

Welcome to the SIG University Webinar Series
Return to Work – Benefit Plan Considerations

Stacy Barrow, Esq. | *Marathas Barrow Weatherhead*

May 27, 2020



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WEBINARS

UPCOMING

JUNE 10TH, 12 PM – 1 PM EST

Affordable Care Act Update: What's New with the ACA

Presenter: Stacy Barrow, Esq., *Marathas Barrow Weatherhead*

JUNE 24TH, 12 PM – 1 PM EST

How to Solve the Biggest HR Tech Problems

Presenter: Josh Hoover, *Benefit Technology Resources*

RECORDINGS

MAY 20TH – Building a Global Mental Health Strategy for Multinationals



VIRTUAL ROUNDTABLES

SAVE THE DATE

MAY 28TH, 1 PM EST

Part Two: Roundtable Working Session –
HR Strategy and Tactical Considerations

Presenter: Sarah Sheckells, HR Executive

JUNE 4TH, 1 PM EST

Part Three: Roundtable Working Session –
HR Strategy and Tactical Considerations

Presenter: Sarah Sheckells, HR Executive

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Our New Normal: Creating a Lifestyle that Helps People Work on Building Healthy Immune Systems

Presenter: Dr. William S. Queale, MD, *Johns Hopkins*

Opening the Doors: Return to Workplace Considerations and Potential Screening Measures for Employees Returning to the Workplace

Presenter:

Ellen Lindahl, Director of Clinical Review, *Relph Benefit Advisors*

Post-COVID: Health Plan Data is More Important than Ever

Presenter: Rod Reason, Co-Founder/CEO, *Springbuk*

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PODCAST
RECORDINGS

COVID-19 **UPDATES**

Visit our Coronavirus Resource Center for the latest information on Coronavirus (COVID-19) including:

- Upcoming Webinars
- Key Documents
- Links to Articles & Insights
- Wellness Resources
- COVID-19 Dashboard of CDC & World Health Organization

<https://aleragroup.com/coronavirus/>

- [IRS Relaxes Election Change, Other Rules for Cafeteria Plans and FSAs](#)
- [Agencies Extend Deadline to Pay COBRA Premiums and Certain Other ERISA and Internal Revenue Codes Due to COVID-19](#)



LEGAL ALERTS



MARATHAS BARROW
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Returning to Work after COVID-19: Employee Benefits Update

SIG

May 2020

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Agenda



- Extension of ERISA and Code Deadlines Due to COVID-19
- Relief for Employers
- Relief for Participants and Beneficiaries
 - Examples
- Relief for Cafeteria Plans and FSAs
- HEROES Act (COBRA subsidy provision)
- FFCRA Leave Update

ERISA and Internal Revenue Code Extensions



- The impacts of the COVID-19 National Emergency, as declared by President Trump on March 13, 2020, have been vast
- As a result, many employers and employees are struggling to meet their various filing, notice, election, or other deadlines
- To ease this burden, the DOL, IRS and HHS issued guidance and relief, including requiring employers to suspend the deadline for qualified beneficiaries to elect COBRA or pay COBRA premiums from March 1, 2020 until 60 days after the National Emergency ends (or such other date as specified by the Agencies)

Relief for Employers



- EBSA: Employee Benefits Security Administration – branch of DOL with oversight authority over health and welfare plans
- [EBSA Disaster Relief Notice 2020-01](#) eases the burden for health and welfare plans (and retirement plans) by clarifying that:
 - Neither the plan nor the employer will violate ERISA for failing to timely furnish a notice, disclosure, or document that must be furnished between March 1, 2020, and 60 days after the announced end of the COVID-19 National Emergency
 - This timeframe is referred to as the “outbreak period”
- Relief extends to COBRA Notices, SPDs, SMMs, SBCs, but use caution – employers must act in good faith and furnish docs as soon as reasonably practicable – most employers will not delay sending COBRA notices

Relief for Employers



- Plans and employers may communicate electronically with plan participants and beneficiaries who they reasonably believe have effective access to electronic means of communication, including email, text messages, and websites
- IRS Notice 2020-23: Filing relief for Form 5500 applies to employers with filings due between 4/1/20 and 7/15/20 (e.g., years ending 9/30, 10/31 or 11/30/19)
 - Employer with these plan years have until July 15, 2020 to file Form 5500
 - Also applies to Form M-1 otherwise due during that time
- Deadline for calendar year plans has not been extended, though plans may file Form 5558 by 7/31/20 for an extension to 10/15/20

Relief for Participants



- DOL has issued a [Final Rule](#) extending certain timeframes and deadlines for participants to notify the plan of special enrollment events and COBRA qualifying events, among others
- **This rule is mandatory for employers, plans and carriers to recognize**
- Final rule applies to plan participants, beneficiaries, qualified beneficiaries, and claimants and provides relief from meeting certain deadlines during the outbreak period
 - Outbreak period: March 1, 2020 until 60 days after the announced end of the COVID-19 National Emergency, or such other date announced by the Agencies in a future notice

Relief for Participants



- Final Rule extends the following deadlines:
 - 30-day period (or 60-day period, for Medicaid/CHIP) to request a special enrollment;
 - 60-day election period for COBRA continuation coverage;
 - Date/deadline for making COBRA premium payments;
 - Deadline for individuals to notify plan of a qualifying event or disability determination; and
 - Certain deadlines for submitting benefit claims, appeals, and external reviews

Examples



- Assume the COVID-19 National Emergency ends July 3, 2020
 - The “Outbreak Period” would end on 9/1/20 (60 days after the end of the National Emergency)
- Example 1: Electing COBRA Coverage
 - Bob experiences a qualifying event and is provided a COBRA election notice on 4/1/20
 - The Outbreak Period is disregarded for purposes of determining the election period
 - Bob’s 60-day election period begins 9/1/20 and ends 10/31/20

Examples



- Example 2: Special Enrollment Rights
 - Assume the COVID-19 National Emergency ends July 3, 2020 and therefore the “Outbreak Period” ends 60 days later, on 9/1/20
 - John declined coverage during his employer’s most recent open enrollment
 - John gets married during the Outbreak Period
 - When does John have to notify the employer of his special enrollment rights?
 - The Outbreak Period ending 9/1/20 is disregarded for purposes of determining John’s 30-day special enrollment period
 - Therefore, John can exercise his special enrollment rights by 10/1/20 (30 days after the end of the Outbreak Period on 9/1/20)

Examples



- Example 3: COBRA Premium Payments
 - Assume the COVID-19 National Emergency ends July 3, 2020 and therefore the “Outbreak Period” ends 60 days later, on 9/1/20
 - On 3/1/20 Frank was enrolled in COBRA
 - Frank paid premium for February but has not paid during the Outbreak Period
 - As of 9/1/20, Frank has made no payments for March through September
 - Does Frank lose COBRA coverage, and if so for which month(s)?
 - The Outbreak Period is disregarded when determining whether premiums are timely
 - If Frank pays within 30 days after 9/1/20 (by 10/1/20), payments for March through September are timely; however, if Frank only pays two months’ premiums, he would just be entitled to COBRA for March and April

Examples



- Example 4: Claim under a group health plan
 - Assume the COVID-19 National Emergency ends July 3, 2020 and therefore the “Outbreak Period” ends 60 days later, on 9/1/20
 - Mark received medical treatment on 5/1/20 for a covered condition
 - The claim is not submitted until 6/1/21
 - The plan requires all claims be submitted within one year (i.e., by 5/1/21)
 - Is Mark’s claim timely?
 - The Outbreak Period is disregarded for purposes of the claim filing deadline
 - Therefore, Mark’s last day to submit a claim is 9/1/21 (one year after the end of the Outbreak Period), so his claim is timely

Examples



- Example 5: Internal appeal under a disability plan
 - Assume the COVID-19 National Emergency ends July 3, 2020 and therefore the “Outbreak Period” ends 60 days later, on 9/1/20
 - Monica received notification of an adverse benefit determination from her disability plan on 4/30/20
 - The notification informed Monica that she has 180 days to appeal the determination
 - What is the deadline for Monica to file her appeal?
 - The Outbreak Period is disregarded for purposes of calculating the appeal filing deadline
 - Therefore, Monica’s last day to submit a claim is 2/28/21 (180 days after the end of the Outbreak Period)

Relief for Cafeteria Plans and FSAs



- IRS Notices [2020-29](#) and [2020-33](#)
- This relief is **voluntary** for employers to adopt
- Provides an extension of “Use or Lose” rule for plan years ending in 2020
 - For unused amounts remaining in a health FSA or a dependent care FSA as of the end of a plan year (or 2 ½ month grace period) ending in 2020, the plan may permit employees to apply those unused amounts to reimburse health FSA or dependent care FSA expenses, respectively, incurred through December 31, 2020
 - Mainly relevant to non-calendar year FSAs
 - For example, an employer with a plan year ending 3/31/2020 could allow employees until 12/31/2020 to incur claims
 - If the plan includes a carryover, it will apply after the end of the 2020

Relief for Cafeteria Plans and FSAs



- For mid-year elections made during calendar year 2020, a cafeteria plan *may* permit employees to:
 - With respect to 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; and
 - revoke an existing election on a prospective basis, provided that the employee attests in writing that the employee is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer
 - With respect to a health FSA or dependent care FSA, make a new election, or decrease or increase an existing election on a prospective basis

Relief for Cafeteria Plans and FSAs



- Employers should secure carrier approval before allowing changes
- Employers may set a timeframe for changes and may limit the scope of changes (e.g., employees may only enroll/add and not drop coverage)
- Employers may also prohibit an employee from reducing a health FSA election below the amount the employee has already received that plan year, to avoid the FSA being put in a deficit position
 - For example, if an employee has elected \$2,750 and has contributed \$1,375 on July 1, but has received \$2,000 from the plan, a reduction on July 1 would be limited to \$625, so that the employee would contribute \$2,000 for the year

Relief for Cafeteria Plans and FSAs



- Notice 2020-33 increases the \$500 carry over limit to 20% of the maximum salary reduction amount (\$2,750 for 2020 plan years)
 - Thus, the carryover amount is \$550 for 2020 plan years
- To use relief under Notices 2020-29 and 2020-33, an amendment for the 2020 plan year must be adopted on or before December 31, 2021, and may be effective retroactively to January 1, 2020
 - Note, however, that all election changes must be made prospectively
 - This retroactive relief is intended to cover changes made prior to the Notices' release date (e.g., if an employer allowed mid-year enrollment earlier in the year based on a carrier's special enrollment opportunity)

Relief from Insurance Carriers



- Some insurance carriers are providing premium credits to their employer clients in recognition that access to care has been disrupted as a result of the state of emergency
- In general, treat them like ACA Medical Loss Ratio rebates
 - If 100% employee paid: employer must use the funds in a way that complies with ERISA's exclusive benefit rule, such as a refund or premium holiday
 - Employer and employee contributions: review the facts along with the terms of the plan to see if there's a basis for the employer to retain the refund
 - If the plan is silent, the employer may need to share the refund with employees proportionate to their contributions, similar to MLR rebates
 - Consider whether employee contributions are communicated as a fixed cost

What's Next?



- **HR 6800 – HEROES Act**
- *If passed*, could provide up to 9 months of premium assistance for health premiums owed by unemployed and furloughed workers
 - Could potentially cover 100% of the cost
- Would apply to ERISA plans, multiemployer plans and governmental plans
- Eligible employees include active workers on furlough and those covered by COBRA due to either involuntary termination or reduction in hours
- Would apply to impacted workers beginning March 1, 2020, and ending six months following the public health emergency
- Subsidies would be available until an individual enrolls in another group health plan or the Marketplace, becomes eligible for Medicare, or their COBRA period or furlough ends

What's Next?



- **HR 6800 – HEROES Act**
- *If passed*, workers who became eligible for COBRA prior to enactment will have an extended election period during which they may elect COBRA coverage retroactive to their qualifying event
- A special enrollment period will be available to allow workers to enroll in coverage through the Marketplaces following the conclusion of premium assistance under the bill
- Would requires written notices to workers that include information regarding:
 - The availability of premium assistance under both COBRA and furlough coverage
 - Alternative coverage options, including subsidized coverage in the ACA Marketplaces

What's Next?



- **HR 6800 – HEROES Act**
- *If passed*, employers and health plans will treat workers as having paid full premium during the subsidy period
- Full reimbursement for premiums waived will be available to the employer through a reduction or credit toward payroll taxes and wage withholdings
- DOL and HHS will provide for expedited review of denials of premium assistance for both COBRA and furloughed workers
 - Cases will be decided within 15 days of being brought by a worker
- Premium assistance will be disregarded when determining eligibility for any other public benefit under both state and federal law
- DOL will conduct an outreach campaign to raise awareness

Families First Coronavirus Response Act



- Provisions include **Emergency Paid Sick Leave** and **Expanded FMLA**
 - These provisions apply to employers with fewer than 500 employees and public employers of any size
 - Effective for leave taken between 4/1/20 and 12/31/20, unless extended
 - DOL FAQs on leave
- Assistance for employers available via a refundable payroll tax credit
 - Tax credit available for health insurance premiums allocable to qualified sick leave payments
 - IRS FAQs on tax credits

Emergency Paid Sick Leave



- Employees may be entitled to 80 hours of paid sick time (pro-rated for part-time employees)
 - All employees are immediately eligible for this leave
- Leave is paid at the employee's regular rate, up to \$511 per day (\$5,110 in the aggregate) when leave is taken due to an employee's own illness or quarantine, and paid at two-thirds of the regular rate, up to \$200 per day (\$2,000 in the aggregate) when leave is taken to care for others
- Emergency paid sick leave is in addition to other leave provided under state or federal law or the employer's existing company policy

Emergency Paid Sick Leave



- Provides paid sick time to an employee who is unable to work (or telework) because the employee:
 1. is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 2. has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
 3. has COVID-19 symptoms and is seeking medical diagnosis;
 4. is caring for an individual who is subject to a quarantine or isolation order;
 5. is caring for a child if the school or day care center has been closed, or the child care provider is unavailable, due to COVID-19 precautions; or
 6. is experiencing any other similar condition specified by the federal agencies

Expanded FMLA



- Amends FMLA to provides up to 12 weeks of job-protected leave for “a qualifying need related to a public health emergency” to employees who have been employed for at least 30 days
- A “qualifying need” is when an employee is unable to work (or telework) due to a need to care for a child if the child’s school or place of care has been closed or is unavailable due to a public health emergency
 - Minor child: under age 15 unless special circumstances exist requiring a need to care for child during daylight hours

Expanded FMLA



- After a 10-day elimination period, the rest of FMLA leave is paid at two-thirds of the employee's regular rate based on normally scheduled hours, capped at \$200 per day and \$10,000 in total
 - Basically, a 10-week continuation of #5 under Emergency Paid Sick Leave
 - Employees may, but cannot be required to, use paid leave during elimination period
 - After elimination period, employer may run paid leave concurrent with E-FMLA

Emergency Paid Sick Leave and E-FMLA



- Exceptions apply for small employers (under 50 EEs) if the required leave would jeopardize the viability of their business
 - Exception for EPSL applies only when an employee takes leave under reason #5: to care for a child whose school or place of care is closed due to COVID-19
 - Small employers not exempt from paying under reasons #1-4 of EPSL

Emergency Paid Sick Leave and E-FMLA



- Employees are not eligible for EPSL or E-FMLA if:
 - their employer closes the worksite, even for a short period of time
 - they are furloughed (but the company remains open)
 - their hours are reduced
- This is true whether the employer closes the worksite for lack of business or because it was required to close pursuant to a Federal, State, or local directive
 - They may be eligible for unemployment

Emergency Paid Sick Leave and E-FMLA



- **Substantiation Requirements**
- An employer substantiates eligibility for tax credits if they receive a written request from the employee that provides:
 - The employee's name;
 - The date or dates for which leave is requested;
 - A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
 - A statement that the employee is unable to work, including by means of telework, for such reason

Emergency Paid Sick Leave and E-FMLA



- **Substantiation Requirements**
- If leave is based on a quarantine order or self-quarantine advice, include:
 - name of the governmental entity ordering quarantine, or
 - the name of the health care professional advising self-quarantine, and
 - if individual is not the employee, that person's name and relation to the employee

Emergency Paid Sick Leave and E-FMLA



■ Substantiation Requirements

- If leave is based on a school closing or provider unavailability, include:
 - name and age of the child (or children) to be cared for
 - name of the school that has closed or place of care that is unavailable, and
 - a representation that no one else will be providing care for the child during that time
 - Also, if employee cannot work or telework due to having to care for a child older than 14 during daylight hours, a statement that special circumstances exist



Questions?

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