EMPLOYEE BENEFITS ADVISORY

Retirement Plans and COVID-19 Considerations

This past period of time has brought much uncertainty to the world as well as to employers with retirement plans that have been impacted by COVID-19. Below is a summary of items to consider for employer-sponsored retirement plans during this uncertain time.

Breaking News: On March 17, the IRS issued an extension for paying individual and corporate tax liabilities for 90 days after April 15. Under the guidance, individuals can defer up to $1 million of tax liability and corporations can receive an extension on up to $10 million. The guidance, however does not extend the April 15 tax-filing deadline. The government's announcement did not address 2020 estimated tax payments, payroll taxes, or estate and gift taxes. We hope that additional guidance and leniency will be forthcoming.

1. **Paid Time Off:** Employers providing employees with paid time off (for example, pay during a mandatory or voluntary quarantine) should check the definition of eligible compensation in retirement plan documents to determine whether that pay is included in eligible compensation for purposes of elective deferrals and employer contributions. If paid time off is considered eligible compensation, employers will need to continue to take deferrals from employees' paychecks in accordance with their elections; employees still will be able to change their elections as permitted under plan documents. Employers might want to consider reminding soon-to-be-absent employees that they can cease their deferrals pursuant to the plan's regular processes should they decide that they cannot afford those deductions.

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2. **Loan Repayment Suspensions:** Sponsors with retirement plans that allow participant loans should check the plan's loan policy to determine whether loan repayments are suspended during certain leaves of absence. Under current rules, a plan may, but is not required to, suspend a participant's loan repayments for up to one year during a leave of absence that is either unpaid or paid (but only where the rate of pay after applicable withholding is less than the installment payment required under the terms of the loan). If the loan policy does not currently allow suspensions, employers might want to consider amending the policy at this time. Also, it is possible that the IRS and DOL may announce administrative relief similar to relief issued in response to certain natural disasters. If issued, it may relax the rules for making plan loans and other distributions.

3. **Hardship Distributions and Other Retirement Plan Concerns:** The impact of COVID-19 surely will result in serious financial difficulties for many individuals whose employment is terminated or whose work hours are reduced. Participants in retirement plans that permit hardship withdrawals likely will reach out for guidance on whether their circumstances would permit a hardship withdrawal from their employer's retirement plan (assuming that they are not terminated and eligible for a distribution due to their termination of employment). Most 401(k) and other retirement plans restrict hardship distributions to the IRS "safe harbor" events. The safe harbor definition of permissible hardship expenses includes expenses for medical care (for the employee, employee's spouse, dependents and primary beneficiary) if the medical expense would be deductible under Code Section 213(d). The safe harbor definition also includes expenses and losses incurred by the employee as a result of a FEMA-declared disaster. As of the date of this advisory, FEMA has not yet declared COVID-19 a disaster. Employers should monitor FEMA's declarations for hardship distribution purposes. Note that the recently declared national emergency does not constitute a FEMA disaster declaration.

4. **Possible Partial Plan Termination Resulting from Layoffs:** Employers grappling with depressed business activity who are considering layoffs and employee terminations should remember the IRS rules on partial plan terminations applicable to retirement plans (including 401(k) plans). If a partial plan termination occurs due to layoffs or employee terminations (generally, when 20 percent or more of the eligible employees are terminated or laid off), IRS regulations require the retirement plan to 100 percent vest all participants who are affected by the partial plan termination. These rules are complex, so consultation with your benefits attorneys is advised.

5. **Retirement Plan Investments and Fiduciary Duties:** The COVID-19 outbreak has caused turmoil in the markets and posed unique financial challenges to plan sponsors and participants. Responsible fiduciaries of a 401(k) or other retirement plan should keep their fiduciary duties in mind in these uncertain times—in particular, their duties of prudence, diversification of plan assets, compliance with plan terms, and ensuring payment of reasonable plan expenses. Since the DOL and courts generally look to process over outcome, plan fiduciaries should be sure to carefully document their steps in monitoring the retirement plan's investments and responding to the

evolving situation, as well as the process behind any actions they take. Fiduciaries seeking guidance in the current climate may wish to consider the following:

- Contact your plan's investment advisor or other financial experts. This is the time to ask questions, utilize all of the resources at your disposal, and listen to expert advisors regarding investment performance, strategy, and short-term and long-term market outlook prior to making any decisions with respect to the plan or communicating with participants. The situation is rapidly evolving, so regular monitoring of plan assets and investments is important. Fiduciaries are required to use the same care, skill, prudence, and diligence as a prudent individual acting under similar circumstances, so ask your plan experts what they are seeing across their clientele at large.
- Keep the lines of communication open. This means regularly communicating with your plan's investment experts and third party administrator, and potentially holding more frequent retirement committee meetings to reassess the current conditions and any required responses. Participant communication may also be reassuring in a time of financial anxiety, although plan sponsors need to be careful in the message that they send, particularly if it contains any financial advice. The plan's third-party administrator and/or investment advisor may be able to assist with the creation and dissemination of participant communications.
- Review plan documents, including the investment policy statement (IPS). Any actions (or lack thereof) taken in response to the current situation must comply with the terms of your plan documents and any service and vendor agreements. In particular, plan sponsors must be sure that they continue to administer the plan according with its terms and paying only reasonable plan expenses. If your plan has adopted an IPS, investment decisions should be made consistently with the guidelines contained within that document.

Our Employee Benefits Group, working remotely, is monitoring the COVID-19 situation closely and is available to discuss any concerns employers may have.