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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Biggest Benefits Policy Developments Of 2019

By **Emily Brill**

Law360 (December 19, 2019, 4:02 PM EST) -- The biggest benefits policy developments of 2019 arrived in the second half of the year, with lawmakers greenlighting a new type of retirement plan and repealing a tax on blue-chip health plans, and the U.S. Department of Labor taking steps toward allowing employers to send all retirement plan disclosures electronically.

The biggest executive compensation policy development also skidded in right before the year's end, arriving Dec. 16 when the IRS issued proposed regulations clarifying which companies must limit the amount of executive pay they write off during tax season.

Here, Law360 breaks down 2019's most exciting regulatory and legislative developments in the world of employee benefits and executive compensation.

Congress Passes The SECURE Act

Right as the year ended, Congress allowed financial institutions to sell a new type of retirement plan: the open multiple-employer plan.

Federal lawmakers also repealed three taxes that had been mandated by the Affordable Care Act: the 2.3% medical device excise tax, an annual fee on insurers known as the health insurance tax, and — of chief importance to benefits attorneys — a 40% excise tax on high-cost health insurance plans.

Congress did this by appending a blockbuster benefits bill to the federal government spending bill, which passed Thursday.

That bill — the SECURE Act — awarded a double win to corporations, allowing them to create a cushy health insurance plan for their executives without paying a 40% tax and offering them a new, potentially less expensive retirement plan option.

It's a win for the financial services industry, too, which will be able to create and sell the "open MEP" product over the coming year.

Multiple-employer plans already exist, but the open MEP is something new. MEPs allow employers who share some sort of tie — they work in the same geographical region, for example — to band together and create a single retirement plan for all of their workers.

Open MEPs would allow many employers who don't share a tie to join a single retirement plan. A financial institution could create and sell an open MEP, which must be structured as a defined-contribution plan like a 401(k), and any company could buy in. The financial institution, then, would be the named fiduciary, not the employer, according to Joshua A. Lichtenstein, a partner at Ropes & Gray LLP.

“In a post-SECURE Act world, you can imagine companies offering 401(k) plans in a way that’s almost the way a medical plan is offered,” Lichtenstein said. “The plan sponsor will retain overall responsibility for monitoring the plan provider, but the plan provider will be the named fiduciary to the plan — not just administering the plan, but actually taking responsibility for the investment menu design.”

This outcome would reduce employers’ administrative burden, according to Lichtenstein.

“It’s a big help to employers. Maintaining a 401(k) plan is difficult, even if you have a very competent recordkeeper that’s handling most of the tasks behind the scenes,” Lichtenstein said.

The “open MEP” is the furthest extension of a retirement plan concept that took its first steps toward becoming a reality this summer, through the DOL’s association retirement plan rule. That rule, finalized in July, relaxed the requirements on employers who sought to band together to offer a single retirement plan.

DOL Publishes Long-Awaited Electronic Disclosure Rule

Christmas came early for corporations looking to limit their benefits costs this year. In October, the U.S. Department of Labor gave companies something they’d long had on their wish lists: a rule allowing employers to email retirement plan disclosures instead of mailing them.

Employers with computer-based workforces are already allowed to email their plan disclosures, but all other companies have to send them through snail mail. That will change if the DOL’s electronic disclosure rule becomes final.

“Employers have wanted this for a very long time,” Lichtenstein said. “The administrative burden of sending out the mailings is very high.”

Employers praised the DOL for taking steps to “modernize” its disclosure policy, but the proposal faced pushback among workers’ advocates who worried it would limit many workers’ access to benefits information.

“Let’s say you’re a laborer, and you don’t have a computer at home, you have an old flip phone. Are you going to take a trip to the public library, which is probably miles away, and sit there in a public setting and look at your personal financial information in a public library?” asked Karen Ferguson, the director of the Pension Rights Center. “You’re not going to take the time.”

Ferguson also balked at the fact that the proposal allows companies to house plan documents on a website, then replace old disclosures with new ones.

“How can you compare how your benefits are doing now versus a few years ago?” Ferguson asked. “How do people get the information they need to know — what their rights are, how much they’ve earned, how well their money is being managed?”

Management-side attorneys said they doubt the worker-side pushback will tank the electronic disclosure rule. They also questioned the notion that the rule makes plan documents harder to access.

“From the plan sponsor side, there’s a very different view about the rule. If anything, we feel it’s very helpful to plan participants,” said Elizabeth S. Goldberg, an associate at Morgan Lewis & Bockius LLP. “If you lose a piece of paper, it’s gone forever, but this will be online forever.”

David Levine, a partner at Groom Law Group, said emailing documents allows employers to reach workers even if their physical addresses change, reducing the risk of benefit plan participants going "missing."

"In the economy now, when people are moving more often than they used to, plans can lose track of them," Levine said. "Your email address is more of an anchor than your physical address."

The deadline for submitting public comments on the electronic disclosure rule was Nov. 22.

IRS Releases Proposed 162(m) Regs

2019 was a relatively slow year for executive compensation policy — that is, until its final weeks, attorneys say.

In mid-December, the IRS took the first step toward clarifying which corporations must limit their tax write-offs of executives’ pay to the first $1 million of C-suite salaries.

Companies used to be able to write off their executives’ entire salaries for tax purposes, as long as the compensation was classified as performance-based. Congress forbade that practice in 2017 through the Tax Cuts and Jobs Act, but a grandfathering provision allowed certain companies to keep doing it.

The IRS was tasked with interpreting the grandfathering provision, but it didn’t issue regulations on the subject until now. Instead, it had issued a piece of initial guidance, which carries less weight than a regulation, in 2018.

“The prior guidance under the tax reform was a notice — 2018-68 — and now it’s a proposed regulation,” said Andrew E. Shapiro, a member of Epstein Becker Green’s employee benefits and executive compensation practice. “It definitely goes into more detail on the rules and requirements of the new [Internal Revenue Code] Section 162(m). It will supersede the notice once the proposed regulations are finalized, and clarify who’s a covered employee and which corporations are subject to the requirement.”

Early reaction to the proposed regulations was either muted, as executive compensation lawyers digested the 129-page proposal, or negative, as attorneys honed in on language that made Notice 2018-68’s more unsavory sections official.

Attorneys from Winston & Strawn LLP and Covington & Burling LLP wrote in blog posts that the regulation codifies the IRS’ broad interpretation of who’s covered by the 162(m) changes.

“To corporations hoping for a holiday reprieve from the IRS’s narrow interpretation of the grandfathering rules included in the Tax Cut and Jobs Act amendment of section 162(m), the IRS has said ‘Bah… Humbug!,’” Covington & Burling attorneys S. Michael Chittenden, Marianna G. Dyson and Michael M. Lloyd wrote.

Michael S. Melbinger, a partner at Winston & Strawn, called the proposal “mostly bad news.”

The regulations establish that once an employee’s compensation has been deemed subject to the $1 million tax write-off limit, that employee will always be subject to that limit.

The regulations also address which executives are covered by the limit, and which corporations can ignore the 2017 162(m) changes.

“The proposed regulations address important definitional issues such as which companies will be considered a ‘publicly held corporation’ and which employees will be ‘covered employees’ under the new, expanded definitions included in the TCJA,” said James E. Earle, a partner at Troutman Sanders LLP.

The IRS is accepting public comments on the regulations until Feb. 18 and intends to hold a public hearing on the proposal on March 9.

--Additional reporting by Dylan Moroses and Amy Lee Rosen. Editing by Emily Kokoll and Marygrace Murphy.

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