

COMPLIANCE RECAP

What every HR leader should know about compliance.

AUGUST 2020



August was a relatively busy month in the employee benefits world.

The Congressional Research Service (CRS) released an updated report on health savings accounts (HSAs) that summarizes the principal rules governing HSAs and changes made to HSAs as a result of the COVID-19 pandemic. The Department of Health and Human Services Office for Civil Rights (OCR) issued amended guidance allowing health plans to use protected health information (PHI) to contact individuals who have recovered from COVID-19 regarding donating blood plasma.

A federal district court invalidated certain provisions of the regulations implementing the Emergency Family Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA) under the Families First Coronavirus Response Act (FFCRA). The U.S. Supreme Court announced the date for oral arguments in the court case challenging the constitutionality of the ACA.

The Small Business Administration (SBA) released frequently asked questions (FAQs) on the Paycheck Protection Program (PPP) that, among other items, addresses which group health plan costs are considered payroll costs that are eligible for loan forgiveness. President Trump issued an executive order and memoranda that provide or extend COVID-19 relief to individuals and businesses.

The Internal Revenue Service (IRS) released leave sharing plans FAQs noting that an employer may set up a leave sharing plan that permits employees to deposit leave in an employer-sponsored leave bank. The Department of Labor (DOL) released a proposed rule on fiduciary investment duties under ERISA.

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Federal District Court Vacates Certain Provisions of the DOL FFCRA Leave Rules

On August 3, 2020, the U.S. District Court for the Southern District of New York (court) [invalidated](#) certain provisions of the regulations implementing the Emergency Family Medical Leave Expansion Act (EFMLEA) and the Emergency Paid Sick Leave Act (EPSLA). The court invalidated the work-availability requirement, the definition of “health care provider”, the requirement that an employee secure employer consent for intermittent leave, and the requirement that the employee requesting leave provide documentation before taking leave.

The court’s decision did not specifically limit the scope of its ruling, so employers nationwide should consult with their attorneys regarding providing and denying leave for employees under the FFCRA that does not comply with the court’s ruling. Employers should stay apprised of future developments including any potential appeals or new guidance or regulations from the DOL.

As background, the DOL released regulations implementing the EFMLEA and the EPSLA provisions under the FFCRA. The EFMLEA provides qualifying employees with paid sick leave during the COVID-19 crisis to care for a child absent from school due to school closure or childcare unavailability. The EPSLA provides employees with paid sick leave for self-care and family care due to possible COVID-19 contraction and exposure, as well as paid childcare leave.

The regulations are effective April 1, 2020, through December 31, 2020, which corresponds to the effective and sunset dates for the FFCRA. The regulations were issued by the DOL to provide immediate guidance prior to the publication of the FFCRA final regulations and have the force of law.

Read more about the FFCRA leave rules and the court ruling in our Compliance Advisors: Families First Coronavirus Response Act Leave Department of Labor Temporary Regulations – [Part I](#), [Part II](#), and [Part III](#).

CRS Releases an Updated HSA Report

The CRS released an updated [report](#) on HSAs that summarizes the principal rules governing HSAs. The report covers matters such as eligibility, qualifying health insurance, contributions, withdrawals, and tax advantages. The report includes changes made to HSAs as a result of the COVID-19 pandemic. The report also includes a discussion of HSA data limitations and recent trends in high deductible health plan (HDHP) enrollment and HSA utilization.

IRS Releases Leave Sharing Plans FAQs

The IRS released [Leave Sharing Plans FAQs](#), noting that an employer may set up a leave sharing plan that permits employees to deposit leave in an employer-sponsored leave bank for use by other employees who have been adversely affected by the COVID-19 pandemic.

SBA Issues PPP FAQs

The SBA issued PPP [FAQs](#) that provide further guidance on the PPP loan program. The FAQs address various topics including the loan forgiveness application, payroll costs that are eligible for loan forgiveness, nonpayroll costs that are eligible for loan forgiveness, and loan forgiveness reductions.

Regarding group health plan costs, employer expenses for employee group health care benefits that are paid or incurred by the employer during the loan Covered Period (or the Alternative Payroll Covered Period) are payroll costs that are eligible for loan forgiveness. The FAQs state that payroll costs do not include expenses for group health care benefits paid by employees (or beneficiaries of the plan) either pre-tax or post-tax. Therefore, the employee share of their premium is not considered payroll costs that are eligible for loan forgiveness. Loan forgiveness is not provided for expenses for group health benefits accelerated from periods outside the Covered Period or Alternative Payroll Covered Period. If an employer has an insured group health plan, insurance premiums paid or incurred during the Covered Period or Alternative Payroll Covered Period qualify as “payroll costs,” as long as the premiums are paid during the applicable period or by the next premium due date after the end of the applicable period.

DOL Releases Proposed Rule on Fiduciary Investment Duties Under ERISA

The DOL released a [proposed rule](#) and [fact sheet](#) to amend the “Investment duties” regulation that applies to ERISA fiduciaries under the duty of prudence. The proposed rule, if finalized, would affect ERISA-covered pension, health, and other welfare plans that hold shares of corporate stock. The proposed rule would not apply to plans that hold stock through registered investment companies.

The proposed rule provides, among other provisions, a list of obligations that fiduciaries must comply with when making decisions on exercising shareholder rights including:

- Acting solely in accordance with the economic interest of the plan and its participants/beneficiaries
- Considering the impact on the investment performance of the plan based on the plan’s holdings in the issuer relative to the total investment assets of the plan, the plan’s percentage ownership of the issuer, and the costs involved
- Not putting the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan below any non-pecuniary objective or sacrifice investment return or take on additional investment risk to promote goals unrelated to the financial interests of the plan’s participants and beneficiaries or the purposes of the plan
- Investigating material facts that form the basis for any particular proxy vote or other exercise of shareholder rights
- Maintaining records on proxy voting activities and other exercises of shareholder rights, including records that demonstrate the basis for particular proxy votes and exercises of shareholder rights
- Exercising prudence and diligence in the selection and monitoring of persons selected to advise or otherwise assist with exercises of shareholder rights

OCR Issues Amended HIPAA Plasma Donation Guidance for Health Plans

OCR issued amended [guidance](#) on how the HIPAA Privacy Rule permits covered health care providers and health plans to use PHI to contact their patients and beneficiaries who have recovered from COVID-19 to inform them about how they can donate their plasma containing antibodies (known as "convalescent plasma") to help treat others with COVID-19. OCR added health plans to the June 2020 guidance that explains how HIPAA permits covered health care providers to identify and contact patients and beneficiaries who have recovered from COVID-19 for individual and population-based case management or care coordination.

The guidance also emphasizes that, without individuals' authorization, the providers and health plans cannot receive any payment from, or on behalf of, a plasma donation center in exchange for such communications with recovered individuals.

President Issues Executive Order and Memoranda on COVID-19 Relief

President Trump issued an executive order and memoranda that provide or extend COVID-19 relief to individuals and businesses.

Under the [Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019](#), President Trump directs the Federal Emergency Management Agency (FEMA) to make available benefits from the Disaster Relief Fund and directs states to use their Coronavirus Relief Fund allocation to provide relief to unemployed Americans affected by COVID-19 through a \$400 payment per week until the earlier of balance of the DRF reaches \$25 billion or for weeks of unemployment ending not later than December 6, 2020.

Under the [Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster](#), President Trump directs the withholding, deposit, and payment of an employee's portion of the Social Security Administration tax to be deferred during the period of September 1, 2020, through December 31, 2020. The deferral will be available for any employee whose wages or compensation payable during any bi-weekly pay period is generally less than \$4,000 (or equivalent amount with respect to other pay periods). The IRS issued a [notice](#) that provides further guidance on this Memorandum.

Under the [Executive Order on Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners](#), President Trump directs the Department of Health and Human Services (HHS), Centers for Disease Control (CDC), Housing and Urban Development (HUD), and the Treasury to consider taking actions (such as halting evictions of tenants for failure to pay rent and helping homeowners avoid foreclosure due to financial hardship) to minimize residential evictions and foreclosures during the COVID-19 national emergency.

Under the [Memorandum on Continued Student Loan Payment Relief During the COVID-19 Pandemic](#), President Trump directs the Department of Education to effectuate waivers and modifications to the requirements and conditions of economic hardship deferments and provide deferments as necessary to continue the temporary cessation of payment and the waiver of interest on student loans until December 31, 2020.

U.S. Supreme Court Announces Date for Oral Arguments on the ACA Constitutionality Case

The U.S. Supreme Court announced the [schedule](#) for its October 2020 term, which includes oral arguments in the court case challenging the constitutionality of the ACA on Tuesday, November 10, 2020.

[Read more](#) about the court case challenging the constitutionality of the ACA.

QUESTION OF THE MONTH

Q: When must an employer provide a Medicare Part D creditable coverage disclosure to an individual?

A: Entities that provide prescription drug coverage through a group health plan must provide a Medicare Part D creditable coverage disclosure to all plan participants that are eligible for Medicare Part D coverage. If an employee and an employee's spouse or dependents are covered under the same plan, a single notice is sufficient for the eligible individual and the individual's family. However, if an employer knows that a spouse or dependent is Part D eligible and has a different address, the employer is obligated to send a separate notice to the spouse or dependent.

Disclosures to individuals must be made:

1. Prior to the Medicare Part D Annual Coordinated Election Period (ACEP) which runs from October 15 through December 7 of each year
2. Prior to an individual's Initial Enrollment Period (IEP) for Medicare Part D
3. Prior to the effective date of coverage for any Medicare eligible individual that joins the plan
4. Whenever the entity no longer offers prescription drug coverage or changes the coverage offered so that it is no longer creditable or becomes creditable
5. Upon request by the individual

If the creditable coverage disclosure notice is provided to all plan participants annually, prior to October 15 of each year, CMS will consider items 1 and 2 above to be met.