BDO

ERISA ROUNDUP

A quarterly recap of recent publications from BDO's ERISA Center of Excellence.

Q2 2020

A NOTE FROM BDO'S NATIONAL ERISA PRACTICE LEADER

During the past several months, business professionals across departments and industries have learned the value of perseverance. As we understand more about our business operations – and our society – we can make better decisions for the future of our organizations.

As the nation remains hopeful for a quick recovery, we shift our focus back to enduring business issues – with a new lens to account for these changing times. We will continue to educate our clients on emerging topics related to changing deadlines and The CARES Act. In addition, we'll cover more forward-thinking implications such as how to handle partial plan terminations and plan considerations for furloughs and layoffs.

As always, our commitment to staying ahead of deadlines and best practices is an integral part of our day to day. We encourage you to keep up with our insights at www.bdo.com/erisa.

Sincerely,

BETH GARNER
National Practice Leader, ERISA

BDO's ERISA Center of Excellence is your source for insights on emerging regulations, industry trends, current topics, and more. Visit us at www.bdo.com/erisa or follow along on Twitter: @BDO_USA and #BDOERISA.

IN THIS ISSUE

2020 Deadlines and Important Dates for Plan Sponsors 1

What Does the CARES Act Mean to Your Mobility Program? 5

CARES Act Aids Employers Who Continue to Pay Employees 6

COVID-19's Impact on U.S. Retirement Plans 9

Coronavirus: Tax & Relocation Implications for the Mobile Workforce 12

CARES Act Relaxes Qualified Plan and Employee Benefit Rules to Improve Cash Flow for Employer and Employees 14

Remote Working and Cybersecurity Considerations for Plan Sponsors 18

IRS Increases Flexibility for Code Section 125 Cafeteria Plans Due to COVID-19 20

Fair Value Disclosures Made Easier: ASC 820 23

What Plan Sponsors Need to Know About Layoffs and Partial Plan Terminations 25

Incentivizing the Next Generation of Leadership with an ESOP 27

www.bdo.com/erisa

2020 Deadlines and Important Dates for Plan Sponsors

Sponsors of defined benefit and defined contribution plans should keep the following deadlines and other important dates in mind as they work toward ensuring compliance for their plans in 2020. All plans are different, so some deadlines may not apply or may have dates shifted based on your organization's fiscal year. For additional support, please contact your BDO representative.

JULY

- **14** / Plans with publicly traded employer stock that use an ERISA format and requested a 15-day calendar extension (Form 12b-25) for the Form 11-K must file the Form 11-k with the Securities and Exchange Commission by July 14.
- **15** / Corporations and sole proprietors that are not getting an extension must fund employer contributions by July 15 and receive tax deduction for the prior year.
- **15** / File PBGC Form 4010 by July 15, Notice of Underfunding for single-employer defined benefit plans.
- **15** / File PBGC Form 10 by July 15, Post-Event Notice of Reportable Events for single-employer defined benefit plans.
- **27**/ File PBGC Form 200 by July 27, if plan sponsor of a single-employer defined benefit plan does not make the July 15 required contribution, causing the plan to have more than $1 million in unpaid contributions.
- **31**/ Large plan audit must be completed by July 31 to avoid requesting Form 5500 extension.
- **31**/ 2019 Form 5500 must be filed by July 31.
- **31**/ To request a 2019 Form 5500 extension, IRS Form 5558 must be submitted by July 31.
- **31**/ File IRS Form 720 and pay Patient-Centered Outcomes Research Institute (PCORI) fee by July 31. Self-insured health plans must pay a fee per person (covered by health plan).

AUGUST

- **14** / File PBGC Form 10 by Aug. 14, Post-Event Notice of Reportable Events for single-employer defined benefit plans.
- **30** / Plans that failed compliance testing may take this mid-year opportunity to run compliance tests. Aug. 30

SEPTEMBER

- **15** / If an extension was filed, Sept. 15 is the deadline to fund employer contributions.
- **15**/ Minimum funding deadline for single- and multi-employer defined benefit plans.
- **25** / File PBGC Form 200 by Sept. 25, if plan sponsor of a single-employer defined benefit plan does not make the Sept. 15 required contribution, causing the plan to have more than $1 million in unpaid contributions.
- **30** / Sept. 30, Summary Annual Report sent to participants with Dec. 31 plan year end (if 2019 Form 5500 was filed July 31).

OCTOBER

- **1** / Make sure procedures align with language in plan document. Oct 1.
- **1** / Annual notices to participants begin Oct. 1, including 401(k) Plan Safe Harbor Notice, automatic contribution arrangement safe harbor and qualified default investment alternative.
- **15** / File PBGC Form 10 by Oct. 15, Post-Event Notice of Reportable Events for single-employer defined benefit plans.
- **15** / Oct. 15 is the extended deadline for filing 2019 Form 5500.
- **15** / Oct. 15 is the extended deadline for filing individual and C-Corp tax returns.
- **15** / Oct. 15, single- and multi-employer defined benefit plans file PBGC Comprehensive Premium document and pay $29 per participant flat-rate premium.
- **15** / Oct. 15 to open a Simplified Employee Pension (SEP) plan for extended tax filers.
- **26** / File PBGC Form 200 by Oct. 26, if plan sponsor of a single-employer defined benefit plan does not make the Oct. 15 required contribution, causing the plan to have more than $1 million in unpaid contributions.

NOVEMBER

- **16** / File PBGC Form 10 by Nov. 16, Post-Event Notice of Reportable Events for single-employer defined benefit plans.

DECEMBER

- **1** / Annual Participant notices must be distributed by Dec. 1. These include: 401(k) safe harbor, annual automatic contribution and qualified default investment alternative (QDIA) notices.
- **15** / Dec. 15 is the extended deadline to distribute Summary Annual Report (SAR) for calendar year plans.
- **31** / By Dec. 31, process corrective distributions for failed ADP/ACP testing; a 10 percent excise tax may apply.
- **31** / Amendments to change traditional 401(k) to safe harbor design, remove safe harbor feature or change certain discretionary modifications must be adopted by Dec. 31.
- **31** / Required minimum distributions for participants age 70 ½ must be completed by Dec. 31 for calendar plan years.*Note: With the passage of the SECURE Act, those who turn 70.5 in 2020 can wait until they turn 72 to start RMDs.
- **31** / Plan sponsors must amend plan documents by Dec. 31 to account for any discretionary changes made during the 2020 year.

IRS ANNOUNCES RELIEF FOR REQUIRED MINIMUM DISTRIBUTIONS

The recently enacted CARES Act, Coronavirus Aid, Relief, and Economic Security Act, allows for a suspension of required minimum distributions from both qualified plans, including 401(k) and 403(b), and IRAs for the 2020 tax year. The reprieve allows any taxpayer required to take an RMD during 2020 to skip the payment and therefore obtain tax relief. This includes any taxpayer who turned 70 ½ in 2019 with the first RMD due on April 1, 2020. This also applies to taxpayers who obtain the age of 72 under Section 114 of the SECURE Act. Note this relief does not apply to defined benefit plans.

As many taxpayers took an RMD early in 2020 and passed the 60-day rollover opportunity for tax-free distributions before the CARES Act was legislated, clarity was needed as to how these individuals could receive a waiver for this year. IRS provided clarity on June 23, 2020 in Notice 2020-51. Anyone who took an RMD beginning with January 1, 2020 now has the opportunity to roll those funds back into a qualified plan or IRA product without a tax penalty by August 31, 2020. Further, the Notice provides a sample plan amendment that if adopted would provide participants a choice whether to receive waived RMDs and related payments.

COVID-19 ALERT FOR PLAN SPONSORS: DEADLINE EXTENSIONS FOR 403(B) AND DEFINED BENEFIT PLANS

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, signed into law on March 27, 2020, extends several key deadlines for 403(b) and defined benefit plan sponsors.

- 403(b) remedial amendment period extended to June 30, 2020: The law extends the initial remedial amendment period for 403(b) plans from March 31, 2020 to June 30, 2020. This gives plan sponsors three additional months to update or restate their pre-approved and individually designed 403(b) plan documents. Original instructions for the program, which give plan sponsors the opportunity to fix mistakes in their plan document retroactive to Jan. 1, 2010, can be found here. In keeping with the original provision, the new law doesn't extend to operational failures.
- Single-employer defined benefit contribution relief until Jan. 1, 2021: Single-employer defined benefit plan sponsors can delay minimum funding contributions until Jan. 1, 2021. Employers will remain responsible for paying interest on the delayed contribution amounts at the plan's effective rate.
- Pre-approved defined benefit plan extensions: The deadline for employers to adopt a pre-approved defined benefit plan and submit a determination letter under the second six-year remedial amendment cycle has been moved from April 30, 2020 to July 31, 2020. Similarly, the end of the second six-year remedial amendment cycle for pre-approved defined benefit plans has been moved from April 30, 2020 to July 31, 2020. The third six-year remedial amendment cycle for pre-approved defined benefit plans will now begin Aug. 1, 2020, and the end date will remain Jan. 31, 2025. The submission period for opinion letter applications will still begin Aug. 1, 2020 and end July 31, 2021. Plan sponsors can expect the Internal Revenue Services (IRS) to issue guidance on the extensions to the second and third six-year remedial amendment cycles in the near future.

IRS ANNOUNCES EXTENSION TO REMEDIAL AMENDMENT DEADLINES

The Internal Revenue Service has extended the Remedial Amendment Period for 403(b) Plans. The original due date of March 31, 2020 to restate pre-approved and individually designed 403(b) documents has been now extended until June 30, 2020.

Additionally, The IRS is extending the April 30, 2020 deadline for pre-approved defined benefit plans to submit a determination letter and end of the second six-year remedial amendment cycle until July 31, 2020. This will be of assistance to plan sponsors that needed additional time to complete the restatements due to the COVID 19 situation.

CONTRIBUTION PLAN LIMITS AND OTHER ROLLING NOTICES FOR 2020

In addition to those important deadlines and dates, plan sponsors should be aware of the contribution plan limits and other rolling notices for 2020:

- Employee salary deferral limits for 401(k), 403(b) and 457 plans will be $19,500. Age 50 catch-up contribution limit increases to $6,500.
- Health Savings Account contribution limit is $3,550 (single) and $7,100 (family). Age 55 catch-up contribution stays at $1,000.
- Traditional and Roth Individual Retirement Account contribution limit will be $6,500. catch-up contributions for participants age 50 and over is $1,000.
- Limitation for the annual benefit under a defined benefit plan under Section 415(b)(1)(A) will be $230,000.
- The dollar amount used to define “highly compensated employee” under Section 414(q)(1)(B) will be $130,000.
- Newly eligible employees must receive a Summary Plan Description (SPD) within 90 days.
- Provide quarterly statements and fee information to participants.

What Does the CARES Act Mean to Your Mobility Program?

With the signing of the Coronavirus Aid, Relief, and Economic Security (CARES) Act by President Trump, millions of Americans are looking forward to receiving their stimulus checks. However, will your relocated employees actually receive one? The stimulus checks are to be delivered to individuals who meet certain income conditions and is phased-out for individuals over certain thresholds.

WHAT WE KNOW

The CARES Act provides eligible individuals with an advance refund check equal to $1,200 ($2,400 for joint filers) plus $500 per qualifying child. If adjusted gross income (AGI) exceeds $75,000 ($150,000 for joint filers), the advance refund check is reduced until it is completely phased-out for those with AGI of $99,000 ($198,000 for joint filers). An individual's most recently filed return will determine eligibility for receiving the advance payment. In most cases, this will be the 2018 tax return, although for some it will be their 2019 tax return (if it has been filed and processed by the IRS).

The advance refund check is being provided in anticipation of an individual's qualification for the related tax credit on his or her 2020 tax return. If an individual does not qualify for an advance payment due to the income level on their 2018 return (or 2019 return), but otherwise would qualify based on their 2020 income level, the credit will be applied on their 2020 tax return against their 2020 tax liability.

It should be noted that if an individual receives an advance refund check but whose 2020 income is higher than the thresholds, the advance would be forgiven and not need to be repaid. Therefore, relocations or assignments starting in 2020 should generally not impact an individual's ability to benefit from the stimulus.

IMPACT TO YOUR MOBILE POPULATION

For your employees who were relocated in or were on assignment during 2018 (or 2019) and had all of their relocation costs and assignment allowances included in their 2018 or 2019 Form W-2, their income was inflated for the year (compared to their "stay at home" income – any compensation they would have received had they not been relocated). As a result, these individuals are likely to receive a reduced advance refund check or possibly no advance refund check and will have to wait to file their 2020 tax return to see if they qualify for any additional amount. If their 2020 reportable income is higher than it would have been in 2018 or 2019, then the loss of the benefit related to the stimulus payment will be a permanent loss to the individual.

For example, consider a married employee with two qualifying dependent children, a base salary of $100,000, and bonus of $50,000 in tax year 2018. The individual moved from the U.S. to France during the year and had total relocation costs and allowances imputed into his or her W-2 of $75,000. Assuming his or her spouse is not employed and is not considering other personal income, this individual has reportable income for the year of $225,000. At this level of income, the individual is not eligible to receive an advance refund check, since income is above the $198,000 threshold for joint filers. However, if they had not been on assignment in 2018, income of only $150,000 would have been reported on the 2018 tax return. As a result, the individual would be eligible to receive an advance refund credit check of $3,400 ($2,400 for joint filers plus $500 for each qualifying dependent child).

The situation becomes even more complex for any inbound employees to the U.S. The CARES Act states that for an individual to be eligible for the advance payment refund check, they must have a valid identification number. In this instance, a valid identification number includes a Social Security Number, but does not include an Individual Taxpayer Identification Number (ITIN). It is a very common situation for inbound families where only the actual working spouse has a Social Security Number while the non-working spouse and children would have ITINs while the family is in the U.S. under temporary visas.Mobile technology to improve
employee engagement

Service providers and plan sponsors continue to find better ways to engage employees about their benefits, and mobile apps are moving from nice-to-have to need-to-have offerings as we head into 2020. Employees want access to benefit information whenever they need it, not just when they are sitting at a computer. In addition, apps and other interactive tools are making it easier for employees to consume information and make decisions about their benefits offerings. Many service providers now offer tools such as savings calculators and healthcare consumption projections that allow employees to see how their decisions affect outcomes over time.

COMPANY CONSIDERATIONS

Since this stimulus payment is, in effect, an advance payment of a tax credit, a company must consider the cost impact to their mobile employee programs (domestic and/or international) like any other tax law change. Based on previous stimulus events and related reactions, it is likely that this stimulus event will create an increased cost to the company. In determining the effect to any impacted employee, the company should consider whether to wait until all information is known (i.e. upon filing of the 2020 tax return and related tax settlement calculation) or whether to review the mobility program population now.

If a company is waiting until the 2020 return is completed, special consideration should be made for employees who were involved in an active relocation or assignment in 2018 or 2019 but are not anticipated to be included on the company's tax authorization list for 2020 tax return preparation.

CARES Act Aids Employers Who Continue to Pay Employees

The Coronavirus Aid, Relief, and Economic Security (CARES) Act provides two distinct and substantial employment tax benefits for certain employers under Sections 2301 and 2302 of the Act. Section 2301 provides a refundable payroll tax credit for certain wages paid to employees from March 13 to December 31, 2020. Section 2302 allows employers to defer the deposit of certain employment taxes for as much as two years. Taken together, these provisions provide significant relief for employers and are designed to encourage employers to continue paying wages to employees during these unprecedented times.

SECTION 2301 EMPLOYEE RETENTION CREDIT

BDO INSIGHT:

This credit is not limited to small employers. However, any employer who receives a Small Business Administration Loan under the Paycheck Protection Program of the CARES Act is ineligible to receive this employee retention credit.

Section 2301 of the CARES Act provides a payroll tax credit of up to $5,000 per employee for eligible employers. The credit is equal to 50% of "qualified wages" paid to employees during a quarter, capped at $10,000 of "qualified wages." The credit is available for wages paid from March 13 to December 31, 2020.

ELIGIBLE EMPLOYERS

To be eligible, employers must meet the following criteria:

1. They must be carrying on a trade or business during 2020, and
2. During the calendar quarter, either:
    - Their operations were fully or partially suspended as a result of orders from a governmental authority limiting commerce, travel, or group meetings due to COVID-19, or
    - Their gross receipts for the quarter were less than 50% of the gross receipts for the same calendar quarter in the prior year. The employer will remain eligible for the credit until such calendar quarter as their gross receipts equal 80% of the gross receipts for the same calendar quarter in 2019.

QUALIFYING WAGES

The wages that can be used to calculate the tax credit differ based on whether the employer has over or under 100 employees. For employers with 100 or more full-time employees on average during 2019 (as determined by IRC Section 4980H as enacted by the Affordable Care Act), only wages paid to employees who are not providing services qualify for the credit. But for employers with less than 100 full-time employees, all wages paid to employees, regardless of whether the employees are providing services, qualify for the credit. For purposes of the employee count, organizations that are under common control (using IRC Section 52(a) and (b)) or that are a member of an affiliated service group (using IRC Section 414(m) and (o)) will be treated as a single employer.

Qualified wages are based on the definition of wages used for FICA taxes, plus the amount paid by the employer for health plan expenses. But the wages cannot exceed what the employee would have been paid for working an equivalent amount of time during the preceding 30 days. In other words, wage increases do not qualify for the employee retention credit. The CARES Act does not explain how this limitation should be calculated, so IRS guidance would be helpful.

Any federally mandated sick or child care leave paid under the Families First Coronavirus Response Act (FFCRA) is specifically excluded from "qualified wages" for the employee retention tax credit, since employers receive a dollar-for-dollar tax credit for such paid leave wages.

BDO INSIGHT:

The employee retention tax credit cannot be taken on the same wages as other tax credits, such as Work Opportunity Tax Credit under IRC Section 51 or Employer Credit for Paid Family and Medical Leave under IRC Section 45S.

HOW TO CLAIM THE CREDIT

Claiming the employee retention credit will track the same procedures for claiming the tax credits for providing federally mandated paid sick and child care leave under FFCRA. In IR 2020-57 (dated March 20, 2020), the IRS said that employers can immediately recoup their refundable tax credits for paid sick and child care leave by reducing their total federal tax deposit amount from all employees (not just from those who are receiving wages that qualify for the credit) by the amount of eligible credit. Specifically, employers can deduct the amount of tax credit for paid sick and child care leave from: (1) federal income taxes withheld from all employees' pay; (2) the employees' share of Social Security and Medicare taxes; and (3) the employer's share of Social Security and Medicare taxes. Likewise, in IR 2020-62 (dated March 31, 2020), the IRS said that employers can follow that same process to immediately recoup their employee retention tax credit. These credits will ultimately be reconciled against the total tax liabilities when employers file their quarterly Form 941 or other employment tax returns.

In addition, the IRS has published Form 7200, Advance Payment of Employer Credits Due to COVID-19, which allows employers to request a rapid refund for both the employee retention credit and the FFCRA paid sick and child care leave tax credits. Form 7200 can be filed (by fax) to request an advance of payments at any time before the end of the month following the quarter in which the qualifying wages were paid. It can be filed multiple times during the quarter if necessary. Amounts use to offset federal tax deposits as described above should not be duplicated on a request for refund on Form 7200. Ultimately, any amounts refunded using Form 7200 will also be reconciled on the employer's quarterly Form 941 or other employment tax returns.

BDO INSIGHT:

The timing of the rapid refunds is still somewhat unclear. They are supposed to be processed within two weeks after receipt of Form 7200, but the IRS's system for processing Form 7200 does not yet appear to be fully operational and it is unclear when it will be up and running. To maximize cash on hand, employers should compare whether they might be better off offsetting their accumulated tax credits from their upcoming payroll deposits or requesting the refund on Form 7200. The result may differ for each employer, depending on their facts and circumstances.

SECTION 2302 EMPLOYER PAYROLL TAX DEFERRAL

BDO INSIGHT:

This payroll tax deferral is available to all employers with no size restriction. However, any employer whose Paycheck Protection Program (PPP) SBA loan is forgiven under Section 1106 of the CARES Act is ineligible for this payroll tax delay.

Section 2302 of the CARES Act permits employers to forgo timely payment of the employer portions of Social Security and RRTA taxes that would otherwise be due from March 27 through December 31, 2020, without penalty or interest charges (as confirmed by IRS Notice 2020-22, dated March 31, 2020). Employers must pay 50% of the deferred amount by December 31, 2021, and the remainder by December 31, 2022.

BDO INSIGHT:

If the employer utilizes this benefit and later is approved for PPP SBA loan forgiveness, it is not clear if the payment date on accumulated deferrals is accelerated to the forgiveness date or if deferrals cease on a prospective basis.

Self-employed individuals can take an equivalent tax deferral on 50% of the OASDI tax imposed on self-employment income under IRC Section 1401 and will not be penalized for failing to make estimated tax deposits on that amount during the deferral period.

To protect third parties, such as payroll service providers and certified professional employer organizations, the CARES Act requires that the customer or client bear the ultimately responsibility for the payment of any deferred taxes if they instruct the third party to defer payment.

BDO INSIGHT:

It is not yet clear how these two provisions would work in tandem. At the moment, it appears that an employer could defer its deposit of payroll taxes that are otherwise due from March 13 to December 31, 2020 (using the payroll tax holiday under Section 2302 of the CARES Act) and offset against those un-remitted payroll taxes the employee retention credit (under Section 2301 of the CARES Act), and/or the tax credits for paying federally mandated FFCRA sick and child care leave, which would reduce the amount that the employer would eventually need to remit (i.e., 50% of the net amount would be owed on December 31, 2021, and the remainder would be owed on December 31, 2022).

COVID-19's Impact on U.S. Retirement Plans

Business leaders face an array of questions they need to answer and information they must analyze during the rapidly evolving response to the COVID-19 pandemic.

While decisions about safety and business operations are obviously top priorities now, plan sponsors still must maintain compliance for their retirement plans. At BDO, we are here to help you navigate these decisions. We address three of the most immediate questions that companies should be considering related to their retirement plans.

WILL THE DEPARTMENT OF LABOR AND/OR TREASURY DELAY FILING DEADLINES?

As of March 27, filing deadlines for retirement plan documents haven't been delayed. While President Trump has declared a nationwide emergency, no subsequent guidance or relief has been issued by the Department of Labor (DOL) or the Treasury Department, which oversees the Internal Revenue Service (IRS).

Historically, departments have issued guidance and postponed deadlines during natural disasters, such as Hurricanes Irma and Maria in 2017. The IRS has broad authority to postpone certain deadlines after the president declares a disaster.

On March 16, the **American Retirement Association** (ARA) issued a letter asking the Treasury Department and DOL to push upcoming deadlines, including:

- Extend Form 5500 deadlines to October 15 for calendar plan years (and similar extensions for non-calendar plan years)
- 90-day extension for failed ADP or ACP testing and a similar extension for distributing excess contributions without the 10% tax penalty
- 120-day extension for defined benefit plan reinstatement (currently April 30, 2020)
- 90-day extension for 1099-R e-filings for employers (currently March 31, 2020)
- Reasonable relief from required plan participant notices

BDO INSIGHT:

BDO is closely monitoring the situation and will issue an alert to plan sponsors if filing deadlines change. Until then, plan sponsors should prepare to meet the current requirements.

CAN PLANS REDUCE OR ELIMINATE MATCHING CONTRIBUTIONS?

Reducing or eliminating matching contributions may seem like an immediate way to reduce cash outflows. But plan sponsors need to examine their plan documents to determine whether changes can be made and the requirements related to such decisions.

In general, plans can reduce or eliminate discretionary non-elective and discretionary matching contributions without needing to amend plan documents. If a company decides to do this, however, it is important to have a thoughtful strategy for how to communicate these changes to employees.

Many plans operate as Safe Harbor 401(k) plans, which waive certain nondiscrimination testing requirements. The safe harbor match can be reduced or eliminated only if (1) the plan sponsor is operating at an economic loss, or (2) the annual safe harbor notice includes a statement that reserves the right to change the contribution schedule midyear. Satisfying one of these options still comes with a few strings attached:

- Participants must receive a notice 30 days before the effective date of the change and be given a reasonable timeframe to change their deferral amount
- The plan loses its safe harbor status for the year and must undergo nondiscrimination ADP/ACP testing

BDO INSIGHT:

Plan sponsors need to carefully consult their plan documents to understand their options for potentially reducing or eliminating matching contributions, as well as the process and timing requirements for such decisions. In terms of depositing employee contributions, plan sponsors should keep to their regular schedule; failure to do so may result in severe penalties.

IS CYBERSECURITY STILL A HIGH-PRIORITY CONSIDERATION FOR PLAN SPONSORS?

Absolutely; retirement plan communications contain highly sensitive information. As more people are working from home, cyber criminals see this as an opportunity to access sensitive data through phishing emails and exploit gaps in remote technology systems. The Cybersecurity and Infrastructure Security Agency (CISA) issued a warning for people to be aware of cyber scams related to COVID-19. CISA also offered recommendations for organizations with employees working offsite.

BDO INSIGHT:

BDO has issued a host of articles to help companies confront new cybersecurity threats related to COVID-19. These include:

- Top Cybersecurity Recommendations Amid COVID-19 (re: five tips for reducing the probability of a cyberattack and mitigating the impact)
- COVID-19 Data Security Insight (re: securing remote access to company systems and data)
- Privacy in the Time of Pandemic (re: data privacy laws)

WE'RE HERE TO HELP

Plan sponsors face many weighty, complex decisions related to the COVID-19 pandemic, and we recognize that retirement plan oversight is just one small part of a company's responsibilities. We are committed to keeping you updated on the rapidly evolving flow of news and regulations related to retirement plans.

Please visit BDO's COVID-19 Crisis Hub for the latest insight on what this pandemic means for your organization. In addition, BDO's ERISA Center of Excellence will provide updates as more information affecting retirement plans becomes available.

Coronavirus: Tax & Relocation Implications for the Mobile Workforce

The novel coronavirus that causes the disease COVID-19 has become a global issue. Since the virus was declared a pandemic by the World Health Organization (WHO), we have seen more border entry restrictions, quarantines and travel bans implemented to stop the virus' spread. The evolving situation has made managing a mobile workforce more challenging.

To keep clients informed, Weichert Workforce Mobility has issued a number of advisories and continues to update their **website** with practical advice for addressing the virus' impact on talent mobility. BDO's **dedicated COVID-19 web page** provides real-time updates on changes in legislation and implications for taxpayers and corporate clients. In this article, we provide recommendations from both perspectives.

MANAGING MOBILE TALENT

As the global pandemic accelerates worldwide, so does anxiety among mobile employees and their families who are "away" from home – on assignment, recently relocated or repatriating. While recommendations depend on the stage of the assignment or relocation and local situations (e.g., mandatory shelter in place, etc.), these observations can inform decisions you may be struggling with.

Pause/Fast Forward Button

In the face of travel restrictions and shelter in place orders, an increasing number of our clients (41%) are deferring new initiations. The situation is very fluid, but many have cited a three-week pause. **Mercer** research indicates 32% of companies have implemented hiring freezes and as a result, new hire initiations will be the first to decrease. Further, many intern programs are on hold. That said, there are also companies that are rapidly ramping up and reorganizing, pushing the fast-forward button but with intense concern over long term costs.

(Stealth) Repatriations

Among our client base, repatriations have been limited (11%) as travel bans and quarantines have made it more difficult to mobilize returns or find a safe haven. Stealth repatriations seem to be spiking, creating significant permanent establishment (PE) issues and challenges tracking and staying in touch with employees. Global mobility may be the last to learn of stealth repatriations, when the employee or manager surfaces compensation issues or questions about expenses, which obviously creates more tax and compliance risks now and down-stream.

MANAGING MOBILITY

New Initiations

Moves that are essential or critical are proceeding with the understanding that services may vary based on local regulations (i.e., virtual inventory of household goods (HHG), "drive by" valuation, virtual destination tour, etc.).

Moves In-Process

- Moves in-process are continuing on a case-by-case basis depending on the stage of the move and local restrictions. Keeping costly home sales together to control costs, delivering household goods where and if permitted, funding "quarantine expenses" and covering extended temporary living and storage, etc.
- Assignees may get a "hardship" allowance or a "shelter in place" per diem.

Destination In-Process

Using virtual solutions, home finding in some locations is continuing. A comprehensive phone-based needs assessment allows the counselor to collect and curate listings/information.

Exceptions

Managing an increasing number and variety of exceptions is creating an incredible burden on global mobility, but with tax, visa and business/budget implications it will be vital to detail circumstances for all future reporting and analysis.

MANAGING THE TAX IMPLICATIONS

We continue to closely monitor the tax landscape for global mobility programs and have identified unanticipated compliance risks for expats as a result of this global pandemic. Global mobility program managers should consider whether these risks apply to their expats and whether prudent action is needed to minimize the exposure created.

- Shadow Payroll Reporting: Companies are repatriating their expats temporarily to address challenges in the host jurisdiction with the virus. In doing so, this may have an impact on the shadow payroll reporting in the host jurisdiction; we recommend that you review the shadow payroll calculations and modify the level of income reported and income and social tax withholdings to account for the absence.
- Hypothetical Tax Withholding: If an expat is repatriated temporarily to his or her home country and is tax equalized and deducting a hypothetical tax, it may be prudent to suspend his or her hypothetical tax withholding and switch back to actual income tax (and potentially social tax) withholdings.
- State Tax Residency: For U.S. outbound expats, repatriating back to the U.S. temporarily may create a tax residency issue in their state of residence. This may require turning on actual state tax withholding or addressing a potential underfunding of state tax withholdings from previous pay periods when the intent had been to break state tax residency.
- Permanent Establishment Risk: When the initial reporting on the virus broke, several expats were relocated to a neighboring country or another country in the region instead of their home country with the expectation of a short timeframe and which allowed the expat to continue to work from the same region. This creates the potential for corporate tax exposure in that country. We recommend that you review such expats' job responsibilities and assess the exposure with your corporate tax department.
- Income Tax Treaty Relief: Many expats are currently quarantined in their host country and are unable to repatriate back to their home country or even a neighboring country due to travel restrictions. These travel restrictions could lead to short term expatriates exceeding the 183-day threshold prevalent in many income tax treaties. This could give rise unexpectedly to tax residency and income taxation in the host country. You should closely monitor the anticipated day counts in the host country and identify any employees that are close to exceeding the 183-day threshold.
- Unbudgeted Tax Costs: Incremental costs to evacuate employees and their families and house them temporarily while they are unable to work in their assignment country could be a taxable benefit in kind. Company policies should be reviewed to determine if these costs are tax protected and budgets and accruals should be reviewed to account for these added costs.
- Tax Filing and Tax Payment Deadlines Extended: Several countries have already announced extended filing and payment deadlines, including the U.S., Canada, and Japan. This will impact the timing of tax filings, tax equalization settlements, and home and host country tax payments. Companies should monitor these updated deadlines to manage cash flows optimally and inform their business leaders accordingly.
- Foreign Earned Income Exclusion: If a temporary repatriation jeopardizes a U.S. outbound expat's ability to meet the bona fide residence or physical presence tests to qualify for the foreign earned income exclusion, the foreign tax credit is usually a viable fallback position to minimize potential double taxation provided taxes are being paid in the host country. For U.S. state tax purposes, if the state does not allow a credit for foreign taxes paid, there could be an unexpected increase in actual state tax costs.A third option, called a buy-in, is seeing a resurgence in popularity. This is a form of Liability Driven Investing (LDI), where the plan sponsor purchases a group annuity contract, just like a buy-out. With a buy-in, however, the plan sponsor remains in control of the assets, but is reimbursed by the insurance company for monthly payments. The insurance company assumes the risk for the benefits it insures. Plan sponsors looking to have more control in timing of a future buyout may want to consider this method.

For the latest updates on preparing for the business impacts of COVID-19, consult these BDO and Weichert resources:

- **https://www.bdo.com/insights/business-financial-advisory/insurance-risk-recovery/covid-19**
- **https://www.weichertworkforcemobility.com/coronavirus-and-your-mobile-workforce-latest-updates/**

CARES Act Relaxes Qualified Plan and Employee Benefit Rules to Improve Cash Flow for Employer and Employees

As the number of employers and employees impacted by the novel coronavirus (COVID-19) grows each day, employers with workplace retirement plans may find that employees may be looking to those plans now more than ever to help cover financial hardships they are experiencing. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (H.R. 748) includes several relief provisions for tax-qualified retirement plans, expands health care flexible spending accounts so funds can be used for over-the-counter items, clarifies some health insurance plan questions, and, through year-end, allows employers to reimburse employees for student loan payments tax-free. This alert explains those items. Further guidance will be needed from the IRS and DOL to answer many open questions about how these relief provisions are intended to work.

DEFINED BENEFIT (DB) RETIREMENT PLANS

Although it is not clear, based on past practices, the IRS may require employers to make an election to use the provisions described below. Plan amendments memorializing those elections would be needed by January 1, 2022.

Funding Relief. Many employers who sponsor defined benefit (DB) retirement plans (including cash balance plans) are facing large contribution requirements due to very low interest rates and a volatile stock market. The CARES Act provides short-term relief for single-employer DB plans. Specifically, employers have until January 1, 2021, to make any minimum required contributions that were originally due during 2020. The relief applies to quarterly contributions and any year-end contributions, regardless of plan year. When paid, contributions will need to include interest for the late payment.

AFTAP Relief. Also, when determining whether Internal Revenue Code (IRC) Section 436 benefit restrictions apply to any plan year that includes the 2020 calendar year, sponsors can (but are not required to) choose to use the plan's adjusted funding target attainment percentage (AFTAP) for the plan year ending in 2019. This could help employers avoid freezing benefits and continue offering lump sums and other accelerated payment forms in 2020, even if the plan's funded status significantly declined due to COVID-19.

RMDs Not Waived for DB Plans. DB plans are not eligible for 2020 RMD waivers (that relief is only available for defined contribution plans (see on following pages)).

DEFINED CONTRIBUTION (DC) RETIREMENT PLANS

Coronavirus-Related Distributions and Expanded Plan Loans. Employers who have DC plans — like a 401(k) plan or 403(b) plan — can let participants take up to $100,000 in "coronavirus-related distributions" by December 31, 2020. The distributions would be exempt from the 10% early withdrawal penalty and taxable over three years. Participants can take up to three years to repay all or any part of those distributions (and the repayment would be treated as a tax-free rollover when repaid to the plan).

From March 27 to September 23, 2020 (i.e., for 180 days after the CARES Act became law), "qualified individuals" can borrow up to the lesser of $100,000 (instead of just $50,000) or 100% of their entire vested account balance (instead of just 50%). For all new or existing plan loans to an affected participant, repayments due before December 31, 2020, may be delayed one year (but interest is charged during the delay). Also, the one-year delay would not count toward the maximum five-year repayment period for plan loans.

These special "coronavirus-related distributions" and expanded plan loan provisions are available to "qualified individuals," which means any participant who self-certifies that he or she:

- Has been diagnosed with SARS-CoV-2 or COVID-19 (with a test approved by the Centers for Disease Control and Prevention);
- Has a spouse or dependent who has been diagnosed with SARS-CoV-2 or COVID-19 (with a test approved by the Centers for Disease Control and Prevention); or
- Has experienced adverse financial consequences from being quarantined, furloughed or laid off; having work hours reduced; being unable to work due to lack of child care; closing or reducing the hours of a business owned or operated by the individual; or from other factors, as determined by the Treasury Secretary.

BDO INSIGHT:

When former employees no longer have payments made via payroll deductions the loans frequently go into default, resulting in taxable income for the participant at the end of the calendar quarter following the default date and a Form 1099-R would be issued showing the loan balance as taxable income for the year. However, the CARES Act appears to provide a one-year grace period for any loans that were outstanding on or after March 27, 2020. It seems that this one-year extension could delay the income inclusion for one year if a participant with an outstanding loan would otherwise default on the loan due to nonpayment including loss of employment due to a COVID-19 related business closure. To prevent such loan defaults, employers may want to amend the loan documents and/or loan policy so that affected participants can take advantage of the one-year delay even if the participant's employment is terminated or if the participant is laid off.

Participants that don't qualify for "coronavirus-related distributions" may qualify for a regular "hardship" withdrawal due to an immediate and heavy financial need, if the plan allows. There are many situations that qualify a participant for regular hardship withdrawals, including expenses or loss of income incurred due to a disaster declared by the Federal Emergency Management Agency, also known as FEMA. Regular hardship withdrawals cannot be repaid to the plan, must be taken into income in the year distributed, and are subject to the 10% early withdrawal penalty (although they are not subject to 20% withholding). Generally, DC plans may also allow in-service distributions for participants who are over age 59½ and may allow vested employer contributions to be withdrawn under a "5 year" or "2 year" rule, so long as the plan document allows it (or is amended to allow it).

2020 Required Minimum Distributions (RMDs) Suspended. The CARES Act waives all 2020 RMDs from DC plans (and IRAs). That waiver includes initial payments to participants who turned age 70½ in 2019 and who did not take their initial RMD last year because they had a grace period until April 1, 2020. The RMD relief does not apply to DB plan participants.

Plan Amendments. Employers can immediately implement the provisions provided by the CARES Act but generally have until the end of the first plan year beginning on or after January 1, 2022, to amend their DC plans for this relief. Amendments to adopt provisions that are not included in the CARES Act require amendment by December 31, 2020.

BDO INSIGHT:

This deadline appears to be the same for individually designed DC plans and for IRS preapproved DC plans.

WHAT SHOULD RETIREMENT PLAN SPONSORS DO NOW?

Employers who sponsor workplace retirement plans should review plan procedures to determine if any changes are needed to implement the CARES Act. For example:

- For DC plans that will allow "coronavirus-related distributions" in 2020, a new distribution code would be needed, so that those distributions are not subject to the 10% early distribution penalty tax or the mandatory 20% withholding that would otherwise apply. If employers have more than one DC plan in their controlled group, procedures are needed so that the amount of such distributions made to any individual does not exceed a total of $100,000. These procedures would be similar to those for plans that made qualified disaster distributions over the past few years for certain hurricanes, floods or wildfires. If the DC plan will allow coronavirus-related distributions to be repaid to the plan, procedures are needed to treat those as rollover contributions and to limit the amount of such repayments to the amount of coronavirus-related distributions that the employee took from all DC plans in the controlled group.
- If a DC plan sponsor wants to increase the maximum plan loan amounts available under the plans during 2020, existing plan loan procedures would need to be updated to allow for that increase. Plan sponsors who limit how many outstanding loans a participant can have at any time may want to increase that limit to allow participants to use the increased loan limits. Permissible one-year delays in loan repayments should be documented (such as updating amortization schedules), so that loans will not go into default. DC plans that do not currently allow participant plan loans could be amended to add them.
- DC plan sponsors will need to update their plan operation immediately for the waived 2020 RMD distributions. Plans would use similar procedures as were used when 2009 RMD payments were waived after the 2008 economic crisis.
- The plan's definitions of covered compensation should be reviewed to ensure it is aligned with the sponsor's intent, especially with regard to determining if employee assistance and paid leave will be subject to employees' deferral elections and employer contributions.

Employers may also want to remind participants that they can change elective deferral amounts at any time in accordance with the plan document and to inform them how to take advantage of any changes in plan operations or procedures due to the CARES Act.

HEALTH PLANS

Tax-Free Over-the-Counter Products. The CARES Act allows employees to use funds in health care flexible savings accounts (FSAs) to purchase over-the-counter (OTC) medical products, including those needed in quarantine and social distancing, without a prescription. This change also applies to Health Savings Accounts (HSAs). Employers must generally have a "high deductible health plan" (HDHP) to have an HSA for their employees. Several years ago, the Affordable Care Act (ACA) eliminated the ability to use health care FSAs for OTC products, so the CARES Act rolls back that prohibition. The CARES Act also provides that menstrual products qualify as OTC products that can be purchased with health care FSA or HSA funds.

BDO INSIGHT:

Employers may want to consult with their vendors to ensure that debit cards or other service delivery mechanisms are updated to accommodate this change in the law, so that employees may begin using health care FSAs or HSAs immediately to purchase COVID-19 related OTC items, such as pain relievers, hand sanitizers, cleaning products, etc.

BDO INSIGHT:

Employers may want to remind employees of change in family circumstance requirements that might allow them to change their health care elections including pretax contributions to medical FSAs. Likewise, plan administrators should prepare for an increased number of requests for change.

HEALTH CARE SERVICES

The CARES Act requires employer-sponsored group health plans (and health insurers) to address several health care services related to COVID-19, including the following.

COVID-19 Testing. Group health plans and insurers are required to cover approved diagnostic testing for COVID-19, including in vitro diagnostic testing, without any cost-sharing to participants, at their in-network negotiated rate (or if no negotiated in-network rate, an amount that equals the cash price for such tests as publicly listed by the provider).

COVID-19 Prevention. Group health plans and insurers are required to cover any qualifying preventative services related to COVID-19 without cost-sharing to participants. Plans are required to cover these services within 15 days after the date that a recommendation is made regarding the preventative service. Preventative services includes (1) any item, service, or immunization that is intended to prevent or mitigate COVID-19 and is evidence-based with an "A" or "B" rating in the U.S. Preventive Services Task Force's recommendations or (2) an immunization with a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.

Expanded Telehealth. Effective March 27, 2020, for plan years beginning on or before December 31, 2021, employers with a HDHP and an accompanying HSA can provide coverage for telehealth services before participants reach their deductible without disqualifying them from being eligible to contribute to their HSA. For calendar year plans, this provision would generally apply for 2020 and 2021. This is consistent with the IRS's previous announcement that an HDHP will not fail to be an HDHP solely because it provides coverage for COVID-19 related diagnostic testing and services prior to participants satisfying their deductible.

TAX-FREE STUDENT LOAN REPAYMENTS

From March 27 until December 31, 2020, employers can contribute up to $5,250 towards an employee's student loans and such amount will be excluded from the employee's taxable income. The employer could either pay the amount to the lender or to the employee. The amount could be applied to principal or interest for "qualified education loans" defined in IRC Section 221(d)(1). The $5,250 limit applies in the aggregate to both the new student loan repayment benefit and other employer-provided, tax-free educational assistance (e.g., tuition, fees, books).

BDO INSIGHT:

This appears to be the first time an employer's payment of an employee's student loan debt can be made tax-free to employees.

Remote Working and Cybersecurity Considerations for Plan Sponsors

With the surge in remote working amid the coronavirus pandemic, employers are rightly focused on strengthening cybersecurity protocols to protect the sensitive information that employees access as part of their daily jobs. Plan sponsors also need to think about protecting retirement plan information.

In this volatile market environment, employees may be checking their 401(k) or other retirement plan balances more frequently—and doing so from less secure home internet connections. The remote working environment may leave employers vulnerable to cyberattacks if they don't have proper protocols in place and educate employees on how they can do their part to limit cyber threats.

Phishing attacks—emails sent by hackers to obtain sensitive information—increased 600 percent in the first quarter, according to Forrester Research. Hackers may be highly motivated to access 401(k) portals because they provide access to cash as well as sensitive information that may be used to exploit plan participants and organizations even further.

Employees' online behavior is cited as the cause of many cyber vulnerabilities, so employers should be thinking about strategies to prevent digital attacks. These include taking action within their information technology (IT) departments to protect information sent to remote devices and developing educational tools to improve cybersecurity awareness for employees.

STRENGTHENING IT SECURITY

The average cost of a cyber data breach is $8.2 million, according to a 2019 IBM report. But most organizations typically spend well below what may be necessary to build the proper information security systems. Companies with remote workers should run advanced diagnostic tests to determine their current level of vulnerability and determine the appropriate budget to help minimize the risk of a cyberattack.

At a minimum, companies should implement the following best practices to enhance their cybersecurity:

1. Ensure that all communications are encrypted properly. While most employers are using virtual private networks (VPNs) while working from home, it is advisable to go a step further by using Layer 2 Tunneling Protocol (L2TP), a higher level of encryption that can protect the activity of remote workers.
2. Establish multi-factor authentication processes for gaining access to company systems and information. These processes make it significantly more difficult for a hacker to access company systems simply by stealing an employees' password.
3. Use cyber intrusion detection systems on company networks to identify any intrusions or unauthorized exfiltration of data.

Other ways to thwart hackers include time limits for employee device usage (leaving a device on and idle for extended periods increases opportunities for hackers to gain access) and using employee clearance levels (essentially internal firewalls) to limit broad access to company information.

Check in with service providers, such as recordkeepers and plan administrators, to ensure their protections are in line with best practices. Remember, as a fiduciary, plan sponsors are required to act in the best interests of their participants, and examining service providers' cybersecurity protocols is part of that responsibility.

EDUCATE EMPLOYEES ABOUT INFORMATION SECURITY

When employees log into their 401(k) plans or access company information from home, they may unknowingly expose sensitive information, such as addresses, bank accounts, Social Security numbers, and private company data. Most employees know they should use secure WiFi networks instead of public networks; they may not realize, however, that their favorite password can be an easy puzzle for hackers to solve. Passwords that are at least 20 characters long and include a combination of letters, numbers, and symbols are exponentially more difficult for hackers to guess than shorter, simpler passwords.

Hackers increasingly are using spear phishing, a sophisticated approach that targets a specific person using personal information to gain access to more valuable data. Employers need to educate employees about these schemes. Many companies are combatting this threat by sending fake cyberattack emails to employees and then rewarding employees who report these emails—or providing further training for employees who fall for these pseudo attacks.

BDO INSIGHT: INFORMATION SECURITY IS WORTH THE INVESTMENT

The coronavirus pandemic has increased our dependence on digital transmissions and created more points of attack for cyber criminals. Plan sponsors need to rise to the challenge and realize that their employees play an important role in protecting the company's data as well as their personal information.

Your BDO representative is available to review potential gaps in your organization's cybersecurity approach, offer diagnostic tools, as well as discuss the latest hacking schemes to help you better understand the most critical threats to your organization's data.

IRS Increases Flexibility for Code Section 125 Cafeteria Plans Due to COVID-19

To assist with the U.S. response to the 2019 novel coronavirus (COVID-19), the IRS has released two notices providing greater flexibility for employers who maintain Internal Revenue Code Section 125 cafeteria plans for their eligible employees. **Notice 2020-29** relaxes the rules regarding mid-year election changes during calendar year 2020 for employer-sponsored health plan coverage, health Flexible Spending Arrangements (FSAs), and dependent care assistance programs (DCAPs). It also allows a special grace period to apply unused amounts in health FSAs and DCAPs to expenses incurred through December 31, 2020.

In addition, **Notice 2020-33** permanently increases the carryover limit of unused amounts remaining as of the end of a plan year in a health FSA that may be carried over to pay or reimburse a participant for medical care expenses incurred during the following plan year, from $500 to $550 (20% of the deferral amount). That notice also clarifies that a health plan can reimburse individual health insurance policy premium expenses incurred before the beginning of the plan year for coverage provided during the plan year (which will help implement individual coverage health reimbursement arrangements (HRAs)).

BDO INSIGHT:

Section 132(f) qualified transportation fringe benefits for employee pre-tax parking or commuting expenses are not addressed by the notices because these benefits cannot be offered under a Section 125 cafeteria plan. However, employers may wish to remind employees who are telecommuting due to COVID-19 to revisit their Section 132(f) elections, which can generally be changed before the beginning of a pay period in accordance with their employer's policies and procedures.

The relief provided in both notices may be applied retroactively to January 1, 2020, but only to the extent that the employer exercises its discretion to do so and amends its written plan document(s) by December 31, 2021.

BACKGROUND

Due to the COVID-19 pandemic, the amount of pre-tax salary deferrals elected by many employees into their Section 125 cafeteria plans have not matched their needs. Perhaps the most obvious are amounts set aside for dependent care for parents to work or attend school. With most U.S. schools and day care centers closed since mid-March and likely to remain closed for months, many employees are not paying qualifying child care expenses and therefore will not incur the expenses that were projected when they made their elections. Similarly, employees who had to postpone scheduled medical procedures might have contributed more to their health FSAs than they can spend. Any employee whose expenses are going to be less than their salary reduction election may wish to reduce future reductions. Others who are furloughed or working reduced hours might need to make a less expensive election for their health plan coverage. On the other hand, employees who contract the COVID-19 virus will have extraordinary expenses and might need increased benefits.

Yet, strict rules under Section 125 require participants to make cafeteria plan salary deferral elections before the start of the plan year and prohibit mid-year changes, except in very narrow circumstances.

Health FSAs and DCAPs also impose a "use it or lose it" rule, where employees generally forfeit unused amounts after the plan year ends. Some health FSAs give employees a grace period (which cannot be later than 2 ½ months after the end of the plan year) during which they may use amounts deferred in the prior year or allow a carryover of up to $500 (but plans generally cannot allow both the grace period and the carryover).

BDO INSIGHT:

The IRS created the carryover and grace period concepts to soften the impact of a general prohibition against a Section 125 plan deferring compensation across tax years (i.e., the "use it or lose it" rule).

NOTICE 2020-29

Special 2020 Mid-Year Changes.

To provide greater flexibility in response to the public health emergency posed by COVID-19, Notice 2020-29 provides that employers may (but are not required to) permit employees who are eligible to make salary reduction contributions under the plan to take any of the following actions as a mid-year election made during calendar year 2020.

EMPLOYER-SPONSORED HEALTH COVERAGE

- Make a new election on a prospective basis, if the employee initially declined to elect employer-sponsored health coverage.
- Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer on a prospective basis.
- Revoke an existing election on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or will immediately enroll, in other health coverage not sponsored by the employer.

HEALTH FSAS

- Revoke an election.
- Make a new election.
- Decrease or increase an existing election on a prospective basis.

DEPENDENT CARE

- Revoke an election.
- Make a new election.
- Decrease or increase an existing election on a prospective basis.

BDO INSIGHT:

- The amendment to make mid-year election changes will be effective only to changes made during 2020 as a temporary tool that allows employees to respond to changes in their personal needs. However, there is no requirement in Notice 2020-29 that an individual must be adversely affected by COVID-19 to be eligible to make an election change.
- Under Section 125(i), the maximum amount an employee could contribute to a health FSA was $2,700 for 2019 and $2,750 for 2020.
- Section 3702 of the CARES Act (which became law on March 27, 2020) expanded health FSAs to include over-the-counter (non-prescription) medications as well as menstrual supplies.

Extended Claims Period.

For unused amounts remaining in a health FSA or DCAP as of the end of the plan's allowable grace period (i.e., up to 2 ½ months after the end of the plan year) or plan year ending in 2020 (including plans that allow for a carryover of unused amounts), the plan may permit employees to apply those unused amounts to pay or reimburse medical or dependent care expenses, respectively, incurred through December 31, 2020.

BDO INSIGHT:

- As an example, for a plan year that ended on December 31, 2019, but had a grace period that ended on March 15, 2020, instead of forfeiting unused amounts on March 16, 2020, the plan may permit participants to apply those amounts to expenses incurred through December 31, 2020. Accordingly, employers may need to coordinate with their flex plan and payroll providers to reverse any forfeitures that have already been made.
- The extended claims period may help employees who had to postpone elective medical, dental or vision procedures.

Retroactive Relief for High Deductible Health Plans (HDHPs).

Notice 2020-29 allows the previously announced temporary relief for HDHPs to be applied retroactively to January 1, 2020 (i.e., with respect to HDHPs covering expenses related to COVID-19 and giving HDHPs a temporary exemption for telehealth services).

NOTICE 2020-33

Increased Health FSA Carryover Amount.

In Notice 2020-33, the IRS increased the maximum unused amount from a health FSA plan year starting in 2020 that is allowed to be carried over to the immediately following plan year beginning in 2021, so that it is 20% of the maximum deferral amount. For 2020, this means an increase from $500 to $550.

BDO INSIGHT:

- The maximum carryover ($500 for 2019 and $550 for 2020) does not count against the annual health FSA salary deferral limit ($2,700 for 2019; $2,750 for 2020).
- An employer may specify in its plan document a lower amount for the health FSA carryover or may decide to not permit any carryover at all.
- Carryover amounts can be used to pay or reimburse a participant for medical care expenses incurred during the following plan year. For example, amounts deferred under a health FSA in 2020 can be carried over to pay expenses

Health FSAs that use the IRS's maximum carryover amount generally would need to be amended by the end of the 2021 plan year to reflect the increased carryover amount for plan years that begin in 2021. However, Notice 2020-33 also allows plans to be amended for the 2020 plan year. Such amendments may be retroactively effective to January 1, 2020, provided that the employer informs all individuals eligible to participate in the plan of the changes.

Individual coverage Health Reimbursement Arrangements (HRAs).

Notice 2020-33 also clarifies that a health plan can reimburse individual insurance policy premiums incurred before the beginning of the plan year for coverage provided during the plan year (which will help implement individual coverage HRAs).

ACTION ITEMS FOR EMPLOYERS

1. Determine which provisions of Notices 2020-29 and 2020-33 will be allowed.
2. Contact your Section 125 cafeteria plan administrator to coordinate:
    - The process to handle the increased volume of mid-year employee election changes.
    - The impact of the retroactive adoption date on previously forfeited amounts and employee contributions that need to be refunded as employees retroactively decrease a pre-tax deduction amount.
    - The process to draft and distribute employee notices of the plan changes and their ability to make mid-year election changes.
3. Notify employees of the specific elections they can change and how to do so, as well as whether they will have additional time to use plan balances at year end.
4. Set up a reminder to make sure the written plan amendment is executed by December 31, 2021.

Fair Value Disclosures Made Easier: ASC 820

The Financial Accounting Standards Board (FASB) has simplified certain disclosure requirements related to measuring the fair value of a plan's assets and liabilities starting in December 2019. As our world's upheaval starts to settle, you may consider taking the time to streamline some of the work required to keep your qualified retirement plan compliant with this accounting standard.

In August 2018, FASB issued final guidance Accounting Standards Update (ASU) 2018-13, Fair Value Measurement (Topic 820): Disclosure Framework—Changes to the Disclosure Requirements for Fair Value Measurement. This update was part of FASB's larger disclosure effort to simplify the process of valuing assets and liabilities. The guidance became effective for all organizations for fiscal years beginning after December 15, 2019. Organizations also were allowed to adopt these standards earlier than this date.

UNDERSTANDING FASB'S THREE LEVELS OF LIQUIDITY

Accounting Standards Codification 820 (ASC 820) specifies three levels of liquidity for assets and liabilities, and each level has different fair value disclosure requirements. As a reminder, liquidity refers to the degree to which a financial instrument can quickly and easily be bought or sold at a price that reflects its intrinsic value.

Level 1 assets and liabilities are highly liquid, such as money-market funds or stocks publicly traded on the New York Stock Exchange, Nasdaq or other exchange. Level 2 assets and liabilities are not as easily valued, but can be measured using other data or market prices, such as interest rate swaps. Level 3 assets and liabilities are highly illiquid, such as foreign stock and certain derivatives.

Prior to ASC 820, many reporting organizations felt required fair value disclosures were cumbersome, expensive to organize and not very useful. ASC 820 sought to ease reporting requirements for organizations by removing, adjusting and adding reporting requirements for fair value measurements across all three levels of assets and liabilities.

Disclosure requirements that were removed:

- Amount of and reasons for transfers between Level 1 and Level 2 of the fair value hierarchy.
- Policy for timing of transfers between levels.
- Valuation processes for Level 3 fair value measurements.
- For non-public entities, the changes in unrealized gains and losses for the period included in earnings for recurring Level 3 fair value measurements held at the end of the reporting period.

Disclosure requirements that were adjusted:

- In lieu of a roll forward for Level 3 fair value measurements, a non-public entity is required to disclose transfers into and out of Level 3 of the fair value hierarchy, as well as purchases and issues of Level 3 assets and liabilities.
- For investments in certain entities that calculate net asset value, an entity is required to disclose the timing and liquidation of an investee's assets as well as the date when restrictions from redemption might lapse only if the investee has communicated the timing to the entity or announced the timing publicly.
- Amendments clarify that the "measurement uncertainty disclosure" is to communicate information about the uncertainty in measurement as of the reporting date.

Disclosure requirements that were added:

- Entities must disclose changes in unrealized gains and losses for the period included in other comprehensive income for recurring Level 3 fair value measurements held at the end of the reporting period.
- Entities must disclose the range and weighted average of significant unobservable inputs used to develop Level 3 fair value measurements. For certain unobservable inputs, an entity may disclose other quantitative information (such as median or arithmetic average) in lieu of the weighted average if the entity determines that other quantitative information would be a more reasonable and rational method to reflect the distribution of unobservable inputs used to develop Level 3 fair value measurements.

BDO INSIGHT: NEW GUIDANCE SHOULD EASE REPORTING REQUIREMENTS

ASC 820 sets a standard for valuations that improves fair value reporting and disclosure requirements. In the past, preparing these valuations required a significant amount of time and resources; the new standard helps to limit unnecessary work and is designed to make the process of complying with disclosure requirements more efficient.

What Plan Sponsors Need to Know About Layoffs and Partial Plan Terminations

The U.S. unemployment rate reached 14.7% in April, its highest level since the Great Depression, as companies looked to cut costs amid the coronavirus pandemic. While downsizing the workforce can help companies remain afloat, plan sponsors need to understand how these decisions could affect their retirement plans.

If layoffs are significant, a partial plan termination may occur and create major financial implications for a plan sponsor.

DETERMINING WHETHER A PARTIAL PLAN TERMINATION HAS BEEN TRIGGERED

While generally speaking a partial plan termination occurs when 20 percent or more of employees participating in a defined benefit or defined contribution plan are involuntarily terminated from employment, there is no perfect formula. Plan sponsors are required to review the "facts and circumstances" surrounding the reductions in workforce. Different rules may apply if the terminated employees work across business lines in an entity or the terminations span more than one plan year.

Simple math is only a starting point:

The first step in determining the size of the layoff for purposes of a partial plan termination is to take the total number of vested and unvested employees that were involuntarily terminated and divide by the total number of plan participants during the applicable period (usually the plan year). While this calculation is a starting point, the final ruling will be based on the facts and circumstances surrounding the terminations.

Only involuntary terminations apply:

Only employees who are terminated for involuntary reasons count toward the partial plan termination trigger. The IRS says that routine turnovers and certain spin-offs may not count toward a partial plan termination. Employers may provide evidence to the IRS that the turnover rate was not the result of an employer-initiated severance.

Partial plan terminations can be triggered by various reasons:

Partial plan terminations can happen for reasons that are less obvious, such as when plan amendments exclude employees or adversely affect vesting rights, or when reduced or eliminated future benefit accruals result in a reversion to the employer.

KEY TAKEAWAY:

Plan sponsors that are unsure whether their facts and circumstances trigger a partial plan termination can request a determination letter from the Internal Revenue Service (IRS).

Consequences of a Partial Plan Termination

Failure to comply with rules and requirements following a partial plan termination can have dire financial consequences for the plan sponsor, including disqualifying the entire plan, which could result in major tax liabilities and penalties.

When a partial plan termination does occur, affected employees (i.e., those who have been terminated that year) automatically become 100 percent vested in all employer contributions, including matching contributions. In general, a plan will remain qualified only if it makes all employees affected by a partial plan termination whole.

If an error in making affected employees whole has occurred, it is possible to fix the error using the IRS Employee Plans Compliance Resolution System (EPCRS).

CONSIDERATIONS FOR DEFINED BENEFIT AND MULTIEMPLOYER PLANS

The Pension Benefit Guaranty Corp. (PBGC) wants to be informed of reportable events that could trigger a partial plan termination. These include when the number of active participants in a plan goes below 80 percent or when operations at a facility stop, reducing the number of eligible employees by 15 percent. The PBGC needs to be informed of these events so it can prepare for the possibility of having to take over such plans.

Multiemployer plans need to be aware that partial terminations can happen when there is a partial suspension of an employer's contributions or a 70 percent contribution decline over a three-year period. A variety of calculations are required depending upon the multiemployer plan's industry and other circumstances, but the 70-percent threshold is a good barometer to track.

Your BDO representative can review your company's unique situation to help determine whether you may be at risk for a partial plan termination.

BDO INSIGHT: PLAN AHEAD FOR YEAR-END CALCULATIONS AND VESTING PAYMENTS

Companies often implement layoffs as a way to reduce expenses, but layoffs can lead to some unforeseen expenses of their own. It is important to realize that partial plan terminations can create major cash outflows in the form of vesting payments to affected employees.

While calculations related to partial plan terminations generally aren't required until the end of the plan year, plan sponsors may decide to take the time up front to determine whether their workforce reductions will trigger this event. By preparing for any potential funding requirements, companies may avoid surprise expenses. Employers should carefully review their turnover rates and plan ahead for the possibility of having to fully vest terminated employees.

Incentivizing the Next Generation of Leadership with an ESOP

Using an Employee Stock Ownership Plan (ESOP), businesses can incentivize the next generation of leaders and align the interests of these leaders with the interests of the company and exiting shareholders.

In addition to its well-known structural benefits, an ESOP can be an extremely attractive incentive plan for business owners who have a pool of strong managers willing to lead the company moving forward. Often, a sale to an ESOP can be more rewarding to the next generation of leadership than a sale to an outside party. Through an ESOP, the next generation of leaders can drive growth of the business while reaping the economic benefits of that growth through a management incentive plan ("MIP"), warrants, and ESOP share allocations.

STRUCTURING AN ESOP WITH A MANAGEMENT INCENTIVE PLAN

Many ESOPs are structured to include a separate MIP that is tied to share price to motivate and reward key employees. These MIPs are non-qualified plans that are over-and-above the annual ESOP share allocations provided to employees, offering key members of the leadership team further incentives to increase employee owner value via phantom stock or stock appreciation rights. The MIP can mirror existing bonus plans in terms of payout and possible performance metrics (though it does not need to replace bonus plans), but its value is tied directly to the value of the company, therefore aligning the interests of the leadership team with those of the company and employees. MIP units may include retention or performance vesting. Retention shares vest over the period of time that an employee remains employed by the company; the vesting of performance shares is typically tied to performance metrics, such as EBITDA, revenue or perhaps sales by department over a period of time. MIP pools can be intentionally designed to include a mixture of both retention and performance shares. While the structure and possible allocation of the MIP is negotiated with the trustee as part of the sale transaction, the compensation committee or other governing body has discretion and flexibility in the granting of MIP units, and those employees receiving MIP grants can change each year. Trustees are typically in favor of MIPs because it incentivizes the future leadership to continue to pursue growth strategies for the company, thereby aligning the interest of both parties.

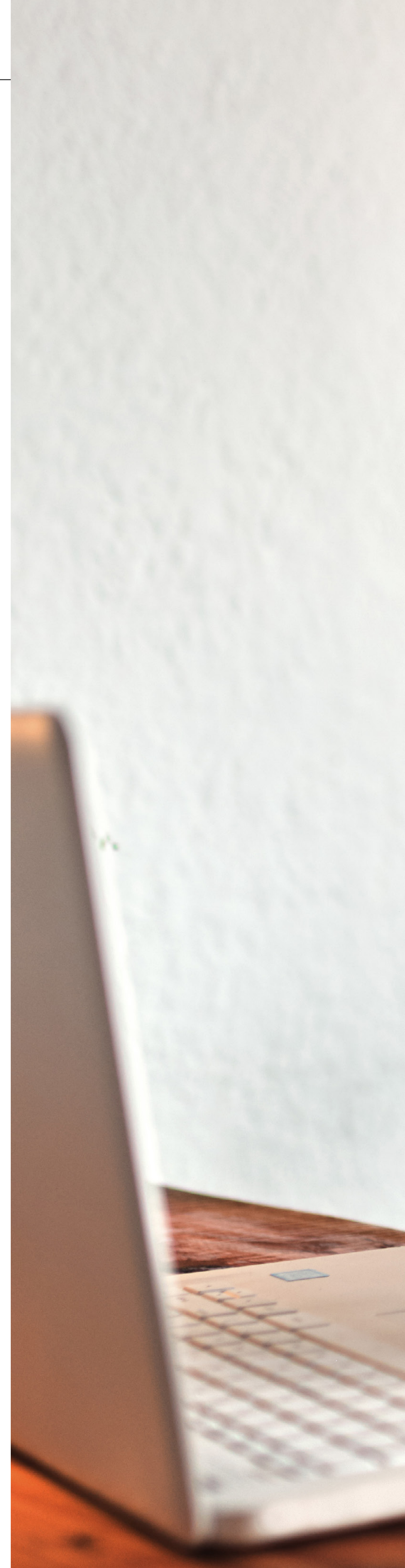
DETACHABLE WARRANTS IN ESOP DESIGN

Another incentive for future leadership can be achieved through the use of warrants. Warrants are often included as part of the overall return of proceeds to selling shareholders participating in the resulting capital structure of the company through a subordinated seller note and, like the MIP, the value is tied to company share price. Former owners can elect to take detachable warrants as part of their overall junior subordinated note package in exchange for a lower cash pay interest rate. Warrants are often referred to as a "second bite of the apple," and any increase in their value is taxed at capital gains rates upon exercise (whereas interest income from a seller note is taxed at ordinary income rates). Younger sellers to an ESOP are often more attracted to the structure of a warrant than to high interest rates as they move into more significant leadership roles, because the value of the warrant increases as the value of the company increases (with no upper limit), whereas interest payments are fixed. Furthermore, warrants can be transferred tax-efficiently from exiting owners to younger leadership to further incentivize growth of the company. ESOP trustees often agree to some level of warrants as part of the overall negotiation of sale structure, as it lowers the interest payment burden on the company in early years.

ESOP SHARE ALLOCATIONS

Perhaps the most obvious benefit of an ESOP to the future leaders of the business is annual ESOP share allocations. While plan design is determined with input from the company and trustee and is relatively flexible (within the Employee Retirement Income Security Act and Department of Labor guidelines), most plans' share allocation formulas are tied to compensation. In other words, employees receive a percentage of the annually allocated shares equal to the percentage of their compensation compared to total eligible compensation recorded by the company. Future leaders are usually among the highest-paid individuals in the company, so they should receive a higher percentage of the annual shares. Another option in the design of the ESOP plan would involve the inclusion of employee tenure in the share allocation formula, so that employees who have been with the company longer receive a higher percentage of the annual ESOP shares. Both options can be advantageous for management team members who will be leading the business going forward, as the value of their shares will grow when the value of the company grows.

The flexibility of an ESOP sale structure provides for the delivery of additional incentives to those who will lead the company post-transaction. Beyond the ownership stake provided to these key individuals by the ESOP, the creative use of incentive plans and warrants can further serve to align the interests of the exiting ownership group, the trustee, the employees, and the key leadership tasked with managing the business to a successful future.



CONTACT:

BETH LEE GARNER
Assurance Partner,
National Practice Leader Employee Benefit Plan Audits
404-979-7143 / bgarner@bdo.com

MICHAEL BELONIO
Assurance Director,
Northeast Region Practice Leader
212-404-5516 / mbelonio@bdo.com

MARY ESPINOSA
Assurance Director,
West Region Practice Leader
714-668-7365 / mespinosa@bdo.com

JODY HILLENBRAND
Assurance Director,
Southwest Region Practice Leader
210-424-7524 / jhillenbrand@bdo.com

LUANNE MACNICOL
Assurance Partner,
Central Region Practice Leader
616-802-3364 / lmacnicol@bdo.com

JOANNE SZUPKA
Assurance Director,
Atlantic Region Practice Leader
215-636-5591 / jszupka@bdo.com

JAM YAP
Assurance Director,
Southeast Region Practice Leader
404-979-7205 / jtyap@bdo.co

WENDY SCHMITZ
Assurance Director
704-887-4254 / wschmitz@bdo.com

DARLENE BAYARDO
National Assurance Director
714-913-2619 / dbayardo@bdo.com

CHELSEA SMITH BRANTLEY
National Assurance Senior Manager
404-979-7162 / csmith@bdo.com

DONNA CHAMBERLAIN
Tax Office Managing Partner,
STS Expatriat Services
704-887-4218 / dchamberlain@bdo.com

GREGG GARRETT
Head of US and International Cybersecurity
703-770-1019 / ggarrett@bdo.com

ANDY GIBSON
Tax Regional Managing Partner
404-979-7106 / agibson@bdo.com

BLAKE HEAD
STS GES Managing Director
Compensation and Benefits
404-979-7122 / bhead@bdo.com

ALEX LIFSON
STS Practice Leader,
Compensation and Benefits
617-239-7009 / alifson@bdo.com

NORMA SHARARA
STS GES Managing Director,
Compensation and Benefits
703-770-6371 / nsharara@bdo.com

JOAN VINES
STS GES Managing Director,
Compensation and Benefits
703-770-4444 / jvines@bdo.com

BDO is the brand name for BDO USA, LLP, a U.S. professional services firm providing assurance, tax, and advisory services to a wide range of publicly traded and privately held companies. For more than 100 years, BDO has provided quality service through the active involvement of experienced and committed professionals. The firm serves clients through more than 65 offices and over 700 independent alliance firm locations nationwide. As an independent Member Firm of BDO International Limited, BDO serves multi-national clients through a global network of more than 88,000 people working out of more than 1,600 offices across 167 countries and territories.

BDO USA, LLP, a Delaware limited liability partnership, is the U.S. member of BDO International Limited, a UK company limited by guarantee, and forms part of the international BDO network of independent member firms. BDO is the brand name for the BDO network and for each of the BDO Member Firms. For more information please visit: www.bdo.com.

Material discussed is meant to povide general information and should not be acted on without professional advice tailored to your needs.

© 2020 BDO USA, LLP. All rights reserved.