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How Employers Can Assist Employees (Current and Former) Right Now

Countless employers have been forced to reduce employees' hours or terminate employees due to the 2019 novel coronavirus ("COVID-19"). Federal and state governments are working to pass stimulus legislation to assist the people and businesses most affected by the economic fallout created by this national emergency. In the meantime, beyond offering paid sick leave or implementing severance pay programs, employers can take other actions under existing employee benefit programs to cushion the fall for their current and former employees. Below is a summary of some of these actions:

AMEND GROUP HEALTH PLANS

- **Subsidize COBRA.** An employer must offer COBRA (or the state law equivalent if a small employer) to an employee who loses group health plan coverage due to a reduction in hours or a termination of employment. Qualified beneficiaries typically are required to pay the full COBRA premium of up to 102% of the cost.¹ However, an employer could subsidize the cost of the COBRA premium for its former employee in order to ensure the continued coverage is affordable. When offering subsidized COBRA coverage, be certain to state in the notice that the subsidy period runs concurrently with and does not lengthen the regularly applicable COBRA coverage period. ***Brownstein Comment:*** We'd be happy to talk with you about how to structure any COBRA subsidies since they could be provided in different ways (reimbursement, employer-direct pay, or direct payment to the qualified beneficiary) with varying advantages, disadvantages and employer risk.
- **Allow Coverage for Part-Time Employees.** Many group health plans impose a "full-time" employment requirement in order for an employee to be eligible for coverage. "Full-time" is typically defined as working 30 hours or more per week consistent with the Affordable Care Act's definition of a full-time employee. An employer could amend its group health plan to provide coverage to employees who are scheduled to work less than the full-time threshold. Doing so would negate the need to offer COBRA and could be limited to a set period of time. In addition, to protect variable-hour employees' coverage, applicable large employers should consider revising applicable lookback measurement periods during the COVID-19 crisis. ***Brownstein Comment:*** While we are aware that some insurers are issuing FAQs indicating that coverage of employees not meeting the agreed-upon eligibility requirements will be permitted for a specified, limited period of time, we recommend that, if you have a fully insured plan, you review your policy requirements and confirm coverage of part-timers with the insurer so as to avoid creating any situation where health services would be denied by the insurer.

AMEND DEPENDENT CARE SPENDING ACCOUNTS ("DCAP")

- **Add a Spend-down Provision.** A spend-down provision allows terminated employees to use the money remaining in the employee's DCAP for qualified benefits incurred through the end of the plan year in which the employee is terminated.² Expenses incurred after a termination of employment are only eligible for DCAP reimbursement if they enable the employee or spouse to be employed (by a new employer), looking for work, or attending school full-time.³ While there will be practical limitations to incurring eligible expenses during the COVID-19 crisis, a spend-down provision removes one roadblock to the use of DCAP funds.
- **Add a Grace Period.** If not already in the plan, add a provision that permits employees to carry over unused DCAP contributions from one year to the next so they don't lose amounts already saved to the DCAP in 2020 that they may be unable to use in 2020 for reasons like being required to work from home and/or the shutdown of day care facilities. The plan may allow participants to access unused amounts remaining in their accounts at the end of a plan year to pay or reimburse expenses for qualified benefits (such as DCAP expenses) incurred during a grace period of up to two months and 15 days following the close of the plan year.⁴
- **Allow Mid-Year Changes.** Ensure that the plan contains provisions and has administrative practice that allows an employee to elect to cease salary deferrals into the DCAP if they take FMLA due to their own or a family member becomes ill with COVID-19.⁵ **Brownstein Comment:** Given the national emergency in which we find ourselves, the IRS would not likely object to liberal interpretations of mid-year election change provisions in order to allow employees to cease their salary deferrals to DCAPs to avoid negative financial consequences if such deferrals were not otherwise allowed.⁶

AMEND RETIREMENT PLANS

- **Allow Multiple Loans and/or Suspend Repayments.** An employer that sponsors a profit-sharing plan ("PSP"), 401(k) plan or 403(b) plan could amend the plan to permit plan loans to participants. If a plan already allows loans but limits each participant to only one loan at a time, the plan could be amended to allow more than one plan loan outstanding at a time. In addition, the plan could be amended to provide for suspension of the loan repayment requirements during (i) an unpaid bona fide leave of absence for up to one year or (ii) a paid leave of absence when the participant's rate of pay (after income and employment tax withholding) is less than the installment payment required under the terms of the loan.⁷ **Brownstein Comment:** Current law and regulations limit plan loans to a participant to the lesser of (i) 50% of the participant's vested account balance and (ii) \$50,000.⁸ We are aware that some legislation being presented to Congress includes changes to those limitations, so future access to more funds through plan loans may be possible.
- **Fully Vest Participants.** An employer could amend its qualified retirement plan to fully vest participants' accounts to the extent funded and not already fully vested. By doing so, the employer would make more money available to participants terminated as a result of COVID-19's impact on the employer. If this measure is combined with a hardship distribution (see below), the participants would be able to access more money without a penalty.
- **Add or Expand In-Service Distribution Provisions.**
 - *In-Service Distributions.* Employers that sponsor a PSP or 401(k) may amend the plan to allow for in-service distribution of amounts that have been held in the plan for at least 24 months. A PSP also could provide for distributions after stated events, such as a furlough, layoff or hardship. A distribution of profit-sharing contributions is also permitted after a fixed number of years to a participant who has participated in the plan for at least five years.⁹ **Brownstein Comment:** Ordinarily such a distribution before age 59½ would be subject to the 10% early distribution excise tax. However, both proposed Senate and House bills contain a waiver of this excise tax on "coronavirus related distributions" taken in 2020.
 - *Hardship Distributions.* Safe harbor hardship events that permit distributions under a 401(k) plan or 403(b) plan include, among others, (i) expenses for medical care previously incurred by the participant, the participant's spouse, any of the participant's dependents, or the participant's primary beneficiary under the plan; or expenses necessary for those persons to obtain medical care deductible under Code §213; (ii) payments necessary to prevent the eviction of the participant from the participant's principal residence or foreclosure on the mortgage on that residence; and (iii) expenses and losses (including loss of income) incurred by the employee on account of a disaster declared by FEMA, provided the employee's principal residence or place of employment at the time of the disaster was located in an area designated by FEMA for individual assistance.¹⁰ An employer could amend its plan to make hardship distributions during the COVID-19 crisis that meet one or more these safe harbor events.
- **Revise Method for Counting Hours of Service.** If a qualified retirement plan normally credits hours using the counting hours

method, an employer could amend the plan to credit hours on an elapsed time basis during the COVID-19 crisis. Under the elapsed time method, service time is credited generally based on date of hire to date of termination, without regard to the actual numbers of hours worked during that period. This may prevent employees with reduced hours from losing accruals and vesting under the plan.¹¹

ESTABLISH A QUALIFIED DISASTER RELIEF PAYMENT PROGRAM

An employer may set up a “qualified disaster relief program” under Code §139. Any amount paid to reimburse or pay reasonable and necessary personal, family, living or funeral expenses incurred as a result of a qualified disaster would fall within the definition of a qualified disaster relief payment to the extent any expense compensated by the payment is not otherwise compensated for by insurance or some other reimbursement.

Qualified disaster relief payments are excluded from an employee’s gross income and from the employee’s wages and compensation for purposes of employment taxes. As a result, these payments are not subject to federal income tax withholding, FICA or FUTA. The payments do not have to be reported by an employer making the payment on the receiving employee’s Form W-2, and do not have to be reported as income by the affected employee.¹² **Brownstein Comment:** While current guidance does not require much, if any, recordkeeping, an employer should keep appropriate records in order to document its corporate tax deduction.

HOW WE CAN HELP

Please contact one of us or your regular Brownstein attorney for answers to your questions and help with addressing your concerns about how to assist employees in the midst of the economic fallout from the spread of the coronavirus. Among other things, we can help you determine if (and how) your plan needs to be amended and help you craft appropriate communications to your employees. We also have employment law experts who can help you address related employment law issues, including applicable state wage and leave laws.

[Click here](#) to read more **Brownstein alerts on the legal issues the coronavirus pandemic raises for businesses.**

1 Code § 4980B(f)(2)(C). The COBRA premium can be up to 115% for disabled individual coverage.

2 Prop. Treas. Reg. § 1.125-6(a)(4)(v).

3 Code § 129(e).

4 Prop. Treas. Reg. §§ 1.125-1(e) and 1.125-5(c)(1).

5 Treas. Reg. § 1.125-3, Q&A-7.

6 We are aware of prior informal non-binding remarks from officials in the IRS Office of Chief Counsel indicating that the DCAP election rules should be liberally interpreted.

7 Treas. Reg. § 1.72(p)-1, Q/A-9.

8 See Code § 72(p)(2).

9 Treas. Reg. § 1.401-1(b)(1)(ii); see also Rev. Rul. 68-24, 1968-1 C.B. 150. See also Rev. Rul. 54-231, 1954-1

C.B. 150.

10 Treas. Reg. § 1.401(k)-1(d)(3), as amended to reflect the SECURE Act.

11 See Treas. Reg. § 1.410(a)-7(g).

12 Note that applicable state and local laws need to be consulted to determine whether these amounts are subject to any state and local taxes (and related tax Qualified Disaster Relief Payments withholding).

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