



Employee Benefits in the Time of COVID-19: Impact of FFCRA and the CARES Act

Webinar Attendees:

Our phone lines are muted until the presentation begins at approximately 1:00 p.m. Pacific. If you are experiencing any technical or sound issues, please contact Stoel Rives Events at events@stoel.com.

1



Employee Benefits in the Time of COVID-19: Impact of FFCRA and the CARES Act

Presented by Bethany Bacci & Howard Bye-Torre
Employee Benefits Practice Group
April 9, 2020

2



Agenda

3



Agenda

- Legislative Response to COVID-19 Pandemic
 - FFCRA: Impact on Welfare Plans
 - CARES Act: Impact on Welfare Plans
 - CARES Act: Impact on Retirement Plans
- Other Health and Welfare Issues
- Other Retirement Issues
- Questions

4

4



Legislative Response to COVID-19 Pandemic

5



Coronavirus Preparedness and Response Supplemental Appropriations Act 2020

- First law enacted by Congress in response to COVID-19 pandemic
- Signed on 3/6/2020
- Provides \$8.3 billion of emergency funding for federal agencies to respond to COVID-19 outbreak
- No significant impact on health plans, plan sponsors or third-party administrators (TPAs)

6

6

Families First Coronavirus Response Act (FFCRA)

- Second piece of major legislation enacted in response to COVID-19 pandemic
- Signed and effective on 3/18/2020
- Impacts most group health plans (GHPs)
- No provisions addressing retirement plans

7

7

Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

- Third major piece of legislation enacted in response to COVID-19 pandemic
- Enacted on 3/27/2020
- Expands some provisions of the FFCRA
- Includes provisions impacting health and welfare plans, defined contribution (DC) plans and defined benefit (DB) plans, along with sweeping non-benefit related economic changes

8

8



FFCRA: Impact on Welfare Plans

9



Key FFCRA Impacts

- Most plans are required to cover COVID-19 testing and related office visits with no cost sharing
 - Plans pay 100% of the cost
- Enforcement authority is shared by HHS, DOL and IRS

10

10

Mandates Coverage of COVID-19 Testing by Most GHPs

- Applies to: Most GHPs and health insurance issuers, including fully insured, self-funded and ACA grandfathered plans and individual policies
 - Does not apply to “excepted benefits” like retiree-only plans
- COVID-19 tests must be covered from date of enactment (3/18/2020) until the Secretary of HHS determines public health emergency has expired
- Covers federally approved diagnostic testing products

11

11

Mandates Coverage of COVID-19 Testing by Most GHPs (cont.)

- Covers items and services furnished during office visits (including telehealth), urgent care visits and ER visits (including costs of such visits) that “relate to” or result in either an order for or administration of the test
- No requirement to pay for the treatment of COVID-19 without cost sharing

Effective:

March 18, 2020, for duration of public health emergency

12

12

Prohibits Cost Sharing for COVID-19 Testing

- Plans cannot impose cost sharing for testing
 - Prohibits deductibles, copayments and coinsurance
- Prior authorization requirements and other medical management requirements are not permitted
 - Example: Plan cannot require a participant to have a flu test as a prerequisite to paying for a COVID-19 test

Effective:

March 18, 2020, for duration of public health emergency

13

13

COVID-19 Coverage Under High Deductible Health Plans (HDHPs)

- IRS published Notice 2020-15 on 3/12/2020 (prior to FFCRA)
- HDHPs may provide benefits associated with COVID-19 testing and treatment without a deductible or cost sharing
 - However, this is not a mandate – the HDHP can require cost sharing for COVID-19 treatment: copayment or coinsurance either before or after deductible has been met
- Providing these benefits will not impact a plan's status as an HDHP or a participant's eligibility to contribute to an HSA

Effective:

March 12, 2020, until further guidance is issued

14

14

Recommendations

- Employers should contact insurer or TPA to confirm testing will be covered in accordance with FFCRA mandate
- ERISA plans must issue Summaries of Material Modifications (SMMs)
- All plans must amend plan documents as needed

15

15

Other Changes Made by the FFCRA

- Expands Family and Medical Leave Act (FMLA) to cover leave needed to care for children out of school due to COVID-19
 - Temporary – through 12/2020 only
- Creates 2 weeks of paid sick leave for childcare and other leave related to COVID-19
- Provides tax credits
 - Related to paid leave mandated by the FFCRA
 - Related to continuing group health plan coverage for leave mandated by the FFCRA

16

16

CARES Act: Impact on Welfare Plans

17

Key CARES Act Impacts

- Expands already-enacted FFCRA rules
- Provides detail not found in the FFCRA
- Adds new rules for telehealth
- Adds new rules for health savings accounts (HSAs) and GHPs such as health reimbursement accounts (HRAs) and health care flexible spending accounts (Health FSAs)

18

18

COVID-19 Coverage: Payment for Testing

- COVID tests required to be covered by GHP include FDA-approved tests and any test:
 - For which the developer has requested (or will request) emergency use authorization from the FDA
 - Developed in and authorized by a state that has notified HHS that it intends to review tests to diagnose COVID-19
 - HHS deems appropriate
- GHP must pay either:
 - Rate specified in a contract between the provider and the GHP or insurer, or
 - If there is no contract or other negotiated price, the cash price posted by the provider

19

19

COVID-19 Coverage: Vaccines

- GHPs are required to cover any Qualifying Coronavirus Preventive Service without cost sharing
- Qualifying Coronavirus Preventive Service means:
 - Item, service or immunization intended to prevent or mitigate COVID-19, and
 - Recommended by the U.S. Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention

20

20

COVID-19 Coverage: Vaccines (cont.)

- Vaccine coverage mandate is effective 15 business days after the date of the recommendation
 - Significant change from ACA rules, which generally give GHPs at least a year after a preventive care recommendation is made to add the new benefit
 - Employers need to monitor announcements about COVID-19 preventive services and vaccinations to ensure timely changes to GHP and communications to participants

Effective :

15 business days after the date of a U.S. Preventive Services Task Force or CDC recommendation

21

21

New Rules for Telehealth

- All telehealth and other remote care services are permitted to be covered by an HDHP without cost sharing before the deductible has been met without disqualifying the plan as an HDHP or disqualifying participants from contributing to an HSA
 - Applies to telehealth services for all health conditions, not just COVID-19 testing/treatment
 - Note: This is an optional change; if implemented, it must be communicated to participants in an SMM
- Effective for plan years beginning on or before 12/31/2021 unless extended
 - Employers: make sure this benefit ends at the end of the 2021 plan year unless Congress extends this rule

22

22

New Rules for HSAs, Health FSAs and HRAs: OTC Drugs and Supplies

- Permits tax-free distributions from HSAs for:
 - Over the counter (OTC) drugs (whether or not prescribed)
 - Menstrual care products (tampons, pads, liners, cup, sponge and similar products)
- Health FSAs and HRAs are permitted (but not required) to provide coverage for these expenses
- Amends Internal Revenue Code (IRC) §§ 223(d) and 106
- Permanent change: does not end when public health emergency ends

Effective :

HSAs: amounts paid after 12/31/2019

Health FSAs and HRAs: expenses incurred after 12/31/2019

23

23

Action Items for Employers

- Contact insurers or TPAs concerning the changes in the law
- Amend health and cafeteria plan documents and update SPDs or issue SMMs for Health FSAs and HRAs if the employer wishes to provide benefits for OTC drugs and menstrual care products
- Inform employees about the changes to their benefits and changes in the law regarding HSAs

24

24

Additional Guidance

- DOL, Treasury and HHS have not yet issued guidance on the GHP requirements in the CARES Act
- Expect guidance to be released on an ongoing basis

CARES Act: Impact on Retirement Plans

Key CARES Act Impacts

- Expands access to early retirement plan distributions and plan loans
- Eases tax burden on individuals who take special early distributions
- Temporarily waives required minimum distributions (RMDs) from DC plans and IRAs for 2020 for all participants
- Provides limited relief for DB plans

27

27

Coronavirus-Related Distributions (CRDs)

- Distributions up to \$100,000 in the aggregate
 - Individual limit applies to total distributions from all sources (e.g., all retirement plans and IRAs)
 - Not limited to amount of actual financial need
- Qualified Individual:
 - Is diagnosed with COVID-19, or
 - Has a spouse or dependent diagnosed with COVID-19, or
 - Experiences adverse financial consequences caused by: quarantine; furlough, layoff, or reduction of work hours caused by COVID-19; inability to work due to lack of child care caused by COVID-19; or other factors determined in Treasury guidance

28

28

Coronavirus-Related Distributions (cont.)

- Waives the 10% early withdrawal penalty under IRC § 72(t) for a participant under 59½
- Exempt from 20% federal tax withholding
- Permits payment of tax on the income from the distribution ratably over 3 years
 - Begins with the year CRD is made unless otherwise elected by the taxpayer
- Plan administrator may rely on employee self-certification that they are a Qualified Individual

Effective for:

*Distributions on/after January 1, 2020 and before December 31, 2020
Plan amendment deadline generally no earlier than December 31, 2022*

29

29

Coronavirus-Related Distributions (cont.)

- Repayments of CRDs permitted within 3 years
 - Period starts on day after date on which each CRD was received
 - May repay in one or more installments
 - May repay any eligible retirement plan; not limited to repaying the plan from which the CRD was received

Effective for:

*Distributions on/after January 1, 2020 and before December 31, 2020
Plan amendment deadline generally no earlier than December 31, 2022*

30

30

Plan Loan Relief: Increase in Limits

- First, whether loans permitted depends on plan terms
- Increased limit for new plan loans to lesser of \$100,000 or 100% of vested account balance
 - Pre-CARES Act: \$50,000 or 50% limits
- Qualified Individual: same definition applies as when determining eligibility for a CRD (see slide 28)
- Applies for 180-day period starting on 3/27/20 (i.e., no later than 9/22/20)

Effective for:

*Loans made from March 27, 2020 through September 23, 2020
Plan amendment deadline generally no earlier than December 31, 2022*

31

31

Plan Loan Relief: Repayment Delay

- Existing loans with payment due dates from 3/27/2020 to 12/31/2020 “shall be” extended by 1 year
- Interest continues to accrue during period of suspension and subsequent payments after suspension “shall be appropriately adjusted”
- Maximum 5-year period for term of loan extended by the term of the repayment suspension period

Effective for:

*Loans outstanding on or after March 27, 2020
Plan amendment deadline generally no earlier than December 31, 2022*

32

32

RMD Waiver for 2020

- The RMD waiver applies to the following that would have otherwise been a RMD but for the CARES Act:
 - Participant RMDs for the 2020 calendar year
 - RMDs for the 2019 calendar year for a participant with an required beginning date (RBD) of 4/1/2020, otherwise required to be paid by 4/1/2020 and not actually paid in 2019
 - Calendar year 2020 payments for death beneficiaries subject to 5-year rule

Effective:

Calendar year 2020
Plan amendment deadline generally no earlier than December 31, 2022

33

33

Defined Benefit Plan Relief

- Funding relief
 - Due dates for minimum required contributions under IRC § 430 otherwise due in calendar year 2020 are extended until 1/1/2021
 - Interest accrues from the original due date at the plan's effective rate of interest
- Lump sum benefit restriction relief
 - May elect to apply plan's AFTAP for the 2019 plan year as the AFTAP for the 2020 plan year

Effective:

Calendar year 2020

34

34

Employer Considerations

- Communicate with your TPA!
 - TPAs may have default administration or constraints on ability to tailor administration of CRDs and loan program changes
- Communicate changes to participants
 - For ERISA plans, update summary plan description or issue an SMM
 - May need to update fee disclosure notice
- Timely review and amend plan documents
- Update policies and procedures

35

35

Plan Amendment Deadlines

- Plans may begin operating in accordance with the CARES Act provisions immediately
- Amendment deadline is generally the end of the first plan year beginning on or after 1/1/2022
- Governmental plan sponsors have until the end of the first plan year beginning on or after 1/1/2024
- If have no loan program, need to amend in 2020 if want to add a loan feature. Relief only extends deadline to amend current loan programs, not to add a loan program.

36

36



Other Health and Welfare Issues

37



HIPAA Implications

- Disclosing an individual's PHI concerning COVID-19 is generally prohibited
- Some exceptions apply
 - Disclosures to public health agencies
 - Disclosures to prevent or reduce a serious and imminent threat
 - Pursuant to an authorization by the individual

38

38

Covering the Uninsured

- Employers concerned about the costs of COVID-19 health care for:
 - Part-timers and others not eligible for their GHP
 - Employees who are eligible for, but did not enroll in, their GHP
- No cafeteria plan rule or special enrollment provision allowing mid-year entry into a GHP due to pandemic
- Reimbursing or paying only for COVID-19 testing and/or treatment for uninsured employees would be a GHP violating the Affordable Care Act (ACA)

39

39

Covering the Uninsured: Special Enrollment Period (SEP) Under State Exchanges

- Washington Health Benefit Exchange announced a SEP for qualified individuals to enroll in individual health insurance through Washington Healthplanfinder
 - SEP opened 3/10/2020 and was originally scheduled to remain open through 4/8/2020
 - On 4/1/2020 the SEP was extended through 5/8/2020
 - Coverage for customers who enroll after 4/8/20 will start 5/1/2020

40

40

Special Enrollment Period (SEP) Under State Exchanges (cont.)

- California, Colorado, Connecticut, Maryland, Massachusetts, Minnesota, Nevada, New York, Rhode Island, Vermont and the District of Columbia have also announced SEPs for the uninsured
- On 4/1/2020 the Trump administration announced it would not have a SEP for the federally-operated ACA exchanges (38 states)

41

41

Other Ways to Help Uninsured Employees

- ICHRAs and QSEHRAs are methods for qualifying employers to help certain employees pay for individual health insurance
 - Could do an ICHRA for part-time employees who are not eligible for employer's GHP
- Employee assistance program
 - Excepted benefit under the ACA
 - Might be able to provide limited number of telehealth visits to uninsured employees
- IRC § 139 Program
 - After declaration of a national emergency, IRC § 139 allows employers to provide tax-free grants to employees for medical and other types of expenses

42

42

Dependent Care Assistance Programs

- Current IRS rules will allow most participant contribution changes relating to pandemic, such as:
 - Increase by working parent whose children are now in daycare rather than at school
 - Reduction by furloughed or WFH parent whose children are at home rather than in daycare
 - Change in contributions due to new daycare provider and/or closure of daycare center
- Important to check cafeteria plan documents for rules regarding leaves of absence

Other Retirement Issues

DC Plans

- Suspending or reducing employer contributions mid-year
- Potential partial plan termination due to layoffs
- Increased risk of future litigation
 - Stock drop cases
 - Allegations of imprudent menu options
 - Target date or stable value fund issues

45

45

Expanded DB Funding Relief

- Part of rationale for CARES Act funding relief is to allow Congress time to consider and enact more comprehensive funding relief
- Mercer's estimate of the pension funded status of the S&P 1500 companies (on an accounting basis) as of year-end 2019 was 88%. As of February 2020, they dropped this estimate down to 79%. Will be even lower at end of March.

46

46

Employer Action Items

- Proactive defensive steps for plan fiduciaries: best defense is a good offense!
 - Engage in robust procedural prudence and document actions taken
 - Seek input from an independent investment advisor
 - Examine plan fund menu and understand mix of investments in a target date fund
 - Consider possible negative returns on a stable value, money market, or bond fund

47

47

Employer Action Items (cont.)

- Monitor layoff and participant headcounts and understand potential plan termination considerations
- Critically examine and watch administrative fees
- Watch for DOL exercise of authority to extend deadlines for certain required notices and government filings (such as Form 5500s)

48

48

Questions?



Bethany Bacci
503.294.9837
bethany.bacci@stoel.com



Howard Bye-Torre
206.386.7631
howard.bye-torre@stoel.com

Additional EB Resources



Chris Briggs
206.386.7616
chris.briggs@stoel.com



Abbey Hendricks
503.294.9224
abbey.hendricks@stoel.com



Jeffrey Krueger
503.294.9856
jeffrey.krueger@stoel.com



Bruce McNeil
206.386.7651
bruce.mcneil@stoel.com



Cheryl Musselman
206.386.7689
cheryl.musselman@stoel.com