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2021 Year-End Preparation for Benefit Plans

November 3, 2021

As 2021 barrels toward its end and the focus is on infrastructure and tax legislation, we don't want to lose sight of important 2021 legislative and regulatory deadlines. With that in mind, we are sending this list of Benefits and Compensation items to be sure to check off your list before 2021 concludes.

Retirement Plans:

1. Hardship Distribution Amendments. Sponsors of individually designed 401(k) or 403(b) plans that permit hardship distributions must adopt interim amendments by December 31, 2021. These changes were effective January 1, 2019 and/or January 1, 2020, and December 31, 2021 is the deadline for adopting the retroactive amendments. Changes include the removal of a suspension of an employee's contributions following a hardship distribution, elimination of the requirement to take a loan first, the expansion of the 401(k) plan sources available for hardship distributions, and permitting employees to certify regarding their need for a hardship distribution.

2. Other Amendments. Plans that made discretionary changes in 2021 need to adopt amendments by year-end. In addition to hardship distribution amendments (see #1 above), employers may need to adopt other amendments this year for elective plan design changes such as employer match or eligibility changes. Retirement plan amendments for SECURE Act and CARES Act changes and the disaster relief provisions of the Consolidated Appropriations Act, 2021 ("CAA") are not required to be adopted until the end of the 2022 plan year (or the 2024 plan year for governmental plans and, for SECURE Act changes, collectively bargained plans).

3. Pension Funding. The American Rescue Plan Act of 2021 ("ARPA") offers funding relief for single-employer defined benefit pension plans. Under this relief, plans may elect to re-amortize the existing unfunded liability and increase the period for amortizing unfunded liability from seven to fifteen years. ARPA also extends and expands the interest rate relief of prior law. Companies have some flexibility in applying the amortization relief and the interest rate relief retroactively. Companies should have discussed these issues with their actuaries. Note that the delayed contribution provision of the CARES Act was not extended into 2021.

4. Notarization. The IRS has authorized remote electronic notarization and remote electronic witnessing of elections by plan representatives through June 30, 2022 (IRS Notice 2020-42 extended via IRS Notice 2021-40). Employers should confer with their defined benefit plan third party administrators about the processes for getting spousal consent and should consider whether any plan amendments are necessary or advisable.

5. Part-Time Employees for 401(k) Eligibility. Companies that currently exclude part-time employees from 401(k) plan participation should have started counting hours in 2021. The SECURE Act included a provision that mandates plan eligibility for long-term part-time employees, starting in 2024. Eligibility is based on working at least 500 hours per year during three consecutive 12-month periods. That means employers whose plans exclude employees based on hours worked should have started counting hours in January 2021 and should continue to do so in 2022.

6. Nonqualified Plan Compliance. Nonqualified plans risk IRC Section 409A failures if operational errors cause payment either too early or too late. IRS deadlines for dealing with Section 409A failures have not been extended in connection with the COVID state of emergency. This means that certain failures corrected by year-end can obtain IRS relief from potentially significant penalties. See more in our separate alert here.

Health and Welfare Plans:

7. Cafeteria Plans and FSAs. Employers must adopt amendments by December 31, 2021, for COVID-19 relief effective in 2020. Amendments for COVID-19 relief effective in 2021 are due December 31, 2022. For example, employers should consider asking themselves the following questions in a self-audit of year-end compliance:
   - Are you indexing the $500 carryover for health FSA? If so, it became $550 in 2021, and will be 20% of the health FSA annual limit hereafter.
   - Did you allow 2021 midyear changes due to COVID-19 for health FSA, dependent care FSA, and/or medical coverage enrollment?
   - Anything special for people on leaves of absence or layoff?
   - Did you adopt the temporary 2021 increase in the contribution limit for dependent care FSAs, from $5,000 to $10,500 for the 2021 tax year?

   See a more detailed information regarding COVID-19 relief for FSAs here.

8. Health Plan Telehealth Relief. The CARES Act created a temporary safe harbor that allows high-deductible health plans to cover telehealth for patients prior to the patient hitting his or her deductible, without running afoul of the rules generally limiting coverage for individuals eligible for health savings accounts. This relief is set to expire on December 31, 2021, unless extended.

9. Surprise Billing. Effective in 2022, the CAA prohibits certain surprise medical billing practices and requires certain out-of-network emergency and ancillary services to be billed at in-network rates. Fee disputes must be resolved through a 30-day open negotiation and then a binding independent dispute resolution process. Additional guidance is expected on health plans' obligations to disclose information on costs and services.

10. Mental Health Parity Expansion. Federal agencies are expected to develop a process for companies to report their analysis confirming mental health parity and compliance with other non-quantitative treatment limitations. The Department of Labor is increasing enforcement of mental health parity laws.

ERISA Plans Generally (Retirement and Welfare Plans):

11. COVID-19 Extensions Expiring. The Department of Labor extended a number of deadlines due to the pandemic. These extensions apply to participant claims and appeals deadlines, participant health plan special enrollment rights, and participant obligations under COBRA. Under applicable law, these deadlines could be extended for only up to one year. DOL Notice 2020-01 provides relief until the earlier of: (i) one year from the date the individual was first eligible for relief under the Notice; or (ii) 60 days after the end of the COVID-19 national emergency. Plan sponsors should be mindful of whether deadlines are still tolled and should be prepared for the end of the deadline extension.

For questions, please contact a member of our Benefits & Compensation Team.