SQUIRE PATTON BOGGS

Top 10 Employee Benefits Issues in a Slowing Economy

The changes in the economy brought on by coronavirus disease 2019 (COVID-19), commonly known as the "coronavirus," present challenges to employers trying to manage their greatest resource – employees. This alert identifies some of the top employee benefits issues for employers to be aware of in this ever-changing environment.

1. HIPAA and Other Privacy Issues – Sharing COVID-19 Information

In this time of uncertainty, employers may want to be aware of and provide employees with information about COVID-19 risks in the workplace. In fact, some employers have adopted policies requiring employees to disclose COVID-19 symptoms that they are experiencing. Employers need to be certain to keep both Health Insurance Portability and Accountability Act (HIPAA) and state privacy laws in mind before requiring disclosure of or sharing employee health information. Although HIPAA generally does not apply to employers collecting health information in the capacity as an employer, employer-sponsored group health plans are subject to HIPAA, and there is often ambiguity regarding the function the employer is performing. For example, human resources personnel often perform both "employment" functions (not subject to HIPAA) and "group health plan" functions (subject to HIPAA).

There also is a range of state privacy laws that employers must navigate. For example, the California Consumer Privacy Act (CCPA), which became effective earlier this year, requires businesses to provide a formal privacy notice to consumers "at or before collection" of personal information (defined broadly). The notice must describe the information collected and how the data will be used. Other state laws regulate how "health information" can be collected and shared independently of HIPAA.

Unfortunately, there is not a one-size-fits-all approach employers can take with these matters. Instead, employers should contact their HIPAA and privacy law advisors. Our Data Privacy & Cybersecurity team is standing by to help. You can check out our blog or contact Elliot Golding.

2. Tax-qualified Retirement Plans – Partial Plan Termination

The Internal Revenue Code (IRC) requires that tax-qualified retirement plans must fully vest participants if there is a partial plan termination. This is important for employers that make matching or other employer contributions that vest over time, such as 401(k) plan matching contributions. The partial plan termination rules are triggered if a business has a large reduction in the size of its employee workforce. Specifically, the Internal Revenue Service (IRS) presumes that a partial plan termination has occurred if the tax-qualified retirement plan's turnover rate is at least 20%. The turnover rate is determined as follows:

The number of participating employees who had an employer-initiated severance from employment during the Plan Year

The sum of all of the participating employees at the start of the Plan Year and the employees who became participants during the Plan Year

3. Participant 401(k) Loans and Hardship Distributions

During times of financial hardship, 401(k) plan participants may seek access to their retirement savings. Absent a termination of employment or attainment of age 59½ for 401(k) plans that allow in-service distributions, participants can access their 401(k) plan accounts through loans or hardship distributions. Notably, however, these options are available only if the 401(k) plan specifically provides them.

Loans, if available, are generally limited to US$50,000 and must be repaid within five years, unless the plan participant is using the funds to purchase his or her primary residence.

If permitted under the 401(k) plan, hardship withdrawals are another avenue for participants to access their plan accounts. Hardship distributions are permitted if there is an immediate and heavy financial need and the distribution is limited to an amount required to satisfy the need. The Treasury Regulations set forth a list of events that the IRS will deem a "heavy and financial need," and most plans do not vary from this list.

4. Termination of Employment – Tax-qualified and Non-qualified Plan Distributions

Many tax-qualified and non-qualified retirement plans provide for distributions upon termination of employment. Employers should review their plan documents to familiarize themselves with the distributions rules, as this area is a frequent point of emphasis in IRS and Department of Labor audits.

5. Health and Welfare Premiums During Leave

A majority of employers that provide health, dental, vision, life insurance, and other health and welfare benefits allow an employee to pay the employee's share of premiums with pre-tax dollars deducted from wages. Questions frequently arise related to continuing coverage during either unpaid leaves of absence or leaves of absence where the employee's wages are not sufficient to pay for premiums along with employment and income tax withholding obligations. Depending on the type of leave, an employer may allow the employee to pay the employee's share of premiums under either (1) a pre-pay option, (2) a pay-as-you-go option or (3) a catch-up option. A careful review of the type of leave and the employer's leave policy must be conducted prior to selecting the payment option.

6. Short-term Disability Considerations

Another frequent question is whether a COVID-19 quarantine would qualify as a disability under an employer's short-term disability policy. Short-term disability policies generally define the events that qualify. In most (if not all) cases, a quarantine period would not fall within the definition of disability, but the time spent recovering from a COVID-19 diagnosis may be within the definition.

7. Loss of Medical Coverage – COBRA Notice Requirements

In response to the Affordable Care Act's Employer Mandate Tax (IRC Section 4980H), most employer group health plans base eligibility on the employee working 30 or more hours per week. Whether the 30-hour threshold is met is based on the employer's policies and procedures for counting hours. In many cases, a reduction in hours for one or two months will not cause employees to lose eligibility for medical coverage, but a careful review of the employer's policies and procedures must occur to make this determination. If an employee loses medical coverage, then requirements to offer continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) come into play.

A COBRA notice is generally required if an employee loses group health plan coverage due to either a reduction in hours or a termination of employment. Federal COBRA (applicable to employers with 20 or more employees) provides that an employee must have 60 days from the date the COBRA notice is provided to elect to continue healthcare coverage. State COBRA (if applicable in the state) applies to employers with fewer than 20 employees and tends to follow the federal COBRA notification rules. In addition to monetary penalties, failure to provide the notice also extends the date by which employees can elect COBRA coverage.

8. Life Insurance – Conversion Notice

Employers offering life insurance benefits need to be aware of the notices that they must provide to employees who are terminated. For example, many life insurance policies offer employees the right to convert a group life insurance policy into an individual life insurance policy. Many insurers place the requirement to notify terminated employees of this right on the employer. Failure to provide the notice could result in a beneficiary filing suit against the employer for the full life insurance benefit.

9. Use of Flexible Spending Account (FSA) Funds

A frequent question asked by employees is whether they can use their accumulated FSA funds after termination of employment. The answer depends on the FSA plan document. Most FSA plan documents will specify a period of time after a termination of employment during which an employee can submit reimbursement requests for eligible expenses incurred prior to termination of employment.

There also may be FSA questions related to changes in dependent care arrangements. As daycare centers shut down due to COVID-19, plan participants may seek alternative arrangements so they can work. Employees and employers should confirm that dependent care claims are for eligible expenses – generally, services obtained so that they can work, not for other purposes.

10. Equity Incentive Plans

Falling stock prices will cause some employers to reconsider their equity incentive plan offerings. A prior option grant to an employee or director may not look as favorable as it did in the past. Employers need to be mindful of the tax considerations, particularly the rules governing nonqualified deferred compensation under IRC Section 409A, when amending plans and replacing or repricing awards.

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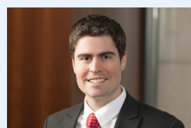

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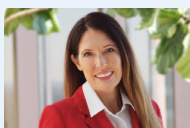

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