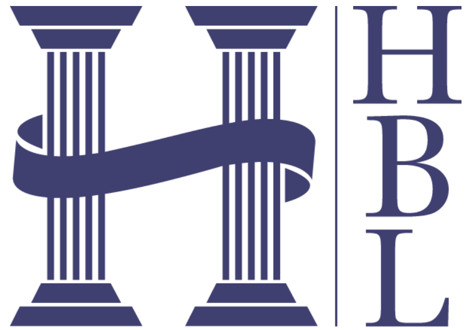
Legal Update: COVID-Related Employment and Benefits Legislation

Atlanta Area Compensation Association (AACA)
April 13, 2021



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- Author of *Case Studies in ERISA: Why It Matters and How It Benefits You*
- Focus on proactive, relationship-driven employee benefits legal compliance
- The HBL team of attorneys serves clients in 30 states
- $70 million+ in ERISA penalty avoidance/abatement since January 1, 2018

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- HBL clients count on Ms. Harris for all things employment law, including working closely with and advising related departments and Executive Management on compensation and benefits, recruiting and staffing, performance management, learning & development, and employee relations and conflict resolution.

Agenda

Since December 2019, Congress has passed several bills impacting employee benefits.

These include:

SECURE ACT (Setting Every Community Up for Retirement) (signed into law December 20, 2019

Consolidated Appropriations Act, 2021 (the "Act")

American Rescue Plan Act

Immediate Changes Under the SECURE Act

Immediate Changes
(i.e., effective for plan years beginning after December 31, 2019):

1. Delay of the RMD starting age from 70 ½ to 72
2. Decrease in in-service withdrawal age for pension and governmental 457(b) plans
3. Increase in failure to file retirement plan returns
4. Penalty-free withdrawals for birth or adoption of child
5. Nondiscrimination testing relief for defined benefit plans
6. Notice relief for nonelective safe harbor plans
7. Increase in auto-escalation cap for QACA safe harbor plans
8. Deadline for extension of adoption of new employer-funded retirement plan

Immediate Changes Under the SECURE Act

Immediate Changes (i.e., effective for plan years beginning after December 31, 2019):

9. Increased tax credits for small employers
10. Prohibition of qualified plan loans via credit cards (effective for loans made after December 20, 2019)
11. Tax Relief for Certain Qualified Disaster Distributions from Retirement Plan
12. Elimination of "Stretch IRAs"
13. Portability of lifetime income (i.e., annuity) options

Impending Changes Under the SECURE Act

Changes Effective After 2020:

1. Prohibition on part-time employee exclusion
2. Provision to participants of annual estimates for lifetime income (i.e., annuity) options
3. Fiduciary safe harbor for selection of lifetime income annuity option insurer for GRIC
4. Permission to consolidate Form 5500
5. Pooled Employer Plans

Coronavirus and Retirement Plans

Coronavirus and Retirement Plans

Agenda

- Employer contribution modifications (i.e., suspensions)
- CARES Act changes to loans and hardships
- Recent IRS Guidance on CARES Act changes

Loan Expansion

Coronavirus Aid, Relief, and Economic Security Act

(the "CARES Act") (eff. March 27th)

- Provides for Coronavirus-related distributions and increases funds available for loans

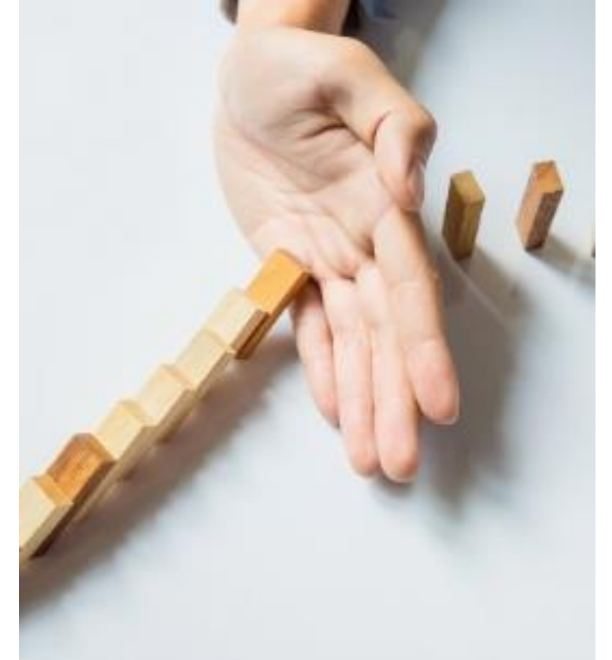
LOANS

- Lesser of:
  - $100,000 (for loans unrelated to Coronavirus, $50,000); or
  - 100% of vested account balance (for loans unrelated to Coronavirus, the greater of $10,000 or 50% of the vested account balance)
- Applies to loans taken for 180 days following March 27 (or loans taken from now until September 23, 2020)
- Requires employers taking advantage of these optional expanded rules to amend retirement plans no later than the end of the 2022 plan year (December 31, 2024 for calendar year government plans)

One-Year Loan Delay

One-year delay in loan repayments (although interest continues to accrue) through 2020 for existing, outstanding loans for *qualified individuals* who are:

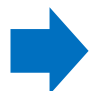
- Diagnosed with Coronavirus (or whose dependent or spouse is diagnosed with Coronavirus)
- Experiencing adverse financial consequences as a result of Coronavirus due to:
  - Quarantine, layoff, furlough, reduction in hours
  - Inability to work due to lack of childcare
  - Closure of business



- **Note:** *Qualified individual* expanded via IRS Notice 2020-50 (***see*** Slide #38)

Employer Considerations:

- A plan's loan policy with respect to the allowable number of loan outstanding is NOT changed under the CARES Act – check the existing loan policy!

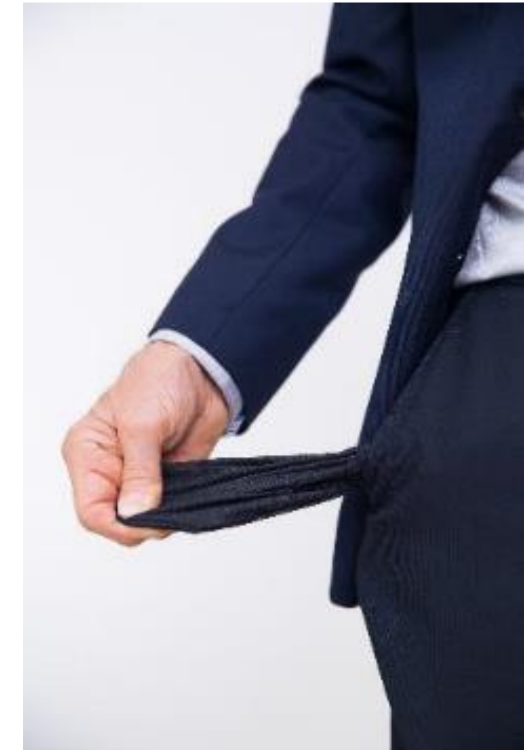


Link to our recent CARES Act Article

New Coronavirus-Related Distribution

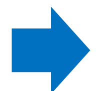
CARES Act provides for waiver of 10 percent penalty for up to first $100,000

- Available for IRAs, 401(k) plans, 403(b) plans and 457(b) plans (not defined benefit plan) beginning March 27 through December 31 to *qualified individual* as self-certified
- Aggregate limit that applies across the employer's controlled group
- Distribution of pre-tax contributions still subject to ordinary income tax
- Can be taken in multiple distributions
    - Includable in taxable income ratably over three years



Repayment

- Option (no requirement) to repay (lump sum or periodically) over three-year period



Link to our recent CARES Act Article on Hardship Withdrawals

Recent Retirement Plan Distribution Guidance

IRS Notice 2020-50 (June 19, 2020):

Loans. Loan repayment that is deferred can be reamortized over its remaining term PLUS a period of up to one year; allows for any "reasonable" method of reamortization

- Expansion of definition of qualified individual; and
- Participants can cancel deferral elections under nonqualified plans due to an unforeseeable emergency or hardship related to COVID-19.

IRS Notice 2020-51

- Further "gloss" and myriad of guidance provisions to RMD changes.

IRS Notice 2020-52 (June 29, 2020) (applies to both 401(k) and 403(b) plans):

- Clarifies that a mid-year reduction in safe harbor contributions to highly compensated employees (HCEs) is permissible.

Consolidated Appropriations Act, 2021

Consolidated Appropriations Act, 2021 (the "Act")

- Signed into law on December 27, 2020
- The Act includes certain provisions affecting health and welfare benefits, including:
  - Health FSA Relief (also generally applies to dependent care FSAs)
  - Optional limited extension of emergency paid sick leave under the FMLA;
  - Retirement plan partial plan termination relief; and
  - Prohibition on surprise billing!
  - Broker compensation transparency rules
  - Mental Health Parity Transparency/Disclosure Requirements

Flexible Spending Account (Health and Dependent Care) Relief

- FSAs may permit participants to carry over their entire unused FSA balances from:
  - A plan year ending in 2020 to a plan year and/or from a plan year ending in 2021; and
  - A plan year ending in 2021 to a plan year ending in 2022
- If elected, this relief supersedes the existing $550 carryover limit applicable to health care FSAs and enables carryovers for dependent care FSAs (this relief is available for both calendar and non-calendar year FSAs)
- FSAs may also allow for grace periods of up to 12 months for plan years ending in 2020 and/or 2021 (this relief is available for both calendar and non-calendar year FSAs)

Flexible Spending Account (Health and Dependent Care) Relief

Spend-Down Feature for Former Employees

- Health FSAs may allow employees who terminate employment in 2020 or 2021 to spend down their unused balances for qualifying medical expenses incurred through the end of the plan year – without a COBRA election.

Increase in Dependent Care FSA (DCFSA) Age Limit

- The Act allows certain DCFSA plan participants to file claims for their eligible dependent care expenses for children through the end of the plan year in which the child turns 13 (rather than the standard IRS provision of only to the 13th birthday).
  - 2020. For example, if a participant's child turned age 13 in August 2020, such child remains eligible for the remainder of the 2020 plan year

Flexible Spending Account (Health and Dependent Care) Relief

Increase in DCFSA Age Limit

- 2021. If the DCFSA participant has an unused balance at the end of the 2020 plan year and the participant's child turns age 13 during 2021. In that instance, the limiting age increases to 14 years old for 2021, and the unused balance remains available to reimburse for qualifying childcare expenses through the end of 2021.
  - The relief only allows prior balances to be used; it does not allow a prospective election for a child who is already age 13.

THE ACT:

Optional Extension to Paid Sick Leave Under FMLA

Employers have the option to extend either emergency paid sick leave or emergency Family Medical Leave emergency act or both from January 1, 2021 through March 31, 2021

- This is NOT required.
- The rules that were in effect during the April 1, 2020 to December 31, 2020 EPSL/EFMLEA mandate period substantially remain in effect during the extension.
- Employers may continue to claim tax credits for paid leave taken by eligible employees during the extended period.
- The Act does not grant additional leave time during the extended EPSL or EFMLEA period.

Retirement Plan Partial Plan Termination Temporary Relief

- Partial plan termination relief applies to the period beginning March 13, 2020 and ending March 31, 2021 (the "Relief Period").
- This relief provides that a plan is not treated as having a partial plan termination if, at the end of the Relief Period (March 31, 2021), the number of active participants covered by the plan is at least 80% of the number of plan participants covered by the plan at the beginning of the Relief Period (March 13, 2020).
- The plan participants who count towards the 80% requirement do not have to be the same original, terminated employees (i.e., the employer is not required to rehire previously terminated employees to be eligible for the temporary relief).
- The partial plan termination relief under the Act does not appear to be available if new hires are ineligible to participate in the retirement plan.

Prohibition on Surprise Billing

- Effective January 1, 2022
  - Certain disclosure requirements will likely also be effective beginning in 2022.
- Congress included surprise billing legislation in the Act focused on balance billing protections for patients and related disclosure requirements as follows:
  - Patients cannot be balance-billed for out-of-network emergency services.
    - This protection applies from the initial evaluation until stabilization when the patient can consent to a transfer to an in-network facility.
    - The protection applies to both out-of-network facilities and out-of-network providers, and air ambulance services (but not ground ambulance services).

Prohibition on Surprise Billing

- Patients can only be balance-billed for non-emergency services performed at an in-network facility by an out-of-network provider under certain circumstances.
  - This is intended to protect patients who receive care at an in-network facility from surprise billing by an ancillary provider.
- Patients can waive these protections by consent if notified at least 72 hours in advance of the care. The No Surprise Billing prohibition includes the following additional limitations:
  - A dispute resolution procedure that includes binding arbitration to resolve conflict between the health plan and out-of-network providers regarding the plan's payment for out-of-network care.
  - Various cost estimate, transparency, and other disclosures, including in-network and out-of-network deductibles on insurance cards.

Broker Compensation Transparency Rules

- Plan fiduciaries have a duty to understand their arrangements with insurance brokers, including both direct and indirect compensation that the broker receives.
  - Where a broker is paid solely in commissions from the insurance company, the services are still not truly "free" to the employer given that the commissions increase the insurance premiums.
- The Act added additional requirements regarding broker and consultant arrangements and compensation.
  - It is unclear whether these rules apply to single-employer health plans or multiemployer plans only.
  - DOL guidance, expected to be released in the coming months, should clarify this issue.

THE ACT:

Mental Health Parity Transparency/Disclosure Requirements

- The Act requires, beginning February 10, 2021, group health plans and insurers to provide certain information related to Mental Health Parity compliance to certain agencies upon request.
  - Nonquantitative treatment limits (NQTL) for substance use disorder must be comparable and no more stringently applied than for medical or surgery benefits.
  - Under the Act, plans are required to perform and document comparative analyses of the design and application of NQTLs.
  - Group health plans are required to make this compliance documentation available to the DOL, HHS, or applicable state authorities upon request.

Mental Health Parity Transparency/Disclosure Requirements

- If a group health plan's analyses does not demonstrate adequate compliance, the plan is provided with a 45-day correction period in which to become compliant by proposing certain actions or providing additional data.
- If the plan is still found to be noncompliant by the DOL, the plan must:
  - Inform participants that the plan does not comply; and
  - The DOL will identify noncompliant plans in its annual report to Congress.
- Additional guidance purportedly forthcoming
  - In the interim, plan sponsors that rely on their third-party administrators or insurance carriers to establish and implement NQTLs should inquire what they are doing to prepare for Mental Health Parity transparency requirements.

American Rescue Plan Act of 2021 (ARPA)

Benefits Provisions

- Signed into law on March 11, 2021
- Benefits provisions include:
  - A six-month 100 percent COBRA premium subsidy for certain former employees;
  - An increase in dependent care FSA exclusion limits for 2021;
  - Actions to address solvency concerns for both single and multiemployer pension plans; and
  - An expansion of the "covered employee" definition under Section 162(m) of the Internal Revenue Code
  - A voluntary extension for FFCRA extended through September 30, 2021 (with new leave eligibility)

COBRA Subsidies

- ARPA creates a 100 percent COBRA premium subsidy for any period of coverage during the period beginning April 1, 2021 through September 30, 2021. The premium subsidy, which also covers any administrative fees, is available for any employee or dependent who:
  - Loses group health plan coverage due to an involuntary termination of employment or because of a reduction of hours; and
  - Elects COBRA coverage.
- Employers are responsible for paying the premium and will recoup the expenditures through credits on their quarterly payroll tax returns (if the subsidy is higher than payroll taxes, they will receive a refund).

COBRA Subsidies

- ARPA does NOT extend the COBRA coverage period; therefore, the COBRA premium subsidy ends earlier if the eligible individual's maximum period of COBRA coverage ceases prior to September 30, 2021.

Lookback Period to November 2019

- ARPA provides an 18-month lookback to November 1, 2019 by creating a special election period for any individual who either:
  - Did not elect COBRA continuation coverage between November 1, 2019 and April 1, 2021 but who would be an eligible individual if such election had been made; or
  - Elected COBRA coverage and discontinued such coverage prior to April 1, 2021 (because, for example, an inability to make monthly premium payments).
  - Individuals allowed to elect COBRA coverage within 60 days of receiving the required extended election notice from the employer.

COBRA Subsidies

Plan Election Changes

- ARPA permits a plan to provide an eligible individual the opportunity to change coverage options in conjunction with electing COBRA coverage.
  - The eligible individual may elect to enroll in a different group health plan within 90 days of the date of notice of the enrollment option (that the employer is required to furnish).

Additional Notice Requirement

- ARPA imposes additional notice requirements for individuals who become eligible to elect COBRA from April 1 until September 30, 2021.
- This notice must also be furnished to eligible individuals if such individual became entitled to elect COBRA coverage on or after November 1, 2019 and prior to April 1, 2021.
  - The notice must be provided no later than June 1, 2021.

Temporary Increase to DCFSA Contribution Limits

- ARPA temporarily increases the dependent care FSA limit from $5,000 to 10,500 (or $5,250 up from $2500 in the case of a separate return filed by a married individual).
- Similar to the dependent care FSA changes under the Act, this is a permissive change and employers are not obligated to increase the election amounts for dependent care FSAs.
- Employers who wish to amend their plans to allow for the increased dependent care FSA limit must:
  - Adopt an amendment no later than the last day of the plan year in which the amendment is effective; and
  - Operate the plan consistent with the amendment terms beginning on the effective date of the amendment and ending on the date the amendment is adopted.

Solvency Relief for Pension Plans

Single Employer Pension Plans

- ARPA extends the plan funding amortization period (i.e., the time period by which employers must fund long-term liabilities) from 7 years to 15 years.
- The shortfall amortization bases for plan years preceding the first plan year beginning after the 2021 plan year and all shortfall installments determined with respect to such bases, shall be reduced to zero.
- ARPA adjusts the existing interest rate corridor (used to determine cash funding requirements) and implements a 5% floor on all interest rates for funding purposes.

Other Relevant Provisions of ARPA

Other relevant provisions of ARPA:

- Modified employee entitlement to COVID-related voluntary leave under FFCRA
- Extended federal unemployment insurance benefits, again
  - Fed. Pandemic Unempl. Comp. (FPUC)
  - Pandemic Unempl. Assistance (PUA)
  - Pandemic Emerg. Unempl. Comp. (PEUC)

BENEFITS

Solvency Relief for Pension Plans

Multiemployer Pension Plans

- ARPA provides financial assistance through the PBGC to provide eligible multiemployer plans with grants ("special financial assistance") to secure pension benefits for plan participants.
  - PBGC is required to publish requirements for the grant applications within 120 days of ARPA's enactment and applications must be submitted by December 31, 2025. To qualify for the grant, a plan will have to meet one of the following four criteria:

1. in any plan year beginning 2020-2022, be in critical or declining status;

2. In any plan year beginning 2020-2022, be in critical status, be funded at least than 40%, based upon current liability measures, and have a ratio of active to inactive participants of less than 2 to 3;

3. Have become insolvent after December 16, 2014, but not yet terminated; OR

4. Have had a suspension of benefit approved as of the date of enactment.

Expanded Class of "Covered Employees" Under 162(m)

Code Section 162(m)

- Section 162(m) limits a publicly held corporation's deduction to $1 million per year for compensation paid to "covered employees."
  - ARPA expands the definition, for tax years beginning after December 31, 2026, by providing that "covered employee" shall also include the five highest compensated employees (in addition to the company's principal executive officer, principal financial officer (PFO), and the three highest compensated officers for the taxable year other than the PEO or PFO).
  - These five additional employees do not have to be officers of the publicly held corporation.
  - 162(m) provides that once an individual is a covered employee for a taxable year, they remain one for all future taxable years
    - This require will NOT apply to the additional five employees whose compensation is subject to 162(m) as a result of ARPA's expansion.

Ok – What Else?

Reductions in Force: 2020 saw unprecedented activity in this area. Hopefully that's in the past, but just in case…

- For mass layoffs or plant closures, don't forget to consider any federal WARN or state mini-WARN, where applicable, obligations
- If you're selecting certain employees for RIF (as opposed to all positions in an area), conduct an adverse impact analysis on the front end
- If winding down operations, consider use of retention agreements to incentivize employees to stay and assist with the winddown
  - Offer a retention bonus in exchange for a global release of claims
  - Remember ADEA consideration/revocation requirements for RIFs as well as state-law considerations (i.e., Illinois)

Ok – What Else?

COVID Immunity Statutes

- Still going strong, with two new states adopting immunity statutes in the last two weeks (Florida & AZ)
- Another really important reason to pay attention to federal, state and local COVID-19 directives
    - Generally does not preempt application of workers' comp statutes, where applicable

OSHA priorities, increased funding and new programs

- Recently Issued Guidance, January 2021
- ARPA – increased OSHA funding for enforcement actions
- National Emphasis Program

Vaccinations

Ok – What Else?

Outside of COVID – Biden priorities

- **Pay Equity – huge priority**
  - Equal pay across genders for substantially XX work
  - Federal & state activity
    - March 8, 2021 EO – Biden directed the creation of a White House Gender Policy Council
      - Goal: Advance equal rights and opportunities, regardless of gender or gender identity
      - Directive: Within 200 days, the Council is ordered to develop and submit a "government-wide strategy for advancing gender equity and equality in the United States"
- **Independent Contractor/Joint Employer changes**
- **Watch out for changes to union organization rules**
  - New DOL Head is a former labor leader
  - Pro Act legislation remains pending
  - Revisit handbook policies

Ok – What Else?

Outside of COVID – Biden priorities

- Influx of wage & hour litigation on the horizon??
  - Several recently filed cases re: COVID-screening time

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