Tax & Benefits Challenges Ahead

Overview

- Legislative response – retirement plans
- Legislative response – health plans
- Legislative response – fringe benefits
- Legislative response – payroll
- Benefit plan impacts – retirement plans
- Benefit plan impacts – health plans
- Benefit plan impacts – fringe benefits
- HR impacts – looking forward
• CARES Act – Participants affected by coronavirus (Section 2202)
  – Participants affected during 2020
    • Participant, spouse, or dependent diagnosed with COVID-19 or SARS CoV-2
    • Participant experiences adverse financial consequences due to quarantine, furlough, or lay off or reduced hours due to such virus
    • Participant experiences adverse financial consequences due to being unable to work or provide child care due to such virus
    • Participant experiences adverse financial consequences due to factors determined by Secretary of the Treasury
  – Plan administrator can rely on employee’s certification that employee satisfies one condition
  – Plan's covered: 401(k) plans, 403(b) plans, and governmental 457(b) plans

• CARES Act – Participants affected by coronavirus (Section 2202)
  – Three forms of assistance available to participants affected
    • Distribution of up to $100,000
      – Not subject to mandatory 20% income tax withholding (participant may request withholding)
      – Not subject to mandatory 10% withholding for early withdrawals prior to age 59½
      – Not treated as eligible rollover distribution (no 402(f) rollover notice)
      – Taxed pro rata over 3-year period (unless participant elects otherwise)
      – Eligible for re-contribution to plan or IRA within 3 years of distribution
• CARES Act – Participants affected by coronavirus (Section 2202)
  – Three forms of assistance available to participants affected (continued)
    • Loan amount expansion
      – Plan loans made from March 27 through September 23, 2020
      – Plan loan dollar limit increased to $100,000 (from $50,000)
      – Plan loan account limit increased to 100% of account (from 50%)
      – Note: Employer may want to expand number of loans available under plan for participants who already have maximum number of loans
    • Loan payment suspension
      – Plan loan payments due between March 27 through December 31, 2020
      – Plan loan payments delayed for one year (5-year repayment period adjusted to accommodate)
      – Plan loan payment adjusted for interest during delay
      – Note: Plan employer should discuss process with plan record-keeper / vendor
    • Plan amendment deadline: Calendar year plans is December 31, 2022

• CARES Act – RMDs (Section 2203)
  – Required minimum distribution (RMD) suspension (Section 2203)
    • Background on RMDs
      – RMDs are amount of retirement accounts required to be included in income each year
      – If employee has terminated employment, for employee who attained age 70½ on or before December 31, 2019, in general RMD would be required in 2019
    • CARES Act RMD relief appears similar to RMD relief approved for 2009 in light of great recession
    • Absent contrary IRS guidance, record keepers / vendors will likely offer 2 alternatives:
      – Default to continue RMDs with individual able to elect to not receive such distribution
      – Default to discontinue RMDs unless individual able to elect to receive such distribution
Legislation – Retirement Plans

• CARES Act – DB plans (Sections 3608)
  – DB plans – Funding relief (Section 3608)
    • Provides that single-employer plan contributions that would be due during 2020 are now due on January 1, 2021
      – 2020 1st quarterly Was due April 15, 2020 Now due January 1, 2021
      – 2020 2nd quarterly Was due July 15, 2020 Now due January 1, 2021
      – 2019 final contribution Was due September 15, 2020 Now due January 1, 2021
      – 2020 3rd quarterly Was due October 15, 2020 Now due January 1, 2021
    • Interest accrues from original due date until paid
  – DB plans – AFTAP election (Section 3608)
    • Provides that for any plan year that includes any portion of 2020, employer may use plan’s adjusted funding target attainment percentage (AFTAP) for last plan year ending before January 1, 2020
    • Allows employers to avoid lump sum and benefit accrual restrictions

• CARES Act – DB plans (Section 3609)
  – DB plans – CSEC plan relief (Section 3609)
    • Cooperative and Small Employer Charity (CSEC) employer pension plans are subject to funding rules that are similar to those in place before 2006 and enactment of Pension Protection Act (PPA)
    • CSEC plans also have lower PBGC premiums (changed by SECURE Act at end of 2019)
    • CARES Act slightly expands definition of CSEC plans to include certain charitable employers that perform or support certain medical research
• **FFCRA – COVID-19 testing (Section 6201)**
  – Families First Coronavirus Response Act ("FFCRA") requires group health plans to cover products and services used in testing and diagnosis of COVID-19
    • On first-dollar basis, without any cost-sharing
    • No medical management requirements, such as preauthorization
    • Retiree-only plans, plans providing only excepted benefits (e.g., limited-scope dental and vision plans), and certain other plans are exempt from FFCRA’s COVID-testing mandate

• **CARES Act – COVID-19 testing (Section 3201)**
  – CARES Act expands types of tests covered
    • Products approved by U.S. Food and Drug Administration (FDA)
    • Products for which developer has requested or intends to request emergency use authorization by FDA
    • Products developed in and authorized by state that has notified U.S. Department of Health and Human Services (HHS) of its intention to review COVID-19 tests
    • Products that HHS approves through published guidance
• **CARES Act – COVID-19 test pricing (Section 3202)**
  – CARES Act also governs amount that plans must cover for COVID-19 testing
    • Healthcare providers are required to publish their “cash price” for COVID-19 tests on public website
    • Plans may reimburse in-network providers for COVID-19 tests at previously negotiated rates
    • For out-of-network providers, plans must either reimburse published “cash price” for test or negotiate lower price
  – IRS issued Notice 2020-15, permitting high-deductible health plans (HDHPs) to cover both COVID-19 testing and treatment on first-dollar basis without making participants ineligible to make health savings account (HSA) contributions

• **CARES Act – Over-the-counter (OTC) medicines (Section 3702)**
  – HSAs, health FSAs, and HRAs can now reimburse participants for costs of menstrual care products and over-the-counter medicines
  – Effective for expenses incurred after December 31, 2019

• **CARES Act – Telehealth (Section 3701)**
  – CARES Act permits, but does not require, HDHPs to waive cost-sharing or provide coverage prior to satisfaction of deductible for general telehealth services without affecting participants’ eligibility to make or receive HSA contributions
  – Effective on March 27, 2020 and applies to plan years beginning on or before December 31, 2021
Legislation – Health Plans

• **EAP guidance**
  - EAP may offer COVID-19 testing without jeopardizing its status as excepted from ACA requirements
  - EAP will not be considered to provide benefits that are significant in the nature of medical care solely because it offers benefits for diagnosis and testing for COVID-19 during the period public health emergency declaration under section 319 of Public Health Services Act (PHSA) related to COVID-19 or national emergency declaration under National Emergencies Act related to COVID-19 is in effect

Legislation – Fringe Benefits

• **CARES Act – Optional student loan assistance under section 127 (Section 2206)**
  - **Background**
    • Under Section 127 of Internal Revenue Code, employers may provide employees with up to $5,250 in tax-free education assistance benefits
    • Benefits must be paid pursuant to written plan and may be used only for expenses permitted under Code
  - CARES Act expands expenses permitted to include student loan repayments made by employer in 2020 to or for benefit of employee
    • CARES Act did not expand limit, so loan repayments count against $5,250 limit
Legislation – Payroll: FFCRA Credits

• FFRCA – Payroll tax credits (Sections 7701 and 7703)
  – For sick leave and family leave wages required to be paid under FFCRA on and after April 1, 2020, refundable employment tax credits equal to entire amount of such wages
  – Tax credits apply against 6.2% Social Security tax portion of employer’s share of FICA tax
  – If credit exceeds tax liability, excess is refundable
  – In other words, federal government reimburses employers for 100% of sick leave and family leave wages required to be paid under FFCRA

Legislation – Payroll: CARES Act Retention Credits

• CARES Act – Retention credits (Section 2301)
  – CARES Act provides for refundable employment tax credits of up to $5,000 per employee equal to 50% of following wages paid (“Qualified Retention Wages”)
  – **If employer has more than 100 full-time employees**
    • Available for wages paid to employees who were not able to provide services due to COVID-19 emergency as result of government closure or partial closure orders or as result of decline in any quarter in 2020 in employer’s gross receipts of more than 50% compared to same quarter in 2019
  – **If employer has 100 or fewer full-time employees**
    • Also available for wages paid to any employees in these circumstances, even if they are able to work
  – Aggregation rules apply to related parties to determine total number of employees
Legislation – Payroll: CARES Act Retention Credits

- **CARES Act – Retention credits (Section 2301) (continued)**
  - Certain exceptions apply, including that employers who receive small business interruption loan under Paycheck Protection Program not eligible
  - Like FFCRA credits, credits apply against 6.2% Social Security tax portion of employer’s share of FICA tax and are refundable
  - Credit applies to Qualified Retention Wages paid from March 13 to December 31, 2020

Legislation – Payroll: Tax Credit Procedures

- **Tax credits**
  - Tax credits to be claimed starting with second quarter Form 941
  - No failure to deposit penalties imposed for amounts of employment taxes not deposited in anticipation of FFCRA and CARES Act credits, as follows
    - To extent amounts not deposited are less than or equal to amount of refundable tax credits to which employer is entitled as of time of deposit, and
    - Employer did not seek payment of advance credit by filing Form 7200
  - If these conditions are satisfied, employer can withhold amount of anticipated credits from deposits of any employment taxes and any FICA and federal income tax withholdings from employees
  - Form 7200 provides alternative mechanism for claiming advance credits
Legislation – Payroll: Deferred Deposit and Payment

- **CARES Act – Employer payroll tax delay (Section 2302)**
- **Deferred deposit and payment of employer portion of Social Security taxes**
  - Substantially delays required dates for deposit of employer portion of Social Security taxes, imposed at 6.2% of employee wages up to $137,700 per employee
    - Applies to taxes due from March 27, 2020 through December 31, 2020
    - 50% of such taxes must be deposited by December 31, 2021
    - Remaining 50% of such taxes must be deposited by December 31, 2022
    - Employers who receive loan forgiveness with respect to Paycheck Protection Program loan are not eligible for this deferral

Benefit Impacts – Retirement Plans

- **DC plans**
  - Potential partial termination
    - If more than 20% of employees over period are involuntarily terminated, then employer likely has had partial plan termination
    - If there is partial plan termination, employer needs to vest any terminated employees who had unvested amount when terminated
    - Causes reduction in forfeitures
  - Employer contribution reduction
    - Many employers have implemented or are considering reducing employer contributions
    - Timing and ability to do so depends on several factors
      - Safe harbor plans: Employer must provide 30-day notice
      - Money purchase pension plans: Employer must provide 45-day notice (204(h) notice)
      - Employer has adopt plan amendment
Benefit Impacts – Retirement Plans

• **DC plans (continued)**
  – ADP and ACP nondiscrimination testing
    • Employers, especially those who suspend safe harbor contributions, likely to have more difficulty passing ADP and ACP testing for 2020 (HCEs may see refunds and forfeitures)
  – Investments and fiduciary duties
    • Review of plan investments
      – Fiduciaries should review performance of funds and measure against benchmarks
    • Employer stock
      – If independent fiduciary does not supervise employer stock, fiduciaries should be monitoring employer stock relative to peers and market in general

• **DB plans**
  – Potential plan termination
    • Similar concern as discussed under DC plans
  – Plan liabilities
    • Low interest rates tend to increase plan liabilities
  – Plan assets
    • Depending upon plan investment strategy, plan investments may have lost value
      – Impact on financial statements
      – Impact on future funding contributions
Benefit Impacts – Health Plans

- Health plans – Potential impacts
  - Cost increase due to coronavirus costs
  - Possible cost decrease due to deferred elective treatments
  - Plan amendments

Benefit Plans – Fringe Benefits

- Benefit plan impacts – Fringe benefits
  - Disaster leave banks
    - Allow employees to donate leave to disaster leave bank (cannot designate recipient)
    - Affected employees can receive paid leave in reasonable amount determined by employer
    - Donor employee not subject to federal income or employment taxes
    - Plan document required
  - Medical leave banks
    - Allow employees to donate leave to medical leave bank (can designate recipient)
    - Employees who are ill or have ill family member can receive paid leave
    - Donor employee not subject to federal income or employment taxes
    - Plan document required
    - Rev. Rul. 90-29, 1990-1 C.B. 11
Benefit Plans – Fringe Benefits

• Benefit plan impacts – Fringe benefits
  – Qualified disaster relief payments
    • Affected employees can receive cash amount (“reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster”) determined by employer
    • Not subject to federal income or employment taxes
    • Plan document not required, but helpful to explain to employees
    • Employers should keep documentation of amounts paid to claim deduction
    • 26 U.S.C. § 139

HR Impacts – Looking Forward

• How will workforce react to economic uncertainty?
  – Delayed retirement
    • Workforce demographics
    • Increased health plan costs
    • Increased PTO/vacation/sick leave accruals
  – Impact of ability to work from home
Conclusion & Contact Information

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