Employee Benefits Alert

October 2020

Employee benefits regulatory guidance this year has been largely reactive to the administrative burdens and uncertainties experienced by employers and plan sponsors due to the Coronavirus Disease 2019 ("COVID-19"). In addition to COVID-19 related guidance, however, regulatory agencies have kept pace in the issuance of guidance unrelated to the pandemic. For these reasons, 2020 has been a challenging year for employers and plan sponsors due to unanticipated changes in the rules coupled with the obligation to comply with existing guidance. The following provides an update on recent guidance on the topics below.

- COVID-19 ERISA and Internal Revenue Code Extensions
- DOL Notice 2020-1 EBSA Disaster Relief and Nonenforcement Position
- SECURE ACT- Mandatory Part-Time Employee Eligibility Effective 1/1/2021
- SECURE ACT- 10% Penalty Exception for Birth or Adoption
- SECURE ACT-Lifetime Income Provisions

COVID-19 ERISA and Internal Revenue Code Extensions

The Department of Labor (the "DOL") in coordination with the Internal Revenue Service ("IRS") has extended several employee benefits deadlines in recognition of the administrative difficulties faced by employers due to COVID-19 by issuing a Final Rule. The IRS and DOL (collectively the "Agencies") also recognized that due to the pandemic, participants and beneficiaries in employee pension benefit plans and welfare benefit plans may encounter problems in exercising their health coverage portability and continuation coverage rights or in filing or perfection benefits claims. The deadline extensions apply to retirement and health and welfare plans with favorable tax treatment under the Internal Revenue Code if 1986, as amended (the "Code") and subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and are intended to provide relief to plan sponsors and participants impacted by COVID-19. The extensions, however, present administrative complexities that require coordination with third party administrators, benefits consultants, legal counsel and carriers.

Employee benefits deadlines on or after March 1, 2020 through the "Outbreak Period" are tolled. The Outbreak Period is "the National Emergency Period plus 60 days following expiration after the National Emergency Period." The end of the National Emergency Period has not yet been declared.

The Final Rule issued by the Agencies provide much needed extensions for the benefit of both participants and employers.

- ***Employer Extensions***

The regulations extend the time for plans to furnish ERISA-required notifications to "as soon as administratively practicable." This includes summaries of material modification(s) (SMM), summary plan description(s) (SPD), benefit/claims determinations, and blackout notices (30-day advanced notice as well as notices required after the blackout periods begins). Further, plan administrators are not required to distribute COBRA notices during the Outbreak Period. The notification periods under ERISA's claims procedures have also been extended by disregarding the Outbreak Period.

- ***Employee Extensions***

Employee obligations have also been impacted by the regulations. The regulations extend the 30 and 60-day HIPAA Special Enrollment timeframes by disregarding the Outbreak Period, and also extend the claims procedure deadlines by disregarding the Outbreak Period. This includes extending health flexible spending arrangement (health FSA) and Health Reimbursement Account (HRA) run out periods still in effect as of March 1, 2020, by disregarding the Outbreak Period. The COBRA response periods are also extended by disregarding the Outbreak Period.

- ***Administrative Impact***

The extensions reflected above have resulted in a high degree of confusion and uncertainty regarding implementation and the proper means of documenting the changes. The end of the Outbreak Period has yet to be determined, which is problematic. Accordingly, there is no known date by which the extensions are to end. Thereafter, the catch-up process will undoubtedly be a time consuming endeavor. At this point, significant unanswered questions remain.

DOL Notice 2020-1 EBSA Disaster Relief and Nonenforcement Position

In response to the COVID-19 pandemic, consistent with the Final Rule above, employers and plan sponsors have been extended relief in complying with other benefits deadlines. Section 3607 of the Coronavirus Aid, Relief and Economic Security Act (CARES Act) amended Section 518 of ERISA to provide, in relevant part, that in the case of an employee benefit plan, or any sponsor, administrator, participant, beneficiary, or other person with respect to such plan, affected by a Presidentially declared disaster or a public health emergency declared by the Secretary of HHS, the Secretary of Labor may prescribe, by notice or otherwise, a period of up to one year that may be disregarded in determining the date by which any action is required or permitted to be completed. Section 518 further provides that no plan shall be treated as failing to be operated in accordance with the terms of the plan solely as a result of complying with the postponement of a deadline.

- **Section 518 Relief Covered by EBSA Notice 2020-1**

In Notice 2020-1 issued by the Employee Benefits Security Administration, the DOL indicated that subject to the duration limitation in Section 518 of ERISA, an employee benefit plan and the responsible plan fiduciary will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or document that must be furnished during the Outbreak Period, if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances. Good faith acts include use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites.

- **Plan Loans and Distributions Verification Procedures**

If a retirement plan fails to follow procedural requirements for plan loans or distributions imposed by the terms of the plan, the DOL will not treat it as a failure if:

- that failure is solely attributable to the COVID-19 outbreak;
- the plan administrator makes a good-faith diligent effort under the circumstances to comply with those requirements; and
- the plan administrator makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively practicable.

This relief for verification procedures imposed by the terms of the plan is limited to verification requirements required under provisions of Title I of ERISA that are within the interpretive and regulatory authority of the DOL, and, for example, does not include spousal consent or other statutory or regulatory requirements under the jurisdiction of the IRS.

- **Participant Loans under the CARES Act**

Section 2202(b)(1) of the CARES Act provides that during the period beginning on March 27, 2020 and ending on September 22, 2020 (the "loan relief period"), in applying the Code Section 72(p) loan limitations, the $50,000 aggregate limit increased to $100,000. Further, a participant may borrow up to 100% of their vested balance, if less than $100,000. Any repayment of a plan loan made to a qualified individual that is due during the period beginning on March 27, 2020 and ending December 31, 2020, may be delayed for up to one year without violating section 72(p) of the Code if subsequent repayments are adjusted to reflect the delay.

Further, the DOL has advised that it will not treat any person as having violated the provisions of Title I of ERISA, including the adequate security and reasonably equivalent basis requirements in ERISA section 408(b)(1) and 29 CFR 2550.408b-1, solely because: (1) the person made a plan loan to a qualified individual during the loan relief period in compliance with the CARES Act and the provisions of any related IRS notice or other published guidance; or (2) a qualified individual delayed making a plan loan repayment in compliance with the CARES Act and the provisions of any related IRS notice or other published guidance.

- **Certain Plan Amendments Related to the COVID-19 Outbreak**

If a plan is amended to provide the relief for plan loans and distributions described in section 2202 of the CARES Act, the DOL will treat the plan as being operated in accordance with the terms of such amendment prior to its adoption if: (1) the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2022, or such later date prescribed by the Secretary of the Treasury (or the Secretary's delegate), and (2) the amendment meets the conditions of Section 2202(c)(2)(B) of the CARES Act.

- **Participant Contributions and Loan Repayments**

Under 29 CFR § 2510.3-102, amounts that a participant or beneficiary pays to an employer, or amounts withheld from the participant's wages by an employer, for contribution or repayment of a participant loan to an employee pension benefit plan constitute plan assets. Generally, these amounts must be forwarded to the plan on the earliest date on which such amounts can reasonably be segregated from the employer's general assets, but in no event later than the 15th business day of the month following the month in which the amounts were paid to or withheld by the employer.

The DOL recognized that some employers and service providers may not be able to forward participant payments and withholdings to employee pension benefit plans within prescribed timeframes during the Outbreak Period. In such instances, the DOL will not – solely on the basis of a failure attributable to the COVID-19 outbreak – take enforcement action with respect to a temporary delay in forwarding such payments or contributions to the plan. Employers and service providers must act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances.

- **Blackout Notices**

In general, the administrator of an individual account plan is required to provide 30 days' advance notice to participants and beneficiaries whose rights under the plan will be temporarily suspended, limited, or restricted by a blackout period under 29 CFR 2520.101-3. For instance, a period of suspension, limitation, or restriction of more than three consecutive business days on a participant's ability to direct investments, obtain loans or obtain other distributions from the plan results in a blackout period and triggers the advance notice. The regulations provide an exception to the advance notice requirement when the inability to provide the notice is due to events beyond the reasonable control of the plan administrator and a fiduciary so determines in writing. The above relief under Section 518 applies to blackout notices that are required to be provided under the regulation, including those required to be provided after the blackout period begins. Further, the DOL will not require the written determination by a fiduciary pursuant to the regulation for blackout notices covered by this notice, as pandemics are by definition beyond a plan administrator's control.

- **General ERISA Fiduciary Compliance Guidance**

During the Outbreak Period, the DOL encourages plan fiduciaries to make reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments and should attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes.

In addition, the DOL acknowledged that there may be instances when plans and service providers may be unable to achieve full and timely compliance with claims processing and other ERISA requirements. The DOL indicated that its approach to enforcement will emphasize compliance assistance and include grace periods and other relief where appropriate, including when physical disruption to a plan or service provider's principal place of business makes compliance with pre-established timeframes for certain claims' decisions or disclosures impossible. Until the National Emergency ends, we anticipate that additional guidance will be issued by the Agencies.

SECURE ACT – Mandatory Part-Time Employee Eligibility Effective 1/1/2021

Part-time employees have historically been excluded from retirement plan participation for failure to meet the minimum participation requirements. Prior to the enactment of the Setting Every Community Up for Retirement Enhancement ("SECURE") Act, part-time employees were extended participation eligibility in cash or deferred arrangements ("CODA") only after the later of the employee's attainment of age 21 and the completion of a 12-month period during which the employee completed 1,000 hours of service pursuant to Section 410(a) of the Code. Participation eligibility could also be extended upon completion of two years of service, if the employee's benefit entitlement was100% vested at commencement of participation. Due to the nature of part-time employment, participation eligibility even for long-term part-time employees was not attainable under the prior rules.

- ***Long-Term Part-Time Employees***

The SECURE Act amended the Code to provide that a CODA may not require an employee to complete a period of service that extends beyond the end of the earlier of: (i) the period permitted under Section 410(a)(1) of the Code (disregarding Section 410(a)(1)(B)(i)); or (ii) subject to Section 401(k)(15) of the Code, the first period of three consecutive 12-month periods during each of which the employee has completed at least 500 hours of service ("long-term part-time employee"). The new Section 401(k)(15)(A) of the Code, also added by Section 112(a) of the SECURE Act, provides that the employee must have attained the age of 21 by the close of the three year period as a condition of eligibility under the long-term part-time employee rule. A long-term part-time employee must be credited with a year of service, for vesting purposes, for each 12-months period during which the employee completes 500 hours of service.

➢ *IRS Notice 2020-68*

The IRS recently published Notice 2020-68, which provides guidance on the implementation of the new long-term part-time employee rules. In the Notice, the IRS clarified that all years of service with the employer or employers maintaining the plan must be taken into account for purposes of determining a long-term, part-time employee's nonforfeitable right to employer contributions under the special vesting rules. Accordingly, long-term part-time employees must be credited with a year of vesting service for each 12-month period prior to and after January 1, 2021, in which the employee completes at least 500 hours of service. The IRS's interpretation is consistent with Section 411(a)(4) of the Code, which generally requires that all years of service with the employer or employers maintaining the plan be taken into account for purposes of determining an employee's nonforfeitable right to employer contributions, subject to certain exceptions. However, Section 112(b) of the SECURE Act excludes 12-month periods beginning before January 1, 2021, for purposes of determining a long-term part-time employee's eligibility to participate in the plan.

➢ *Administrative Impact*

Employers are required to determine whether long-term part-time employees are vested in any employer contributions by looking back to determine whether such part-time employees completed 500 or more hours of service prior to January 1, 2021. However, long-term part-time employee eligibility is to be determined prospectively beginning January 1, 2021.

SECURE ACT - 10% Penalty Exception for Birth or Adoption

Section 113 of the SECURE Act amended Section 72(t)(2) of the Code to add a new exception to the 10% early withdrawal penalty for qualified birth or adoption distributions ("QBOAD"). The new Section 72(t)(2)(H) permits an individual to receive a distribution from an eligible retirement plan of up to $5,000 without application of the 10% additional tax if the distribution meets the requirements to be a qualified birth or adoption distribution. The amount of the qualifying distribution is taxable, but the early withdrawal penalty will not apply. As discussed below, plans are not required to permit in-service withdrawals for qualified births or adoptions. Accordingly, the penalty exception would apply only to participants in plans that have been amended to implement the optional withdrawal provision.

➢ *Qualified Birth or Adoption*

A QBOAD is defined as any distribution from an applicable eligible retirement plan to an individual if made during the 1-year period beginning on the date on which the child of the individual is born or the legal adoption by the individual of an eligible adoptee is finalized.

- ***Child or Eligible Adoptee***

In Notice 2020-68, the IRS clarified that a distribution to an individual will not be treated as a QBOAD with respect to any child or eligible adoptee unless the individual includes the name, age, and the Taxpayer Identification Number (TIN) of the child or eligible adoptee on the individual's tax return for the taxable year in which the distribution is made. Further, an eligible adoptee includes any individual who has not attained age 18 or is physically or mentally incapable of self-support. An individual is considered "physically or mentally incapable of self-support" if the individual is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration. An eligible adoptee does not include an individual who is the child of the taxpayer's spouse.

- ***Maximum Distribution***

Under the new rules, each parent is entitled to receive a QBOAD of up to $5,000 with respect to the same child or eligible adoptee. An individual is permitted to receive QBOADs with respect to the birth of more than one child or the adoption of more than one eligible adoptee if the distributions are made during the 1-year period following the date on which the children are born or the legal adoption for the eligible adoptees is finalized. The IRS provides the following example in Notice 2020-68:

> <u>Example</u>:
>
> Employee A gives birth to twins in October 2020. Employee A takes a $10,000 distribution from her 401(k) plan in January 2021. The entire $10,000 distribution is a qualified birth or adoption distribution, assuming that Employee A includes the TINs of her twins and other required information on her 2021 tax return.

In making a determination whether an individual is eligible for a qualified birth or adoption distribution, a plan sponsor or plan administrator of an applicable eligible retirement plan is permitted to rely on reasonable representations from the individual, unless the plan sponsor or plan administrator has actual knowledge to the contrary. QBOADs are not eligible for rollover but a recontribution could be rolled over.

- ***Recontribution of Distribution***

An individual may recontribute any portion of a qualified birth or adoption distribution (up to the entire amount of the QBOAD) to an applicable eligible retirement plan in which the individual is a beneficiary and to which a rollover can be made under Code Sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), as applicable. Notice 2020-68 provides that a plan which permits QBOADs is required to accept the recontribution. As indicated above, however, we await receipt of guidance from the IRS that will address the recontribution rules, including rules related to the timing of recontributions.

Discretionary Withdrawal Provision

It is optional for an applicable eligible retirement plan to permit in service distributions for QBOADs pursuant to the new Section 72(t)(2)(H) of the Code. If an employer decides to implement the provision, the plan must be amended no later than the last day of the first plan year beginning on or after January 1, 2022, which would apply retroactively to January 1, 2020 or the effective date reflected in the plan. Further, the plan must be operated as if the amendment were in effect prior to actual amendment.

SECURE ACT - Lifetime Income Provisions

Section 203 of the SECURE Act amended Section 105 of ERISA to require defined contribution plan benefit statements to include a lifetime income disclosure at least once during any 12-month period, which illustrates the monthly payments the participant would receive if the total account balance were used to provide lifetime income streams, including a qualified joint and survivor annuity for the participant and the participant's surviving spouse and a single life annuity. The Secretary of Labor is directed to develop a model disclosure.

This new disclosure obligation was added in order to assist participants in retirement planning by correlating the funds in their defined contribution plan to lifetime income, in the same manner as if the benefit entitlement were payable by a defined benefit plan. Plan fiduciaries, plan sponsors, or other persons will have no liability under ERISA solely by reason of the provision of lifetime income stream equivalents that are derived in accordance with the assumptions and guidance issued by the DOL and that include the explanations contained in the model disclosure to be issued by the Secretary of Labor.

This lifetime income disclosure requirement is effective for benefit statements furnished 12 months following the later of the DOL's issuance of (i) interim final rules, (ii) a model lifetime income disclosure, or (iii) assumptions used to convert total accrued benefits to lifetime income streams. Due to the DOL's issuance of the interim rules, as discussed below, the disclosure obligation is effective for statements required to be issued after September 18, 2021.

On September 18, 2020, the DOL issued interim rules in order to assist plan sponsors in complying with the new disclosure requirement, which included the assumptions that administrators must use to calculate the monthly payment illustrations as single life annuities ("SLA") and qualified joint and survivor annuities ("QJSAs"). The rules also include model disclosure statements.

- **Assumed commencement date:** Plan administrators must calculate monthly payment illustrations as if the payments begin on the last day of the benefit statement period.

- **Assumed age:** Plan administrators must assume that a participant is age 67 on the assumed commencement, which is the Social Security full retirement age for most workers, or the participant's actual age, if older than 67.

- **Assumed Spousal and Survivor Benefits:**
  - Plan administrators must illustrate a SLA, which will pay a fixed monthly amount for the life of the participant, with no survivor benefit after the participant's death.
  - Plan administrators must assume that all participants have a spouse of equal age, regardless of a participant's actual marital status or the actual age of any spouse.
  - Plan administrators must use a 100% QJSA, which will pay a fixed monthly amount for the life of the participant, and the same fixed monthly amount to the surviving spouse after the participant's death.
- Plan administrators must use the 10-year constant maturity Treasury rate (10-year CMT) as of the first business day of the last month of the statement period to calculate the monthly payments. The 10-year CMT approximates the rate used by the insurance industry to price immediate annuities.
- **Assumed mortality:** Plan administrators must use the gender neutral mortality table in section 417(e)(3)(B) of the Internal Revenue Code – the mortality table generally used to determine lump sum cash-outs from defined benefit plans.
- **Example Illustration:** The following example from the DOL illustrates the application of all of these regulatory assumptions.

Facts: Participant X is age 40 and single. Her account balance on December 31, 2022, is $125,000. The 10-year CMT rate is 1.83% per annum on the first business day of December. The benefit statement of this participant would show:

Regulatory assumptions example illustration	
Current Account Balance	$125,000
Single Life Annuity	$645 per month for life (assuming Participant X is age 67 on December 31, 2022)
Qualified Joint and 100% Annuity	$533 per month for participant's life, and $533 for the life of spouse following participant's death (assuming Participant X and her hypothetical spouse are age 67 on December 31, 2022)

We are available to assist you in implementing the discretionary and mandatory law changes discussed in this Newsletter and to provide guidance on any required changes in your administrative practices. Remember, we are more than lawyers and are always here to help!

If there are any topics that you would like for us to cover in our Employee Benefits Alerts, please email Bonita Hatchett-Bodle at bhatchett@parkerbrown.com.