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Coronavirus Relief Guidance for FSAs and Other Welfare Benefit Plans

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As employers start to think about asking their employees to return to work, in addition to all of the employment law issues, there are also employee benefit plan considerations. Employers need to consider all their benefit plans and the impact the drop in work hours caused by the coronavirus as well as the significant drop in the financial markets will cause on benefits under their plans.

Economic challenges from the coronavirus have caused employers to reduce employees' hours, furlough, and in some cases, lay off employees. Such changes impacting an employee, an employee's spouse, or an employee's dependent may trigger eligibility to make consistent benefit election changes. These changes can impact the employee's employment relationship and need for certain benefits. Employment changes may also impact an employee's eligibility for health benefits and other benefits. An employer may need to suggest that an employee assess all of the changes in the employee's life that may trigger eligibility to change benefits in difficult economic times to assist the employee in managing through the current challenges.

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BENEFIT ELECTION CHANGES

While the Treasury regulations addressing when an employee can make changes in benefit elections¹ have always permitted employees to alter their benefit elections when the employment status of the employee, the employee's spouse, the employee's dependent(s) change, or the number of dependents change, and for certain other changes. The IRS has provided some additional relief for employees and employers² by permitting mid-year changes to pre-tax benefit elections with respect to health coverage, health flexible spending accounts, and dependent care assistance programs during calendar year 2020. The additional changes permitted include changes to the employee's election:

1. To enroll in coverage under the employer's health plan on a prospective basis after previously declining such coverage;
2. To revoke an existing election of health plan coverage and make a new election of a different health plan coverage sponsored by the same employer on a prospective basis;
3. To revoke an existing health plan coverage election on a prospective basis, provided the employee attests in writing that the employee is enrolled or immediately will enroll in other coverage;
4. To revoke an election and make a new election with respect to the amount of health flexible spending account coverage for the remainder of the plan year; and
5. To revoke and make a new election to decrease or increase the amount of dependent day care flexible spending account or assistance on a prospective basis.

An employer may amend its cafeteria plan to permit any or all of the above election changes for 2020

¹ Reg. §1.125-4. All section references herein are to the Internal Revenue Code of 1986, as amended (the "Code"), or the Treasury regulations promulgated thereunder, unless otherwise indicated.

² Notice 2020-29.

on or before December 31, 2021, with such amendment effective retroactively to January 1, 2020. An employer can rely on an employee's attestation in writing that he or she is enrolled in other coverage or will be enrolled in other coverage immediately, and thus is eligible to change his or her election under the employer's cafeteria plan. A proposed form of attestation was included. An employer is entitled to so rely on the employee written attestation as long as the employer does not have knowledge to the contrary. An employer may limit the employee's ability to make election changes to prevent adverse selection impacting the employer's other plans. Employers may want to limit the scope of changes in health plan coverage elections in their amendment to the cafeteria plan to preclude adverse selection or to limit when an employee can switch from family coverage to employee only coverage. The plan's election changes should not cause the plan to fail to comply with the nondiscrimination rules applicable to cafeteria plans.

FLEXIBLE SPENDING ACCOUNT CLAIM INCURRENCE DEADLINE CHANGES

Due to the impact of coronavirus on employees, the IRS provided some expanded time for employees to submit claims against health flexible spending accounts (FSAs) and dependent day care FSAs if the employee's respective employer chooses to amend its plan to provide for these extended deadlines. An employer can limit changes to FSAs so that employees cannot reduce their contributions below the level necessary to fund the amounts already incurred under each type of FSA plan.

The IRS also provided that employees can submit claims for unused amounts remaining in a health FSA or dependent day care FSA that exist as of the end of the plan's grace period ending in the 2020 plan year to permit those unused amounts in the FSAs to pay such respective expenses incurred through December 31, 2020. Originally, health FSAs had a use it or lose it rule and amounts set aside in the health FSA for a calendar year were only available to reimburse expenses incurred in that same plan year. The grace period, if elected in the health FSA design, permitted an individual who did not use his or her full health FSA with expenses incurred during the plan year to also use expenses incurred within the first two and a half months of the next following year to utilize funds set aside in the health FSA for the prior plan year.³ For FSAs designed with a grace period which permits expenses incurred after the end of the plan year to be re-

³ Notice 2005-42.

imbursed for a limited period in the next plan year against the health FSA amount for the prior plan year, the guidance permits any amounts not used in the health FSA at the end of the 2019 plan year which are available to be carried forward to be used in the 2020 grace period (which ends on March 15, 2020, for 2019 calendar year health FSA plans absent the extension in Notice 2020-29) to be used for expenses incurred through December 31, 2020. This extended claims period for health FSAs applies to all types of health FSAs, including general and the limited purpose health FSAs designed to work with high deductible health plans (HDHP) to permit the individual to remain eligible to make health savings account (HSA) contributions. Plans that used the grace period rule cannot also use the carryover rule which was established in Notice 2013-71 and vice-versa. This extended period for submitting claims for health FSAs permits employees of employers adopting this relief through a plan amendment for a calendar year plan, to submit claims incurred through December 31, 2020, against any remaining health FSA account from the 2019 calendar plan year. However, for employers offering HDHPs who desire to offer this extended period for claims to be incurred and submitted should be aware that this extension is an extension of a health coverage that is coverage beyond HDHP coverage if the health FSA subject to the extension is not a limited purpose or limited scope health FSA. If the health FSA is a general health FSA designed to reimburse any medical expense, then the extension of the claim submission period is an extension of the general health FSA's coverage that will disqualify the individuals covered by such general health FSA from making a tax deductible contribution to his or her HSA because the individuals would have disqualifying health coverage.⁴

HDHP COVERAGE RELIEF

The CARES Act⁵ and the Families First Coronavirus Response Act⁶ (FFCRA) both mandated coverage of coronavirus testing by group health plans. This coverage mandates was accomplished by including this as part of the preventive care required to be covered. The IRS previously provided relief for HDHPs by permitting such plans to cover both the diagnosis and treatment of coronavirus.⁷ Notice 2020-29 reiterates that such coverage will not destroy a status as such a plan with respect to expenses incurred on or after January 1, 2020, and clarifies the panel of diag-

⁴ Notice 2005-86.

⁵ Pub. L. No. 116-136.

⁶ Pub. L. No. 116-127.

⁷ Notice 2020-15.

nostic tests for influenza A & B, norovirus and other coronaviruses, respiratory syncytial virus, and any items or services required to be covered with zero cost sharing under the FFCRA as amended by the CARES Act are all part of the testing required to be covered and which can be covered without destroying HDHP status for the individual and their eligibility to make tax deductible contributions to an HSA.⁸

RELIEF RELATED TO HEALTH FSA CARRYOVERS

In a second notice issued the same day,⁹ the IRS provided an option for employers that permit employees to carryover a limited amount of unused health FSA funds at the end of a plan year.¹⁰ Notice 2020-33 increased the amount permitted to be carried over to a subsequent plan year from the previous limit of the lesser of (1) the unused amount of health FSA coverage of the end of the health FSA plan year, or (2) \$500. Instead, Notice 2020-33 increased the carryover dollar limit to \$ 550 for 2020 from \$500. The increase to \$550 for the carryover is effective for an unused amount from a plan year starting in 2020 to be carried over to the plan year beginning in 2021. Any amounts carried over to subsequent plan years do not count against the annual limit on health FSAs of \$2,750 for 2020. Employees are still limited to only electing to contribute up to the indexed dollar limit on employee contributions to a health FSA of \$2,750 for 2020. Employers must adopt the amendment to incorporate the indexing of the carryover limit at any time before the last day of the plan year beginning in 2021.

Normally, the cafeteria plan adopting the carryover must be amended to provide for the carryover by the last day of the plan year from which amounts will be carried over. To use the increased amount of the carryover, the cafeteria plan must be to adopt the increased carryover limit for a plan year that begins in 2021 by the last day of the plan year beginning in 2021. However, for 2020, a plan may adopt the indexed limit on the carryover amount using the delayed amendment due date in Notice 2020-29, provided the amendment specifies it is effective as of January 1, 2020.¹¹

CLARIFICATION RELATED TO INDIVIDUAL COVERAGE HEALTH REIMBURSEMENT ARRANGEMENTS

In Notice 2020-33, the IRS rules that there are limitations on when expenses must be incurred related to

individual coverage health reimbursement arrangements which permit certain employers to establish health reimbursement arrangements or accounts defining an employer's contribution toward health insurance each year that permits an employee to purchase individual health insurance coverage. The cost of that health insurance coverage is to be reimbursed by the individual coverage health reimbursement arrangement. However, there are practical issues such as health insurance having to be paid for in advance of the period to which it applies, which necessitate that some portion of the coverage is paid for during the plan year prior to the year of coverage. Notice 2020-33 solves this timing issue related to paying premiums for periods of coverage in a subsequent plan year by permitting an individual coverage health reimbursement arrangement to treat an expense for a premium for health insurance coverage as if it was incurred on either (a) the first day of each month of coverage on a pro rata basis, (b) the first day of the period of coverage, or (c) the date the premium is paid. This means a premium for January 1, 2020, for coverage for the month of January 2020 that was paid on December 15, 2019, can be treated as incurred on January 1, 2020, by the individual coverage health reimbursement arrangement even though it was paid in December 2019. This permits the employer's individual coverage health reimbursement arrangement to treat the premium paid in December 2019 as incurred in 2020 and payable out of the individual coverage health reimbursement arrangement for 2020.

RELIEF FOR EMPLOYEES OFFERED TELEHEALTH WITH A HDHP TO PERMIT THE EMPLOYEES TO BE ELIGIBLE TO MAKE TAX DEDUCTIBLE HSA CONTRIBUTIONS FOR ALL OF 2020

The IRS also extended the relief provided in the CARES Act for permitting the use of telehealth services with an HSA-eligible HDHP to allow such services to be covered for all of calendar year 2020.¹² Prior to the CARES Act's enactment, telehealth coverage was not permitted, and when added to an HDHP, coverage would have disqualified the individual from making a tax-deductible contribution to an HSA. The CARES Act made the exception to permit telehealth coverage with an HDHP, but only for periods after March 27, 2020.¹³ This guidance expands this relief for individuals so that they can make a tax-deductible HSA contribution for all of 2020, if otherwise eligible.

⁸ Notice 2020-29.

⁹ Notice 2020-33.

¹⁰ Carryover was originally permitted under Notice 2013-71.

¹¹ Notice 2020-33.

¹² Notice 2020-29.

¹³ CARES Act, §3701.

DEADLINE CHANGES

The IRS and the Employee Benefit Security Administration (EBSA) within the U.S. Department of Labor collaborated to provide relief to individuals by requiring plans to disregard a period of time designated as the coronavirus “Outbreak Period.”¹⁴ The Outbreak Period that must be disregarded in imposing the specified limits starts on March 1, 2020, and ends 60 days after the end of the national emergency or the date announced by the agencies in a future notice. No declaration has been made that the national emergency has ended, nor has any agency provided a different date to end the Outbreak Period as of the time this is being written.

DEADLINES IMPACTED BY OUTBREAK PERIOD TOLLING

Many plans specify the maximum time limits for certain tasks, such as paying COBRA premiums or making COBRA elections. The changes to the deadlines in the final rule issued by the IRS and EBSA extended the minimum periods during which participants must take certain actions for the Outbreak Period, but did not impose a maximum limit on when such actions must be completed. Courts faced with ambiguous requirements on participants have found in favor of participants and have not imposed exhaustion requirements.¹⁵ Employers should review their plan provisions — particularly the claim and appeal rules — because the prior maximum limits on filing certain actions such as appeals of denials may need to be altered due to the tolling of these periods during the Outbreak Period. The requirement to disregard the Outbreak Period (similar to a tolling period for incapacity) in determining whether the deadlines have been exhausted may require plan amendments for retirement as well as health, disability, and other benefits using the ERISA claim procedures.

The final rule extending the deadlines did not address when plan amendments need to be made to con-

sider the Outbreak Period. Plan operations do not have any delay in the effective date and it was made effective upon its publication on May 4, 2020. This will likely impact most summary plan descriptions that explain the process employees must follow for filing a claim or appeal and that set forth COBRA deadlines. Claim denial letters, which communicate the next steps a participant must take to appeal a denial, COBRA rights notices, and COBRA election forms should also be affected. While EBSA issued updated COBRA notices on May 1, 2020, such model notices do not address the deadline changes in the final rule.¹⁶

Employers should consider reviewing their plan service providers, their internal claim and appeal procedures, COBRA procedures, and other plan administrative processes to verify that the plan’s administrative processes and communications are edited to consider the Outbreak Period extensions.

OTHER HEALTH PLAN COVERAGE CLARIFICATIONS

EBSA and the IRS clarified required Covid-19 related testing under the CARES Act. This clarification included a statement that retiree-only plans and benefits that are not health coverage, such as on-site clinics or “excepted benefits” (as such concept was added by HIPAA) and limited scope benefits (e.g., dental or vision) are not subject to the mandated coverage of Covid-19 testing under the CARES Act. This clarification did not exempt any of the plans sold as minimum essential coverage plans from complying with the CARES Act Covid-19 testing mandates.¹⁷ Employers must carefully consider what type of health plan is involved with respect to each piece of guidance and analyze in each piece of guidance which types of health or other benefits are impacted.

¹⁴ Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak, 85 Fed. Reg. 26,351 (May 4, 2020).

¹⁵ *Watts v. BellSouth Telecommunications, Inc.*, 316 F.3d 1203 (11th Cir. 2003).

¹⁶ <https://www.dol.gov/newsroom/releases/ebsa20200501>.

¹⁷ U.S. Dep’t of Labor et al., *FAQs About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Act Implementation Part 42* (Apr. 11, 2020), available at <https://www.cms.gov/files/document/FFCRA-Part-42-FAQs.pdf>.