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COVID-19 and Return to Work Policies: Vaccination Requirements, Leave Requests, Workers' Compensation

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The EEOC & Policy Considerations

COVID-19 VACCINATION PROGRAMS

The EEOC & COVID-19 Vaccines

EEOC Vaccine Guidance

- **December 16, 2020** – Updates to technical assistance guidance on COVID-19 issues under federal employment laws.
- Provides clarification on employer COVID-19 vaccination practices under the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act and the Genetic Information Nondiscrimination Act (GINA).

ADA & COVID-19 Vaccines

1. COVID-19 vaccines are not “medical examinations.”

- Employer is not seeking information about employee’s health status or impairments.

2. Nor are “proof of vaccine” requirements.

- “Requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability.”

ADA & COVID-19 Vaccines

3. What about pre-vaccine screening?

- **EEOC** → Is “likely to elicit” disability-related information.
- Seeks medical details about employees to determine if COVID-19 vaccine can be safely administered.
- Falls squarely within scope of disability inquiries regulated by ADA.

ADA & COVID-19 Vaccines

3. What about pre-vaccine screening?

- Employers must show that screening is “job-related and consistent with business necessity.”
- **Key** → Can you show that an employee who is *not screened* (and does not receive the vaccine) poses a “direct threat” to themselves or your workforce?

ADA & COVID-19 Vaccines

Exceptions

1. Voluntary employer programs

- COVID-19 vaccine and pre-screening are offered on a **voluntary** basis.
- No consequences for employee refusal.

2. Third-party administration

- Program conducted by third party with no connection to employer.
- Employer does not request copies of pre-screening surveys.

Reasonable Accommodations

- **EEOC** → Employers are free to require COVID-19 vaccines, but must still consider reasonable accommodation issues.
 - **ADA** → Accommodate employee disabilities.
 - **Title VII** → Accommodate “sincerely held” religious beliefs.

Disability Accommodations

- If an employee is unable to receive a COVID-19 vaccine due to disability...
 1. Do they pose a “direct threat” to health or safety?
 - a. Duration of risk?
 - b. Nature and severity of potential harm?
 - c. Likelihood of harm?
 - d. Imminence of harm?

Disability Accommodations

2. Can the “threat” be eliminated or reduced by reasonable accommodation?

- Flexible, interactive process required.
- Case-by-case assessment.
- Consider number of other employees who are vaccinated (i.e., “herd immunity”).
- **If no accommodation is possible** → Is the employee entitled to any leave under applicable law or company policy?

Religious Objections

- Employers must consider “sincerely held” religious objections to COVID-19 vaccines.
 - Religious objections are *assumed* to be “sincerely held.”
 - Must have an “objective basis” for questioning the religious objection to request supporting information.
 - Mere disagreement with employee’s beliefs is not sufficient.
 - Duty to accommodate unless doing so imposes “undue hardship.”

Personal Choice Objections?

- **No obligation** to accommodate employees who refuse vaccine because of “personal choice.”
 - Anti-vaccination generally.
 - Deny the existence of COVID-19.
 - Uncomfortable with “emergency authorization.”
 - Fear of needles or hospitals.

GINA & COVID-19 Vaccines

- GINA prohibits discrimination based on an employee's genetic information or family history.
- **Per EEOC, GINA is *not* implicated by:**
 - COVID-19 vaccine itself.
 - Requiring or administering the vaccine.
 - Requiring proof of vaccination.
- **But** GINA issues arise if pre-vaccine screening seeks family medical history or genetic test information.

Considerations for COVID-19 Vaccination Programs

Mandatory or Voluntary?

- Per EEOC, employers are free to mandate COVID-19 vaccinations, provided:
 - ✓ Accommodations are considered for employee disabilities or sincerely held religious objections.
 - ✓ Pre-screening questions are job-related and consistent with business necessity.
 - ✓ No inquiries are made as to genetic testing or family medical history.
 - ✓ Vaccine administration and pre-screening are conducted confidentially.

But Consider...

- **Workers' compensation**

- Employee illness due to mandatory COVID-19 vaccine may support workers' compensation claim.
- Time spent receiving vaccine may also be covered by workers' compensation.
- Depends on state law, but argument is that mandatory vaccine is “within scope of employment.”

- **Wage and hour**

- Mandatory vaccines should be paid for by the employer (similar to pre-employment physicals or drug tests).
- Time spent receiving vaccine is “compensable.”
- State “spread of hours,” “split shift” or “call-in pay” requirements.

But Consider...

- **Union obligations**

- Does the CBA provide *express* authorization for vaccine mandate or program?
- If not, duty to bargain with union before implementing mandatory program for union employees.

- **Employee relations**

- Availability of vaccine due to CDC or state health guidelines → may not be possible for all employees to receive vaccine.
- High population of employees object to vaccine based on “personal choice.”

Voluntary Programs

- Employer encourages, but does not require, employees to receive COVID-19 vaccine.
 - **Wage and hour** → Eliminates wage and hour issues related to vaccine administration.
 - **Workers' compensation** → If vaccine is purely voluntary, reduces potential exposure if employee becomes ill due to vaccine.
 - **EEO considerations** → Mitigates potential issues related to accommodations and pre-screening questions.

But Consider...

- **OSHA or state health requirements**

- If OSHA (or state equivalent) takes position that vaccines should be mandated for certain industries, may require shift in policy approach.
- **New York A11179** – seeks to require virtually all state residents to receive COVID-19 vaccine under certain circumstances.
- **Cal/OSHA** – currently requires employers to implement “prevention programs” for COVID-19 → could this be expanded to require vaccines?

- **Workers’ compensation**

- Non-vaccinated workforce increases risk of workplace COVID-19 spread.
- Demonstrated cases of workplace COVID-19 outbreaks could justify workers’ compensation claims.

For Any Vaccination Policy

- ✓ Clearly communicate the company's position regarding COVID-19 vaccines (mandatory vs. encouraged).
- ✓ Explain procedure for employees to receive vaccine, submission of proof, payment for vaccine and any applicable deadlines.
- ✓ Discuss what happens if an employee declines or is unable to receive vaccine.
- ✓ Include EEOC protective provisions for disability accommodations or religious objections.
- ✓ Emphasize that all employee vaccine information, including objections or requests for accommodation, will be kept confidential.

Vaccine Administration

- ✓ **Administration options** – on-site vaccination clinic, off-site administration through third party or require employee proof of vaccine.
- ✓ **Timing** – consider waiting until vaccine is more widely available to all employees under CDC and state guidelines.
- ✓ **Pre-screening** – ensure that pre-screening questions comply with ADA and GINA.
 - Establish procedure for confidential collection and retention of pre-screening questions.
 - If contracting to third party, consider an indemnification provision.

Vaccine Administration

- ✓ **Accommodation procedures** – develop uniform procedures for fielding, responding to and documenting requests for accommodation, as well as guidelines for interactive process.
- ✓ **Training** – prepare and train HR staff and other vaccine program team members on company policy, vaccine program and accommodation procedures.
- ✓ **Existing measures** – continue to implement and enforce existing COVID-19 prevention practices, including social distancing, facial coverings and disinfection efforts.

FFCRA Paid Sick and Family Leave

- FFCRA's paid leave requirements expired on December 31, 2020 (state/local laws may differ)
- Consolidated Appropriations Act of 2021 offered 100% tax credits to covered employers who provided paid FFCRA leave between January 1 and March 31, 2021
- Tax credits again extended under ARPA for paid FFCRA leave provided between **April 1 and September 30, 2021**

Requirements for Claiming Paid Emergency Sick Leave Tax Credit

- Emergency paid sick leave (EPSL) bank starts over. If participating in the extended tax credits, full-time employees are permitted to take up to 80 hours of EPSL regardless of how much was used in preceding quarters. Part-time employees receive an amount equal to their two-week average
- EPSL must be made available for three additional reasons:
 - Absence due to seeking or awaiting results of a diagnostic test for, or medical diagnosis of, COVID-19, provided that employee has been exposed to COVID-19 or employer has requested that employee obtain the test or diagnosis
 - Employee is “obtaining” COVID-19 vaccination
 - Employee is recovering from injury, disability, illness, or condition related to receiving their COVID-19 vaccination

Requirements for Claiming Emergency Paid Family Leave Tax Credit

- Emergency paid family leave (EPFL) must be made available for original qualifying reasons and same new reasons as EPSL
- First two weeks of EPFL no longer unpaid. If reason for leave is dual-eligible with EPSL, must claim credit for first two weeks as EPSL leave
- Both amount of leave and credit for EPFL increased from \$10,000 to \$12,000

Employee Retention Tax Credit

- Employee retention credit (ERC) enacted under Coronavirus Aid, Relief, and Economic Security (CARES) Act to encourage employers to retain employees during pandemic
- Consolidated Appropriations Act of 2021 extended ERC through June 2021 and expanded eligibility to employers who received PPP loans
- ERC extended under ARPA through **December 31, 2021** and once again enhanced

ARPA's Changes to ERC

- Employers now eligible for ERC with only 20% decline in gross receipts (previously 50%)
- Credit rate raised to 70% of qualified wages (previously 50%)
- Maximum qualified wages increased to \$10,000 per quarter (previously \$10,000 in aggregate)
 - Means credit increases from \$5,000 per employee to up to \$28,000 per employee
- “Small employer” limit raised to 500 full-time employees (previously 100). Small employers may claim all wages paid during eligibility period (large employers can only claim those for employees not providing services)

ERC Eligibility Expansion in Second Half of 2021 (beginning July 1)

- “Recovery startup businesses”
 - Startup must have opened after February 15, 2020 and have average annual gross receipts that don’t exceed \$1 million
 - If met, eligible for ERC even if “significant decline in gross receipts” or “suspension of operations” tests not met
 - Credit capped at \$50,000 per quarter
- “Severely financially distressed employers”
 - Employers who suffer at least 90% decline in gross receipts in quarter compared to same quarter in 2019
 - Large employers (more than 500 full-time employees) that meet threshold can claim ERC for all wages paid

KEEPING UP WITH CDC GUIDANCE

CDC Guidance on Workplace Safety



Updates as of December 31, 2020:

- Expanded guidance on in-person or virtual health checks.
- Added a section on testing considerations.
- Addressed shortened quarantine options.
- Clarified that all workers should wear masks.

CDC Guidance on Workplace Safety

Guidance urges employers to implement an approach to testing.

- Approaches include:
 - Initial testing of all workers entering workplace.
 - Periodic testing at regular intervals.
 - Targeted testing of new workers or workers returning after prolonged absence.
 - Combination of approaches.



CDC Guidance on Workplace Safety

- Shortened quarantine options:
 - Quarantine can end on day 10 without testing and if no symptoms have been reported during daily monitoring
 - Quarantine can end on day 7 with a negative test and no symptoms during daily monitoring



CDC Guidance on Workplace Safety

- Employee health checks
- Virtual health checks: Electronic monitoring system can be implemented for employees to verify criteria prior to arrival at the workplace.
- In-person health checks:
 - Utilize social distancing during screening.
 - Erect barrier or partitional controls to separate the screener from the employee.
 - Ensure the contact thermometers are cleaned and disinfected after each use.



REMOTE WORK CONTINUES

Remote Work Continues

- PWC study released this week shows that, prompted by the COVID model, most companies are heading toward a hybrid workplace. Many will have a large number of office employees rotate in and out of offices configured for shared spaces.



Remote Work Continues

- Remote working has been deemed a success by study participants, with 83% of employers saying that the shift to remote work has been successful for their company. More than half say average employee productivity has improved in the remote environment.



Remote Work Continues

- Fewer than one in five executives say they want to return to the office as it was pre-pandemic. However, some office time remains important. More than two-thirds of executives say a typical employee should be in the office at least three days a week to maintain a distinct company culture. On the flip side, over half of employees want to work remotely three days a week or more.



Remote Work Continues

The new normal brings new legal challenges for employers:

- Unique trade secret issues
- Privacy and security concerns
- State-specific payroll issues

Some Things Have Not Changed

- Identify trade secret information for employees.
- Limit access to those with a need to know.
- Use passwords and secure logins.
- Use firewalls or other security software.
- Consider encryption.



Home Security Measures Are Critical

- Require minimum home security measures for employees' home internet networks
- WiFi passwords and limitations
- Multifactor authentication to log in to a company portal



Employers Should Consider Monitoring Policies

- Routine monitoring
- Suspicious use monitoring
- Key data monitoring



Other Policy Modifications to Consider

- Review handbook
- Update policies to address new workplace
 - WFH policies
 - Updated agreements
 - Travel



Renewed Training Is Key

- Remind employees of confidentiality policies and any security protocols generally associated with the access and use of sensitive business information and documents.
- Retrain employees remotely on the importance of nondisclosure and confidentiality policies.
- Remind and expressly advise remote workers that discussions or viewing of sensitive business information should occur in an isolated part of the home, away from others – even family.
- Remind and train employees who use videoconferencing services such as Zoom to discuss sensitive topics to use the services' security features.
- Train and refresh employees on the importance of recognizing and avoiding phishing scams.

THE LITIGATION LANDSCAPE

2021 Litigation Landscape

- Terminations topped the list of COVID-19 related litigation in 2020, representing more than three-quarters of employee disputes. Disputes related to safety and compliance accounted for the next most common complaints.



2021 Litigation Landscape

- 2020 saw a significant decrease in the number of harassment and discrimination claims – that trend is not likely to continue in 2021.
 - The decrease was likely due to the increase in remote work and decrease in actual interaction between workers.
 - Federal workplace enforcers like the EEOC and DOL shied away from litigation under the business-friendly Trump administration.
 - Biden administration is expected to enforce workplace EEO laws aggressively.



2021 Litigation Landscape

- FLSA claims may increase, especially in light of the impact of remote working on tracking time.
 - Reassess timekeeping procedures and specifically address remote work scenarios.
 - Regularly remind nonexempt employees to follow established procedures.
 - Remind managers or supervisors to look for signs that an employee is working outside of normal hours or seems to be tracking a schedule rather than actual hours.



2021 Litigation Landscape

- COVID WARN Act cases have gotten a green light.
 - Florida federal case was a test case for potential liability of employers who made abrupt personnel cuts because of the pandemic.
 - Company sought to have the case dismissed under WARN Act exceptions for natural disaster and unforeseeable business circumstances.
 - Judge rejected the natural disaster defense.
 - The unforeseeable business circumstances defense may apply, but discovery is necessary to provide context.
 - Case demonstrates that WARN Act considerations remain relevant with regard to pandemic related mass layoffs.



Retirement Plan Provisions

The Consolidated Appropriations Act

- Signed into law December 27, 2020
- Notable COVID-19 retirement plan-related provisions include partial plan termination relief

The Consolidated Appropriations Act

- Partial Plan Termination Relief
 - Designed to address short-term workforce changes.
 - Traditionally, whether a partial plan termination has occurred is based on the facts and circumstances, but generally is presumed to occur if the number of participants in a plan falls by 20% or more during the plan year. In that event, affected participants must be fully vested.
 - **Relief:** If the number of participants in the plan on March 31, 2021 is at least 80% of the number of participants in the plan on March 13, 2020, no plan termination will have occurred in either 2020 or 2021.

The Consolidated Appropriations Act



- What it did not do:
 - It did not extend the CARES Act provisions that applied to 401(k) plans (CRDs, enhanced loan limits, loan deferments, and MRD relief for 2020).

Pension Plan Funding Relief

Note: Guidance is expected and may impact this summary

■ Single-employer pension plans

- Enhanced “smoothing” of interest rates used to calculate minimum required contributions
 - Decreases pension liabilities, resulting in lower contribution requirements
 - Applies to plan years starting in 2020, 2021 or 2022, at employer’s option
- Extended amortization of funding shortfalls
 - Repayment over 15 years rather than 7 years as otherwise required
 - Will result in more stable and lower minimum funding requirements
 - Applies to any plan year starting in 2019, 2020, 2021 or 2022, at employer’s option

■ Multiemployer pension plans

- New financial assistance program through PBGC for severely underfunded plans
- Temporary freeze of the current zone status for certain multiemployer pension plans
- Extension of current funding improvement and rehabilitation plans



Outbreak Period Deadline Extensions

Outbreak Period Deadline Extensions

The Outbreak Period is disregarded for purposes of determining the following deadlines:

Medical						Medical	Medical
HIPAA special enrollment	COBRA election	COBRA payment	COBRA qualified beneficiaries to provide notice of a qualifying event or a disability	Filing a claim	Requesting an appeal	Requesting an external review	Perfecting an external review
All Group Health Plans				All ERISA Plans			

Outbreak Period Deadline Extensions

- Outbreak period
 - Begins March 1, 2020
 - Ends 60 days after the end of the national emergency
 - End of the national emergency will be announced
 - Emergency may end at different times in different parts of the country
- However, the DOL/IRS do not have authority to require a plan to disregard a period of more than one year
 - Impact of this one-year limitation was not clear when guidance was issued last year
 - Clarifying guidance was issued on February 26, 2021

Outbreak Period Deadline Extensions

- Assume the national emergency ends January 30, 2022 and the Outbreak Period ends March 31, 2022
- The Outbreak Period (but no more than one year) must be disregarded in determining a COBRA election deadline
 - Example 1:
 - If Amy's 60-day COBRA election period began February 20, 2020, her election deadline normally would fall on April 19, 2020
 - The period of March 1, 2020 through February 28, 2021 is disregarded
 - Amy's COBRA election deadline is April 19, 2021
 - Example 2:
 - If Amy's 60-day COBRA election period began February 20, 2022, her election deadline normally would fall on April 20, 2022
 - The period of February 20, 2022 through March 31, 2022 is disregarded
 - Amy's COBRA election deadline is May 30, 2022

Outbreak Period Deadline Extensions

- Issues to consider
 - To what extent should individuals be notified of the one-year extension limitation?
 - SMM for benefits-eligible employees
 - Notice to persons whose COBRA election or payment deadline fell within the outbreak period
 - Updated COBRA election notice
 - Targeted notice to persons whose deadlines now fall on or soon after March 1, 2021
 - Any other?
 - Should the plan apply the one-year limitation or be more generous?
 - Further extension may be appropriate for deadlines now falling on or soon after March 1, 2021
 - Further extension may be helpful for administrative ease
 - Administration should be coordinated with benefit enrollment vendor, COBRA administrator, and claims administrators
 - May need approval from insurer or stop loss carrier for voluntary extensions
 - Coordinate with insurers and administrators



FSA Relief

FSA Relief - Overview

- The Consolidated Appropriations Act and IRS Notice 2021-15 provide for four types of relief
 - Unlimited carryover or extended grace period
 - Mid-year election changes without a life event
 - Health care FSA spend-down provision
 - Reimbursement of care for a 13-year-old child
- All types of relief are permissive – none are mandatory
- Depending on the relief adopted, a plan amendment may be required by December 31, 2021 or December 31, 2022.

FSA Relief – Carryover or Grace Period

- A plan can adopt either the carryover or the grace period regardless of how the plan was designed prior to the CAA
- Both options prevent forfeiture of unused funds in the 2020 and/or 2021 plan years
- The carryover is administratively easier and prevents forfeitures that might otherwise occur under the grace period
 - The grace period, when adopted with a spend-down provision, extends the time during which a terminated participant may incur reimbursable expenses

FSA Relief – Carryover or Grace Period

- Example:
 - Assume Employee has \$2,000 in an FSA as of 12/31/20
 - Employee contributes \$2,000 for 2021 and receives reimbursement of \$1,000 in 2021
 - Employee contributes \$2,000 for 2022

Carryover	Grace Period
<ul style="list-style-type: none">• \$2,000 carries over from 2020 to 2021• \$4,000 available for use in 2021	<ul style="list-style-type: none">• \$2,000 from 2020 may be used in 2021• \$4,000 available for use in 2021
<ul style="list-style-type: none">• \$3,000 (\$1,000 from 2020 and \$2,000 from 2021) carries over from 2021 to 2022• \$5,000 available for use in 2022	<ul style="list-style-type: none">• \$1,000 from 2020 is forfeited• \$2,000 from 2021 may be used in 2022• \$4,000 available for use in 2022

FSA Relief – Carryover or Grace Period

- Employees entitled to the carryover or extended grace period will be ineligible to contribute to an HSA for the following year unless the funds are HSA-compatible
- Additional amounts available do not impact:
 - Maximum contribution amounts
 - The health care FSA's status as an excepted benefit
 - Application of COBRA
 - Dependent care FSA amounts reported on Form W-2
 - It is currently unclear whether excess dependent care FSA reimbursements would be taxable, but the American Rescue Plan Act raises the income exclusion limit to \$10,500 for 2021

FSA Relief – DCAP Exclusion Increase

- Maximum amount that may be excluded from an employee's gross income under a Section 129 dependent care assistance program is **increased from \$5,000** (\$2,500 married filing separately) to **\$10,500** (\$5,250 married filing separately) for 2021
 - Appears to permit increases in 2021 contributions
 - Amendment may be retroactive if adopted by end of 2021 plan year
 - Consider impact on nondiscrimination testing
- Appears to partially address issues created by Consolidated Appropriations Act relief

FSA Relief – DCAP Exclusion Increase

- Scenario:

- Employer adopts the unlimited carryover relief for 2020 and 2021
- Employee has \$3,000 remaining in his FSA at the end of 2020
- Employee elects to contribute \$5,000 in 2021 – \$8,000 is available for reimbursement
- Employee receives \$6,000 in reimbursement in 2021, leaving \$2,000 to carry over to 2022
- Employee elects to contribute \$5,000 in 2022 – \$7,000 is available for reimbursement
- Employee receives \$7,000 in reimbursement in 2022

- Tax implications:

- Employee's \$6,000 reimbursement in 2021 is below the \$10,500 limit for 2021, so none of the reimbursements are taxable
- Employee's \$7,000 reimbursement in 2022 is above the \$5,000 limit for 2022, so \$2,000 might be taxable (future guidance may confirm)

FSA Relief – DCAP Exclusion Increase

- Scenario:
 - Employer adopts the unlimited carryover relief for 2020 and 2021
 - Employee has \$3,000 remaining in his FSA at the end of 2020
 - Employee elects to contribute \$10,500 in 2021 – \$13,500 is available for reimbursement
 - Employee receives \$11,500 in reimbursement in 2021, leaving \$2,000 to carry over to 2022
 - Employee elects to contribute \$5,000 in 2022 – \$7,000 is available for reimbursement
 - Employee receives \$7,000 in reimbursement in 2022
- Tax implications:
 - Employee’s \$11,500 reimbursement in 2021 is above the \$10,500 limit for 2021, so \$1,000 might be taxable
 - Employee’s \$7,000 reimbursement in 2022 is above the \$5,000 limit for 2022, so \$2,000 might be taxable (future guidance may confirm)

FSA Relief – Carryover or Grace Period

- Options to consider

Adopt Carryover?	Adopt Extended Grace Period?
For 2020 and/or 2021?	For 2020 and/or 2021?
Healthcare FSA and/or dependent care FSA?	Healthcare FSA and/or dependent care FSA?
Allow the full unused amount to carry over or limit carryover amount?	Extend grace period to December 31 or an earlier date?
Require a participant to have elected contributions to be eligible for the carryover?	N/A
Allow participants to opt out?	Allow participants to opt out?
Automatically convert carryover funds to limited purpose or allow employee choice?	Automatically convert grace period funds to limited purpose or allow employee choice?

FSA Relief – Mid-Year Election Changes

- The plan may allow employees to make any prospective changes to medical, dental, and/or vision coverage during the plan year ending in 2021
 - An employee may not drop medical coverage unless the employee attests in writing that he/she is enrolled or immediately will enroll in other comprehensive health coverage
- The plan may allow employees to make any prospective changes to FSA elections in the plan year ending in 2021
 - The plan may apply limits, such as:
 - Changes permitted only during a limited window
 - Employees allowed to drop dependents or coverage but not to add
- Similar relief was provided in 2020

FSA Relief – Mid-Year Election Changes

- Options to consider
 - Allow changes to medical, dental, vision, healthcare FSA and/or dependent care FSA elections?
 - Allow changes from a general purpose FSA to a limited purpose FSA?
 - Limit changes to a window or certain number of changes?
 - Limit to certain types of changes (e.g., decrease but not increase)?
 - If an employee elects to begin FSA contributions, allow for reimbursement of 2021 expenses incurred before contributions begin?
 - If an employee elects to stop FSA contributions, permit reimbursement of 2021 expenses incurred after contributions stop?

FSA Relief – Spend-Down Provision

- The plan may be amended to permit reimbursement for otherwise-eligible expenses incurred during the plan year and associated grace period following termination of participation in the health care FSA
 - Applies for plan years ending in 2020 and/or 2021
 - May limit reimbursement amount to the amount of unused contributions (the full year's election amount need not remain available)
- Interaction with carryover/grace period relief
 - If the unlimited carryover is adopted, a terminated participant will have only until the end of the plan year to spend down the account
 - If the extended grace period is adopted, a terminated participant will have until the end of the following plan year to spend down the account

FSA Relief – Spend-Down Provision

- Options to consider
 - Add a spend down provision to the health care FSA?
 - Apply for 2020 and/or 2021?
 - Limit the spend-down to the amount of contributions made to date minus the amount of reimbursements made to date?
 - If you don't already have one, add a spend-down provision to the dependent care FSA?



FSA Relief – Age 13 Expenses

- The plan may be amended to permit 2020* contributions to be used for care of a child who turns 13 in 2020 or 2021
 - If the child turns 13 in 2020
 - Expenses for care of the 13-year-old child in 2020 are reimbursable
 - Expenses for care of the 13-year-old child in 2021 are reimbursable from any dollars left over from 2020
 - If the child turns 13 in 2021
 - Expenses for care of the 13-year-old child in 2021 are reimbursable from any dollars left over from 2020

*This relief applies to the last plan year with respect to which the end of the regular enrollment period was on or before January 31, 2020 (2020 for calendar year plans)

FSA Relief – Age 13 Expenses

- Options to consider:
 - Adopt age 13 relief for 2020 and/or 2021?
 - Is a plan amendment needed?





COBRA Subsidies

COBRA Subsidies

Note: Guidance is expected and may impact this summary

- ARPA provides a full COBRA subsidy from April 1, 2021 through September 30, 2021 for certain subsidy-eligible individuals
 - Includes all group health plans except healthcare FSAs
 - Includes both Federal COBRA and comparable state continuation
- Subsidy-eligible individuals pay nothing for coverage, and the employer or insurance company recoups the cost of the premium through a payroll tax credit

COBRA Subsidies

Note: Guidance is expected and may impact this summary

- Subsidy-eligible individuals
 - Must have lost medical, dental, and/or vision coverage due to reduction in hours or involuntary termination of employment
 - Reduction in hours need not be involuntary
 - Change in business hours of operation
 - Change from full-time to part-time status
 - Temporary leave of absence
 - Lawful labor strike
 - Guidance is expected on the definition of “involuntary termination of employment”
 - DOL FAQs state that individuals terminated for gross misconduct do not qualify for COBRA or the subsidy
 - Must be a qualified beneficiary

COBRA Subsidies

Note: Guidance is expected and may impact this summary

- The subsidy is not available for months after a person becomes eligible for other group health plan coverage or Medicare
 - Individuals are not “eligible” while they are in a waiting period
 - DOL guidance does not address mid-year election opportunities
 - Individuals receiving the subsidy are required to notify the plan
 - \$250 tax penalty for inadvertent failure to notify
 - Increases to 110% of the subsidy for intentional failure to notify
 - Does not include:

Stand-alone dental, vision, or other excepted benefits	QSEHRA	FSA	Medicaid	Individual policy
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COBRA Subsidies

Note: Guidance is expected and may impact this summary

- Certain individuals have a new election opportunity
 - Available to individuals who meet the following three criteria:
 - Lost coverage due to a reduction in hours or involuntary termination prior to April 1, 2021
 - Either did not elect federal COBRA when first offered or elected federal COBRA but is no longer enrolled
 - Have not exceeded the maximum COBRA period as of April 1, 2021
 - Individuals may choose the coverage effective date
 - Prospectively from the date of the election or
 - April 1, 2021
 - Must elect coverage within 60 days after notice is provided
 - Outbreak period extensions do not apply to this deadline

COBRA Subsidies

Note: Guidance is expected and may impact this summary

- Required notices
 - Notice to subsidy-eligible individuals who became entitled to elect COBRA prior to April 1, 2021
 - Notice must be provided by May 31, 2021
 - Modified COBRA election notice for qualified beneficiaries who become entitled to elect COBRA during the subsidy period
 - General timing rules apply without the Outbreak Period extensions
 - Alternative notice available for individuals qualifying for state continuation coverage
 - Notice to persons whose subsidy will expire for reasons other than eligibility for other group health plan coverage or Medicare
 - Must be provided at least 15 days but no more than 45 days prior to the end of the subsidy
- The DOL provided model notices on April 7, 2021

COBRA Subsidies

Note: Guidance is expected and may impact this summary

Plan administrator provides COBRA election notice

- Entitled to elect COBRA before April 1: Notice of subsidy/second-chance election by May 31, 2021
- Entitled to elect COBRA during the subsidy period: COBRA election notice within 44 days
- Alternative notice for state continuation

Employee completes "Request for Treatment as an Assistance Eligible Individual" form and returns it (with the COBRA election form if applicable) within 60 days of the notice

Plan provides notice of subsidy expiration at least 45 but no less than 15 days before the subsidy expires

Individual may have HIPAA and Marketplace special enrollment rights when the subsidy expires

COBRA Subsidies

Note: Guidance is expected and may impact this summary

■ Payroll tax credit

- Assistance eligible individuals elect COBRA, but pay no premiums for the months of April 2021 through September 2021
- For self-funded plans, the employer takes a payroll tax credit for the amount of the COBRA premium that assistance eligible individuals otherwise would pay
 - If COBRA coverage would be subsidized by the company, the company likely will be able to take a payroll tax credit only for the unsubsidized portion
- The process may be different for fully-insured benefits

COBRA Subsidies

Note: Guidance is expected and may impact this summary

- Impact of subsidy on other credits
 - Individuals receiving the subsidy are not eligible for
 - The Health Coverage Tax Credit
 - A Marketplace premium tax credit
 - No credit for any months enrolled in COBRA – with or without the subsidy

COBRA Subsidies

Note: Guidance is expected and may impact this summary



- Optional election change
 - An employer may - but is not required to - allow assistance eligible individuals to switch into a lower-premium plan option
 - The enrollment change must be requested within 90 days after receipt of notice

COBRA Subsidies

Note: Guidance is expected and may impact this summary

- Issues to consider
 - Identify former employees who lost health coverage due to an involuntary termination of employment or reduction in hours
 - Identify the applicable termination codes
 - Consider how far to look back
 - Consider whether to allow assistance eligible individuals to switch into a lower-premium plan option
 - Consider whether to amend severance programs and/or revise severance agreements to reduce or eliminate company-provided subsidies
 - Coordinate with COBRA vendor
 - Consider potential impact on claims experience



QUESTIONS?



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