

**COVID-19 – Employee Benefit Plan Considerations**

**Tiffany D. Downs**, Partner – Atlanta Office  
 » Tuesday, March 31, 2020

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**Presenter:**



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**Agenda**

- Families First Coronavirus Response Act ("FFCRA")
- Coronavirus Aid, Relief, and Economic Security Act ("CARES")
- Implications of Cost Cutting Measures – furlough v. layoff
- Health Plan Eligibility and Termination
- Section 125 events
- Retirement Plan relief

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**First Families Response Act**

- Effective as of March 18, 2020
- DOL issued Questions and Answers - <https://www.dol.gov/agencies/whd/pandemic/ffcr-questions>
- Requires coverage for COVID-19 testing for all plans (insured, self-funded and grandfathered)
  - Prohibits any form of cost sharing (e.g. deductibles, copays, and coinsurance)
  - Prohibits medical management practices (e.g. preauthorization)
- Requires coverage for encounter with health care provider for diagnostics and testing
  - coverage for items and services related to office visit, telehealth visit, urgent care visit, or emergency room visit for COVID-19 testing for diagnostics that result in an order for or administration of a COVID-19 test

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**Health Savings Account Changes**

- IRS Notice 2020-15 allows High Deductible Health Plans ("HDHP") to provide coverage for medical services and items purchased related to testing for and treatment of COVID-19 prior to satisfaction of the applicable minimum deductible for plan years
  - HSA eligibility can be maintained by all individuals covered by plans providing first-dollar coverage for testing and treatment of COVID-19
  - Communication with plan participants and HSA vendor

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**CARES ACT**

- Signed into law on March 27, 2020 and impacts health plans, retirement plans, executive compensation
- Expected guidance to be issued by DOL and IRS

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CARES ACT – Health Plans

- Expands coverage of COVID-19 testing required by FFCRA to include coverage of testing by out-of-network providers setting at the rate the provider must publicly post on its website or at a lower rate negotiated with the provider
- Requires coverage of COVID-19 vaccinations at no cost to the participant
- Allows telehealth services to be covered under a high deductible health plan (HDHP) before the deductible is met for plan years beginning before 2022
- Repeals Affordable Care Act ("ACA") exclusion for coverage of over-the-counter drugs with no prescription for health savings accounts ("HSAs"), health reimbursement arrangements ("HRAs"), health flexible spending accounts ("FSAs") and Archer medical savings accounts ("MSAs;")
- Expands coverage to include menstrual care products as of January 1, 2020

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CARES ACT – Other Provisions

- Expands educational assistance programs to allow employers to contribute up to \$5,250 for each employee toward tuition and textbook assistance combined with student loan repayment assistance on a tax free basis through December 31, 2020
- Allows employers to potentially receive tax credit advances for both emergency paid sick leave and emergency FMLA leave, capped at the same amount as the tax credits specified in FFCRA
- Makes emergency FMLA leave accessible to rehired workers if they were laid off on or after March 1, 2020 and worked for at least 30 days of the last 60 calendar days before the layoff
- Allowable uses of the loan include covering costs related to employee compensation and benefits, including: (i) payroll costs, (ii) costs related to the continuation of health care benefits during periods of paid sick, medical or family leave and insurance premiums, (iii) employee compensation (up to \$100,000 per employee as prorated during the covered period) and more
  - Payroll costs do not include sick leave wages or family leave wages for which a tax credit is allowed under the FFCRA

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CARES ACT – Retirement and Pension Plans

- For Defined Contribution ("DC") plans assistance is available for
  - individuals who are diagnosed with COVID-19 or whose spouse or dependent is diagnosed with the disease AND
  - individuals who are negatively affected financially due to quarantine, furlough, layoff, work hour reduction or who lack of child care impacts ability to work
- 10% early withdrawal penalty does not apply for in-service distributions (capped at \$100,000) from DC retirement accounts for withdrawals taken in the 2020 calendar year
  - 20% federal income tax withholding does not apply
- Delayed repayment of money to retirement accounts or stretch out income taxes owed on early distributions over three years
- No required minimum distributions ("RMDs") from employer-sponsored DC retirement accounts, such as 401(k) plans or individual retirement accounts ("IRAs"), in calendar year 2020

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**CARES ACT – Retirement and Pension Plans**

- For Defined Contribution ("DC") plans assistance is available for
  - Increase in maximum amount allowed for loans of up to \$100,000 for 180 days
  - One year extension to pay off a loan from a retirement plan that was due on or before 12/31/20
- For Defined Benefit ("DB") plans assistance is available for
  - Delay of required 2020 minimum contributions to a single employer DB plan, but interest will accrue
  - DB plan can use its 2019 funding status when determining whether it has to impose benefit restrictions based on the funding level of below 80%

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**COVID-19 Testing Coverage Triggers Plan Amendments**

- COVID-19 Coverage Mandate is a Material Modification
- Material modification can be address by updating Summary Plan Description or Summary of Material Modifications ("SMM")
  - A material modification is any modification that would be considered by an average participant to be an important change in covered benefits or other terms of coverage under the plan
- Timing:
  - Recommended to provide as soon as possible, but generally must be provided within 210 days after the close of the plan year in which the modification was adopted
- Distribution:
  - electronically to employees with work-related computer access that is an integral part of their job duties or those employees that provide consent for electronic disclosure
  - posting on an intranet or benefit administration portal and notify employees of the posting, or
  - mailing

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**Welfare Plan Eligibility and Termination**

- Furloughs, layoffs, reductions in force, reduction in hours, and leaves of absence
- Impact on health and welfare benefits
  - Waiver of eligibility for continued active coverage
  - Section 125 qualifying events to make payroll deduction changes
  - Leave of absence
  - Loss of eligibility
  - COBRA
  - Potential trigger of Employer Shared Responsibility Payment under Patient Protection and Affordable Care Act ("PPACA")
- Short-Term Disability Plans
  - Waiting periods
  - Benefits amounts
- Life insurance and Disability Plans
  - Conversion and Portability

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### Retirement and Pension Plans

- Review plan terms to determine if mid-year changes can be made to matches and employee elections
  - Safe Harbor plan can impact ability to do so
- Plan terms could provide hardships or in-service withdrawals for plan participants

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### Cost Cutting Implications

- Are employers required to continue employment and employee benefits during the pandemic?
- It depends on the cost cutting measures, the status of the employees, the terms of the plans, collective bargaining agreements, employment contracts, and the applicable laws.
- It could impact ability to obtain loans under the CARES Act
- Multiemployer Plans and fringe contributions (DOL provided FAQ)

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### Cost Containment Implications

- Cost containment: Reduction in hours, furloughs, reductions in workforce, or layoffs
  - These terms are not clearly defined under US law and can mean different things for different employers and in different settings
  - Could mean continuation of employment or termination of employment (payout of PTO and accrued wages)
  - Impact on eligibility and continuation of coverage under employee benefit plans
  - Layoff is a termination of employment and usually results in loss of employer provided health plan coverage
  - Reduction in hours does not usually end employment but can result in a loss of employer provided health coverage
  - Furlough can be considered a unpaid leave of absence or an employee who is maintained as an active employee with no hours and no pay, but it could trigger loss of health plan coverage depending on the health plan terms

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### Cost Containment Implications

- Reduction in hours or termination of employment and loss of health plan coverage triggers COBRA
  - An employer may choose to continue to pay for all or part of active employee coverage or contribute to the cost of COBRA, but beware of non-discrimination testing requirements
- Potential trigger a partial plan termination under a retirement plan
  - Cost cutting event could trigger a vesting of terminated participants if over 20% threshold
- Trigger a 20% Excise Tax under Section 409A relating to nonqualified deferred compensation
- Use of employee benefits in a pandemic
  - Health plans required to provide coverage of COVID-19 testing
  - Telemedicine to encourage social distancing
  - Employee Assistance Programs
  - Loans, hardship withdrawals, in-service withdrawals available to employees from retirement plans
  - Severance plans
  - Leave sharing programs
  - Supplemental Unemployment Benefit plans




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### Questions?



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