan sponsors may consider providing a SMM or updated SPD, even before plan amendments are adopted, and may consider using the new “safe-harbor” for electronic disclosure of ERISA-required notices.

Finally, plan sponsors and administrators must not forget their fiduciary responsibilities under ERISA. Additional steps in response to the pandemic may include:

- Additional meetings of the plan's fiduciaries to monitor investment options amid market volatility
- Additional communication with the plan's 3(21) co-fiduciary advisor or 3(38) investment manager, as appropriate
- Additional participant education regarding diversification, asset allocation and avoidance of market timing in light of volatile market conditions.

Conclusion

It is, of course, entirely unclear whether the nation is entering a post-pandemic period, or merely a new phase of economic life with COVID. Nevertheless, plan sponsors must begin to think strategically about their responses to the crisis now, in order to avoid compliance issues later. A comprehensive plan for monitoring benefits-related guidance, documenting decisions, and assigning responsibility for follow-through is a good first step.

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