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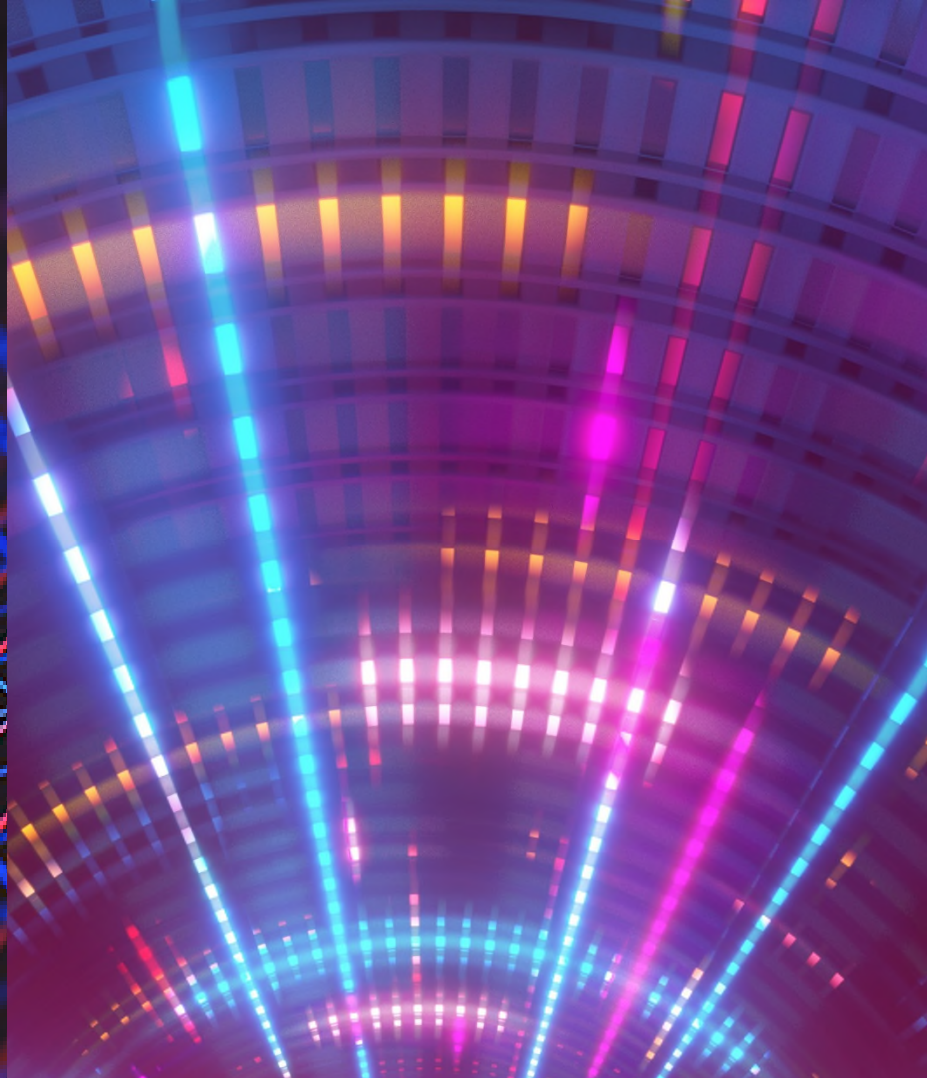
NEXT.

**THE LIGHTS ARE
BACK ON**

**Benefits and Compensation
Challenges in a Return to
Work Environment**

Althea Day, Randy Tracht, and
Jonathan Zimmerman | June 23, 2020

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Presenters



Althea Day



Randy Tracht



**Jonathan
Zimmerman**

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Agenda

- Workforce Change and Severance Plans | Randy Tracht
- Fringe Benefit and Payroll Tax Issues | Jonathan Zimmerman
- Retirement Plan Issues | Althea Day and Randy Tracht
- Executive Compensation Considerations | Althea Day
- Health and Welfare Plans: Extended ERISA Deadlines, Permitted Election Changes, and Extended Claims Periods | Jonathan Zimmerman

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Workforce Change and Severance Plans

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Workforce Change and Severance Plans



Workforce Change

As employers reopen, return to work, or otherwise restructure to address the new economic environment, workforce change is a constant



Workforce Reduction

Many employers are considering approaches for reducing their workforce through voluntary or involuntary separation programs (or a combination of both)



Implementation

In implementing these reductions, employers may need to review, evaluate, or potentially update their severance plans, policies, and programs

Severance Plan Considerations

Different approaches to severance plans

- Informal practice or custom of providing severance in certain situations without a specific severance policy or document
- Formal ERISA-covered severance plans with a written plan document and detailed descriptions of severance pay/benefits and the qualifying events giving rise to severance pay/benefits

Threshold decision – ERISA or Not ERISA

This decision is not entirely a matter of choice:

- ERISA's plan definition includes "any plan, fund or program. . ." established by an employer to provide certain benefits, *including* severance benefits
- Courts have interpreted this to find an ERISA plan whenever there is an "ongoing administrative scheme"
- One-time, lump-sum payments may not meet this standard
- Programs that are generally available over time, provide installment payments, provide for employer discretion in determining benefits, etc., may meet this standard *even if the arrangement is not in writing or formally treated as an ERISA plan*

Severance Plan Considerations (cont.)

Reasons to embrace ERISA status and maintain formal severance plan

Employers can avoid uncertainty and risk of being held accountable to provide same types and amounts of severance pay/benefits provided in other situations

1. Employers can establish discretion in eligibility and benefit determinations (severance benefits are not vested under ERISA)
2. Employers can establish a clear right to amend or terminate severance benefits

Employers can take advantage of and establish favorable procedural rules for resolving claims and handling disputes

1. ERISA preemption of state laws (e.g., breach-of-contract claims, wage-payment laws, etc.) relating to the payment of severance benefits
2. No jury trial
3. Administrative claims and appeals procedure for resolving disputes

4. Claims determinations potentially subject to deference
5. Ability to include other potentially favorable litigation-management provisions (venue, statute of limitations, etc.)

Severance Plan Considerations (cont.)

Perceived disadvantages to ERISA status

- Obligation to establish and maintain a written plan document
- ERISA's reporting and disclosure requirements—notably, Form 5500 annual filings and obligation to distribute “Summary Plan Description”
- Loss of flexibility in providing (or not providing) severance

Release and Waiver (R&W)

Permissible for severance plan to make benefits contingent on a release and waiver of claims subject to the considerations

R&W Considerations

Rapidly evolving legal landscape for releases—important to periodically review and update model release language

R&W Considerations

Release of age-discrimination claims raises special considerations under the Older Worker Benefit Protection Act (esp. for “group” terminations)

Other Severance Plan Considerations

Age and Service Eligibility

Be careful of severance arrangements with age and service eligibility requirements (e.g., age 65 and 10 years of service) that may look more like a retirement plan

Section 409A

Severance plans and releases should be reviewed for compliance with Internal Revenue Code (IRC) Section 409A deferred compensation rules and requirements—exceptions are available, but careful drafting and administration are still important

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Fringe Benefit and Payroll Tax Issues

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OVERVIEW

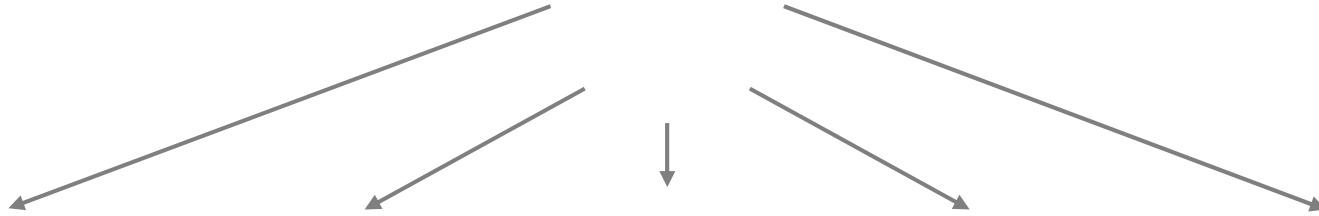
CARES Act

1 6.2% Payroll Tax Deferral

2 Employee Retention Credit

CARES Act: 6.2% Payroll Tax Deferral (§ 2302)

Employers may delay payment of 100% of the employer share of Social Security tax (6.2%) on wages where such taxes are due between March 27, 2020 and January 1, 2021



Deadline for paying 50% of deferred taxes is December 31, 2021

Deadline for paying the remaining 50% is delayed until December 31, 2022

These delay provisions are available regardless of workforce size

May be claimed in addition to the employee retention credit

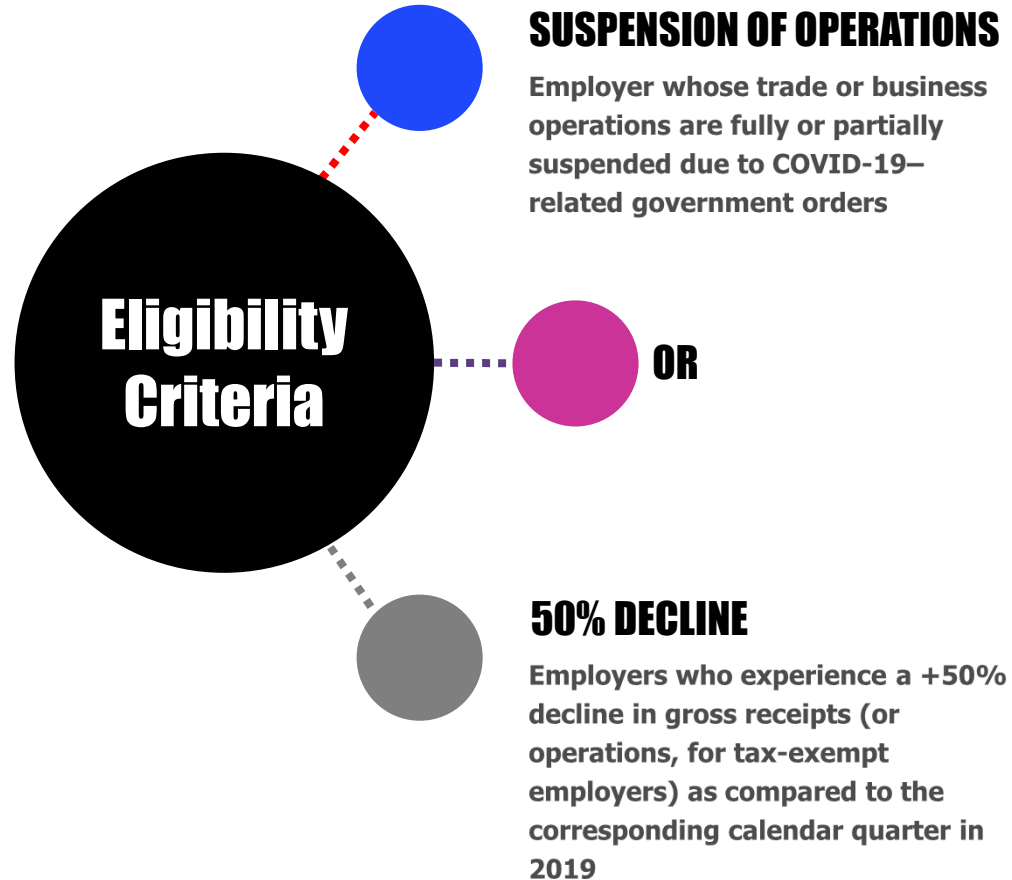
This deferral was not originally available after an employer's PPP loan was forgiven, but the Paycheck Protection Program Flexibility Act removed this restriction

CARES Act: 6.2% Payroll Tax Deferral (§ 2302) (cont.)

- Most employers have used or will use this deferral
- Under current guidance, it is not possible to defer taxes that have already been paid
- Initially, the IRS indicated informally that the deferral could be claimed against other taxes in Q2 2020
 - In draft Form 941 instructions issued in early May (after the Q1 return was filed), the IRS said that no credits or refunds would be allowed for taxes already paid
 - The American Bar Association (ABA) has complained about this harsh conclusion, but no change in the draft instructions has yet been issued by the IRS

CARES Act Retention Credit (§ 2301)

Provides up to \$5,000 in refundable tax credits for qualified wages paid to employees by an eligible employer who meets these eligibility criteria



CARES Act: Retention Credit (§ 2301) (cont.)

- The retention credit applies to 50% of “qualified wages” (capped at \$10,000, for a maximum credit of \$5,000) paid between March 13, 2020 and Dec. 31, 2020
 - For employers with more than 100 full-time employees in 2019 (determined using the Affordable Care Act's 30-hour/week measure), "qualified wages" available for tax credit include wages paid (including health benefits) to employees who are not providing services due to the circumstances that triggered the employer's eligibility for the credit
 - For employers with 100 or fewer full-time employees in 2019, "qualified wages" available for a tax credit include wages paid (including health benefits) to all employees, regardless of circumstance
 - Aggregation rules apply to identify whether an employer has more than 100 employees

CARES Act: Retention Credit (§ 2301) (cont.)

- The retention credit is a fully refundable credit against the employer share of Social Security tax (6.2%), though it may be claimed through offset of other employment taxes (employer Medicare, employee Medicare, employee Social Security, employee federal income tax withholding) or advanced from the IRS via Form 7200
- Employers will report claims for credit on qualifying retention wages paid during Q1 (March 13–March 31) on the Q2 Form 941
- Employers also can choose to pay the taxes up front and file a refund claim
- Employers taking a CARES Act section 1102 Small Business Administration (SBA) loan are not eligible to claim the CARES retention credit
- Importantly, this rule prohibiting claims of the Employee Retention Credit (ERC) applies if any entity in the aggregated group obtained an SBA loan
- For current guidance on the retention credits, see:
<https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>.

Retention Credit FAQs: The Good, the Bad, and the Ugly

- On April 29, 2020, the IRS issued 94 FAQs on the CARES Act Retention Credit
 - **FAQ 64 and 65** denied any credit if an employer had furloughed workers without pay — which was an onerous result for the industries that had tried, at least, to continue health benefits
 - This proposal was changed on May 7, 2020, with the release of new FAQs allowing the credit even if wages were not paid
 - **FAQ 33** denies the credit to any employer that is able to continue operations by having employees telecommute—which contradicts the example in the Joint Committee on Taxation (JCT) report
 - **FAQs 56 and 57** deny any credit for employers of more than 100 employees for any leave payments (including sick and family leave) and for severance payments, even where the employer was not required by law or contract to make those payments. Nonleave payments to continuing employees unable to work still count, but without much guidance on the difference between furlough and severance

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Retirement Plan Issues

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CARES Act Defined Contribution Retirement Plan Features

The CARES Act contains a number of provisions impacting 401(k) and other retirement plans:

- Enhanced **ACCESS** to retirement savings
- Temporary **DELAY** of certain required actions
- It's **OPTIONAL!**

Key features of the CARES Act that plans can make available to "Qualified Individuals" include:

- **Coronavirus Distributions**
 - Distributions of up to \$100,000
 - Favorable tax treatment
 - Only for 2020
- **Coronavirus Loans**
 - Doubles maximum plan loan to \$100,000 or 100% of account
 - Only until September 22, 2020
- **Suspended Plan Loan Repayments for 2020**
- **Suspended Required Minimum Distributions for 2020**

Definition of "Qualified Individual" for these features is an individual:

- **Afflicted with Coronavirus:** an individual who is diagnosed, or whose spouse or dependent is diagnosed, with COVID-19 using a CDC-approved test; or
- **Adverse Financial Consequence:** an individual who experiences (or whose spouse or another member of the individual's household experiences) adverse financial consequences because of an inability to work due to quarantine, furlough, layoff, reduced hours, reduced pay, loss of childcare, a rescinded job offer, a delayed start date for a job, or the closing or reduction of hours of a business owned or operated by the individual because of COVID-19
- **Self-Certification Permitted**

Hardship Withdrawals (not CARES Act)

Existing 401(k) rules allow hardship withdrawals for “immediate and heavy financial needs” including expenses and losses stemming from a disaster:

“provided that the employee’s principal residence or principal place of employment at the time of the disaster was located in an area designated by FEMA for individual assistance with respect to the disaster.”

COVID-19 pandemic declared a nationwide disaster, but:

- FEMA has not designated all states as eligible for “individual assistance”
- New York, Washington, California, Massachusetts, etc., are eligible for individual assistance, but declarations not uniform across the country

Some uncertainty about whether the individual assistance designated by FEMA (FEMA’s individual “Crisis Counseling Program”) qualifies for these purposes

FEMA designates crisis counseling as individual assistance, but it’s not traditional financial individual assistance

Suspension of Retirement Plan Contributions



Many employers are considering the temporary suspension of employer-provided retirement plan contributions

In many instances, ongoing and periodic employer contributions can be suspended prospectively with nothing more than a plan amendment

However, suspending contributions in a so-called “safe harbor” 401(k) plan raises special issues and considerations

Other types of annual employer contributions that are contingent upon satisfying certain conditions may raise special issues and considerations

CARES Act Defined Benefit Retirement Plan Features

Permits plan sponsors to delay making minimum required contributions due in the 2020 calendar year

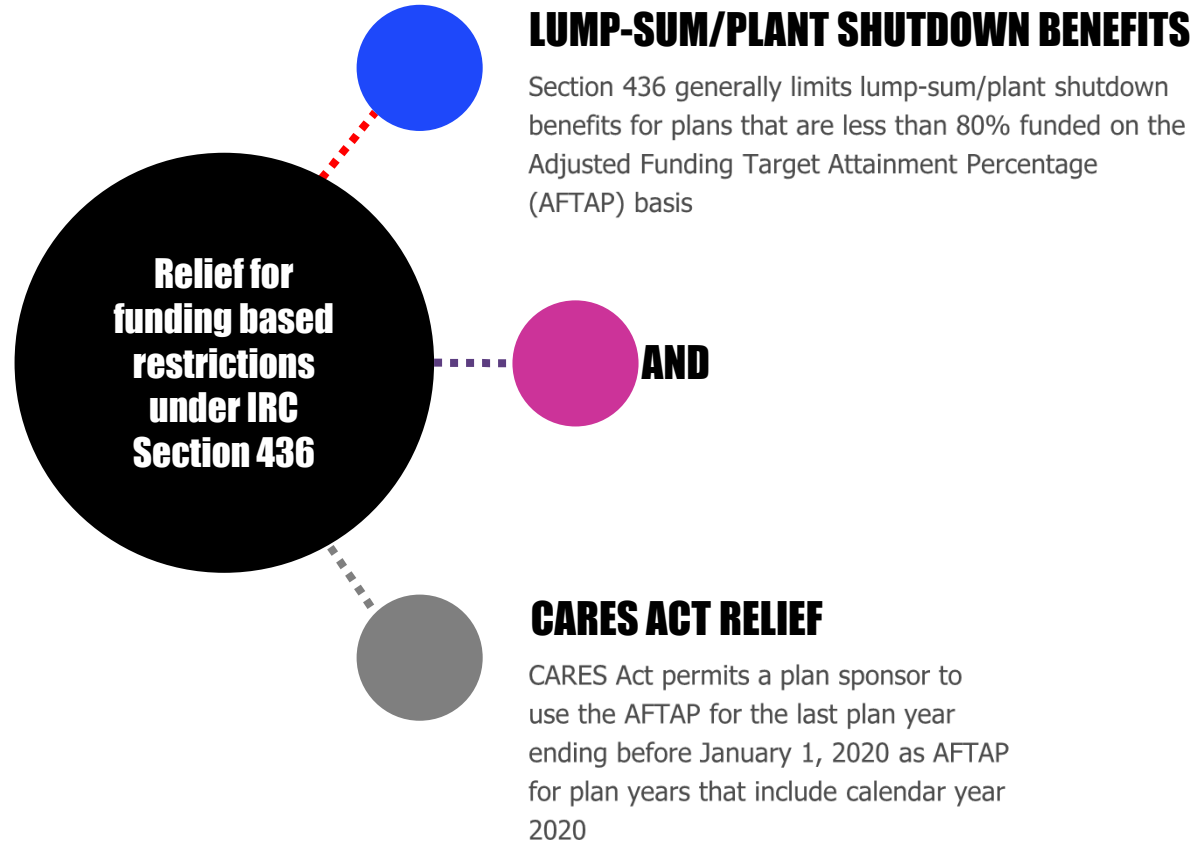
- Payment due date deferred until January 1, 2021, regardless of year to which they relate
- Deferred payments can include amounts due in 2020 for the 2019 plan year
 - Interest will accrue on deferred amounts using plan's effective rate of interest for the plan year that includes the payment date
- Need IRS guidance
 - Application for noncalendar-year plans
 - How will delayed contributions be taken into account for Form 5500 Schedule SB reporting?
 - Deductibility of delayed contributions

CARES Act Defined Benefit Retirement Plan Features (cont.)

Other considerations in delaying defined benefit plan contributions

- Impact on Pension Benefit Guaranty Corporation (PBGC) premiums due in 2020 related to delayed 2019 contributions
- Financial accounting issues?

CARES Act Defined Benefit Retirement Plan Features (con't)



Other Defined Benefit Plan Considerations

- Partial plan terminations/reductions in active participants
 - Vesting
 - PBGC reportable event if the number of active participants is reduced below 80% of number at beginning of year
- Plant-closing considerations
 - ERISA 4062(e) liability arises when a "substantial cessation of operations at a facility" occurs, meaning that operations at a facility permanently cease, resulting in a workforce reduction of more than 15 percent of eligible employees
 - PBGC notice required

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Executive Compensation Considerations

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Base Salary



Reductions

Temporary reduction of
base salary



Deferrals

Deferral of a portion of
base salary to a later tax
year



Equity exchange

Exchange stock for base
salary

Annual Bonus/Long-Term Incentive Bonus

Setting performance goals

If performance goals have not been set, can typical performance goals be adjusted to take into account the pandemic's impact on the business?

Adjusting existing performance goals

Can existing performance goals be adjusted in light of the pandemic, with adjustments to performance metrics or changes to applicable goals?

Deferring payment

Can bonus payment be deferred to a later tax year?



Equity Grants Considerations

STOCK OPTIONS

- Timing of grants
- Valuation
- Repricing
- Modifications

RESTRICTED STOCK

- Timing of grants
- Changes to vesting period
- Section 83(b) elections

RESTRICTED STOCK UNITS

- Timing of grants
- Changes to conversion date
- Deferral of delivery of shares

Employment/Severance Arrangements

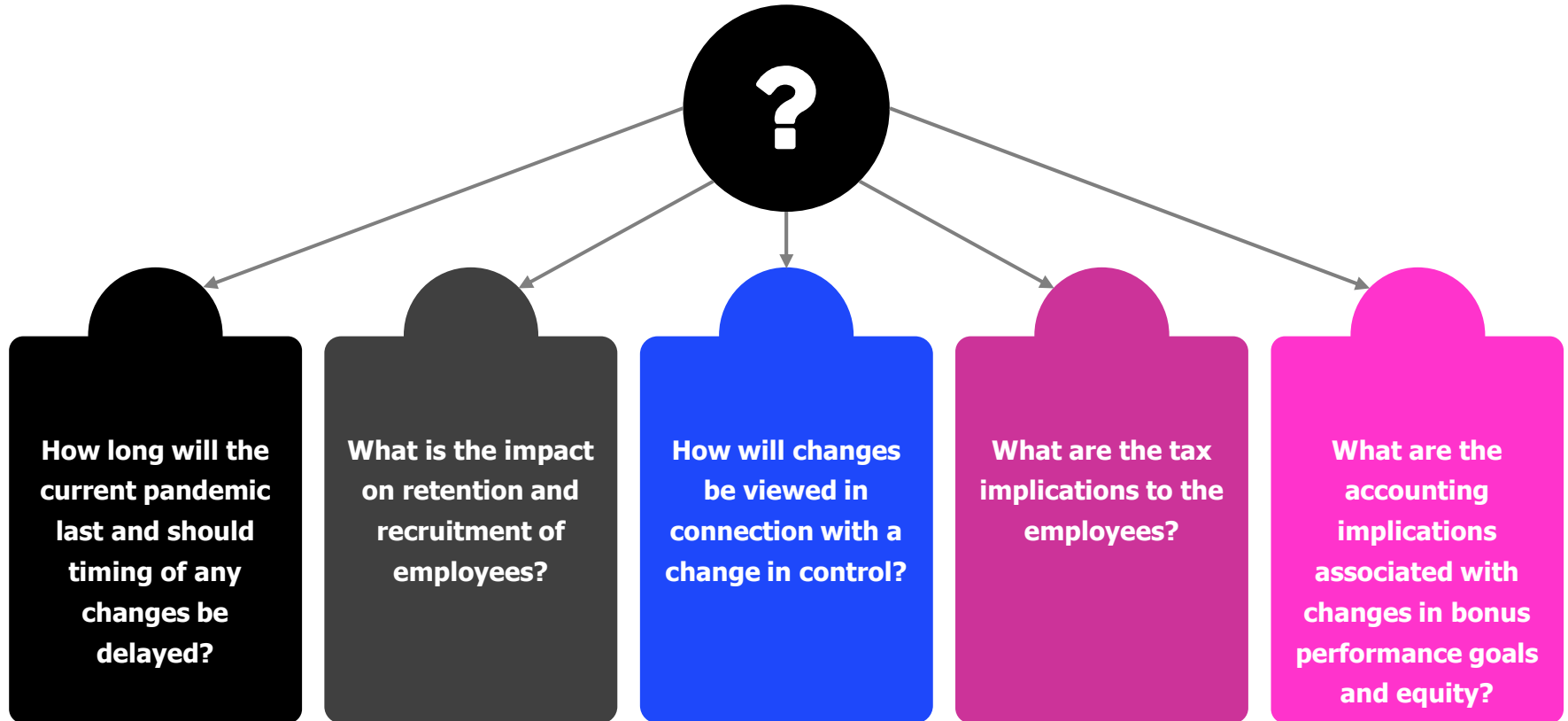
Change to Employment Terms

Any reductions in compensation (base salary, bonus, equity) may conflict with terms of existing agreements with employees

Severance Arrangements

The impact on changes in compensation will need to be taken into account in connection with any terminations while the change is in effect

Additional Considerations



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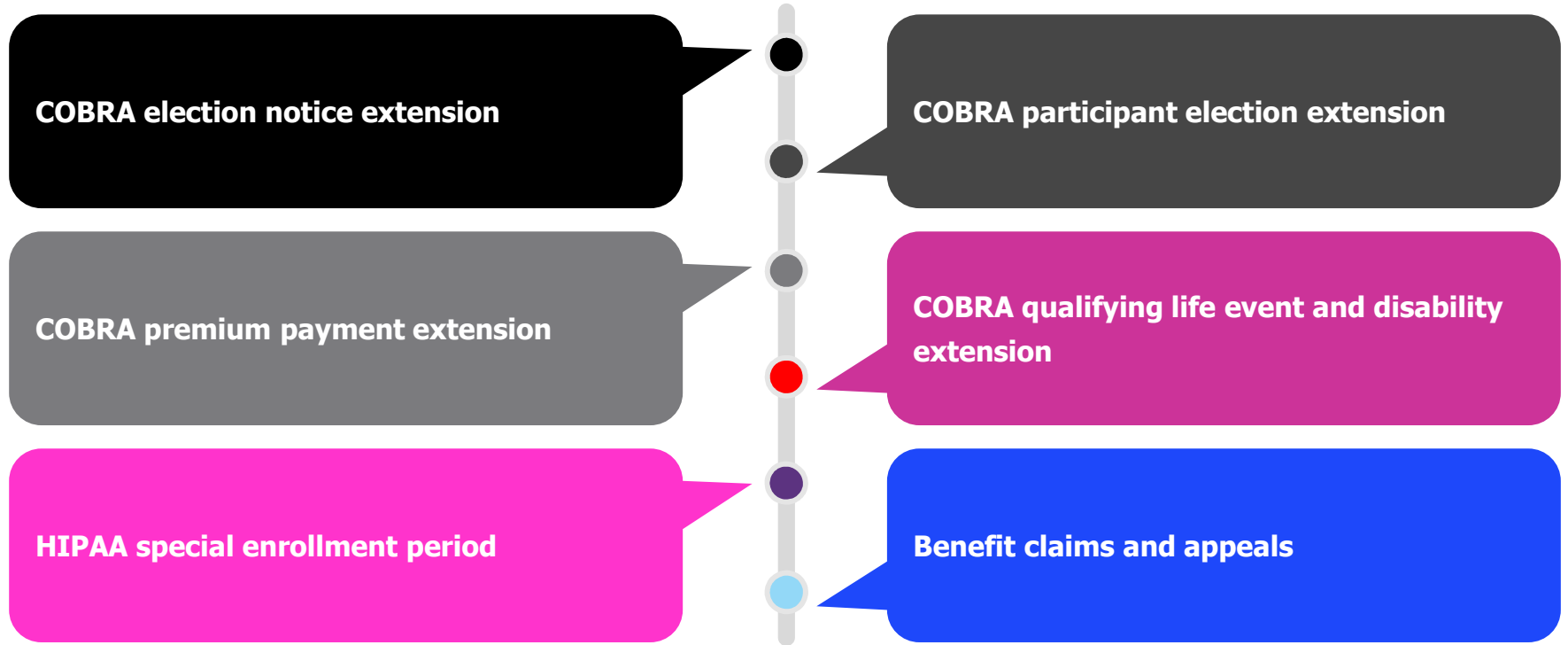
Health and Welfare Plans: Extended ERISA Deadlines, Permitted Election Changes, and Extended Claims Periods

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EBSA Disaster Relief Notice 2020-01

- Relates to notifications required under Title I of ERISA
 - Summary plan descriptions (SPDs), summary of material modifications (SMMs), summary benefits of coverage (SBCs), summary annual reports (SARs), Medicare Part D Notices, etc.
- Applies to notices required between March 1, 2020 through 60 days after the end of the period of national emergency
- Deadlines to provide notices extended
 - Act in good faith, which includes the use of electronic communications
 - Provide notices as soon as administratively practicable under the circumstances

Extension of Certain Time Frames



Cafeteria Plan Elections

- Permits **prospective** mid-year election changes for employer-sponsored health coverage, health flexible spending accounts (HFSAs), and dependent care flexible spending accounts (DCFSAAs)
- Practically, a midyear open-enrollment opportunity
 - Make a new election
 - Revoke an existing election for other employer coverage or different coverage (with attestation)
 - Stop an HFSA or a DCFSA, make a new election, decrease or increase an existing election
- Doesn't require any event or other criteria
- Permissible to offer—but not required

Elections Under Cafeteria Plans

- Not required to provide unlimited election changes
- Can provide a limited time frame to take advantage of relief
- HFSA election to reduce contributions can be limited to the amount already reimbursed
- Amend plan documents to reflect changes by December 31, 2021

Practical implications

All changes are prospective; this means no refunds from spending accounts permitted

Gives eligible employees who declined coverage a second chance to elect employer group health plan coverage

Extended Claims Periods for Health FSA and Dependent FSA

- Permits unused amounts remaining in a calendar-year HFSA and DCFSA as of the end of a 2019 grace period (or 2019 HFSA \$550 carryover) or a plan year ending in 2020 to extend the time frame to incur claims through December 31, 2020
- Must amend plan document by December 31, 2021

High-Deductible Health Plans (HDHPs)

- HDHPs can offer medical care services related to testing and treatment of COVID-19 prior to satisfaction of deductible at no cost-sharing or reduced cost-sharing back to January 1, 2020 without jeopardizing HSA eligibility
- HDHPs can offer telehealth services related to testing and treatment of COVID-19 at no cost-sharing or reduced cost-sharing prior to satisfaction of deductible back to January 1, 2020 without jeopardizing HSA eligibility

Practical implications

Solve problems created by vendors who jumped the gun

Could potentially rejudge claims back to January 1, 2020

Remains to be seen whether this becomes permanent

Health FSA Carryover

- Increases carryover feature in an HFSA to \$550
- Amendment must be adopted by December 31, 2021

Biography



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Althea Day is a partner in the employee benefits and executive compensation practice. Althea advises plan sponsors of all types with regard to employee benefits and in developing practical solutions to complex issues. Her experience includes the design, implementation, governance, operation, and regulatory compliance of qualified and nonqualified retirement plans, equity and executive compensation arrangements, and health and welfare plans. She also counsels clients, both multiemployer funds and contributing employers, on complex multiemployer plan issues.

Althea is a regular speaker on employee benefit topics. She is active on the Employee Benefits Committee of the ABA Tax Section. She is ranked in *Chambers USA: America's Leading Lawyers for Business*.

Biography



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Randy Tracht is a partner in the employee benefits and executive compensation practice. Randy advises clients on a broad range of employee benefits and executive compensation issues involving clients' tax-qualified pension and 401(k) plans, health and retiree medical plans, nonqualified deferred compensation plans, equity incentive plans and other executive compensation arrangements, employment agreements, and fringe benefit plans. His work includes counseling clients on fiduciary issues under ERISA, tax-qualification requirements and other issues under the IRC, the employee benefits aspects of corporate transactions, and other matters. He also represents clients before federal agencies in a range of proceedings, including remedial correction programs, agency-initiated audits, and transactions and restructuring matters.

Randy speaks and publishes frequently on employee benefits issues and has authored numerous LawFlashes and other publications, and has presented at regional and national employee benefits conferences on various issues.

Biography



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Jonathan Zimmerman is a partner in the employee benefits and executive compensation practice. Jonathan helps clients design and maintain all types of employee benefit plans and programs. His practice focuses on IRC and ERISA compliance for retirement, health and welfare, and executive compensation plans. He also devotes a large part of his practice to payroll, withholding, and fringe benefits matters. He works with clients of all sizes and routinely handles matters ranging from large transactions to day-to-day administrative questions.

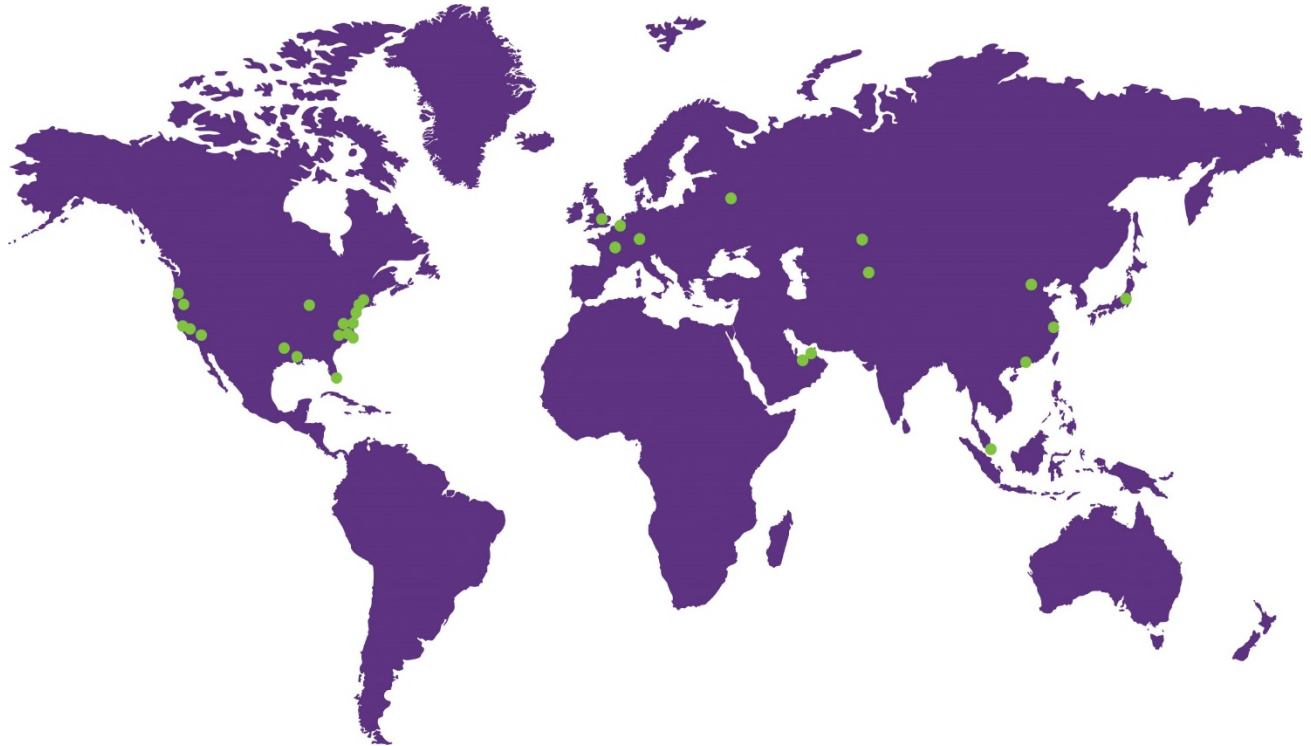
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