



2020 POLICY WINS

*delivering legislative, regulatory and legal
victories for employer benefit plan sponsors*

The health and economic consequences of the COVID-19 pandemic has presented numerous challenges for employer sponsors of benefit plans. Although the legislative and regulatory response to these challenges dominated the public policy arena in 2020, several other employee benefit initiatives not related to the pandemic were also addressed by federal policymakers. The American Benefits Council engaged in virtually all of them and advocated on behalf of our members on myriad issues described in this report.

It is said that “success has a thousand parents, but failure is an orphan.” In that spirit we acknowledge that for most of the accomplishments described below, the Council was not solely responsible. However, we were actively involved in *all* of them and on many of them we led the business community advocacy.

We are grateful to our members whose support makes possible our efforts; and we are proud to have delivered a return on their investment in the form of significant policy victories in Congress, the executive branch and the federal judiciary.

In addition to the many specialized best practice and compliance resources we provide our members we believe the plan sponsor community is strengthened by the Council’s best-in-class policy advocacy. Reflected below are brief descriptions of several of the health and retirement policy issues in which we engaged – both pandemic-related matters and other benefits policy priorities.

HEALTH CARE POLICY

PANDEMIC/COVID-19 RELIEF

Expanding Telehealth: Advocated for and obtained relief in the CARES Act allowing health savings account (HSA)-eligible High-Deductible Health Plans (HDHPs) to cover telehealth services without cost-sharing pre-deductible for plan years beginning before January 1, 2022. The Council also advocated for and obtained guidance from the U.S. departments of Treasury, Labor (DOL) and Health and Human Services (HHS) allowing employers to offer substantial standalone telehealth to non-benefits eligible employees during the COVID-19 crisis.

Flexible Spending Arrangements: Advocated for and obtained in the year-end Continuing Appropriations Act optional, temporary relief regarding health and dependent care flexible spending arrangements (FSAs), allowing employers to provide employees an extra year, in 2021 and 2022, to spend any unused amounts from the prior year. The Council also successfully advocated for additional flexibility for health and dependent care

FSA during the COVID-19 crisis. This included additional relief allowing employees to make mid-year election changes and the ability to permit increased carryovers and grace periods to avoid forfeiture of contributions that employees were unable to use through no fault of their own. The Treasury Department and IRS provided responsive relief through guidance for 2020, Relief for 2021, and in some cases 2022, was provided in the year-end spending bill.

COVID-19 Treatment Mandate: The Council argued against a mandate to cover COVID-19 treatment without cost-sharing. Employer objections were due not only to financial factors but also concerns regarding inconsistent and inequitable payments for COVID-19 vis-à-vis other health conditions. The mandate prohibiting cost-sharing was *not* included in COVID relief legislation approved in 2020.

HSA-Eligible HDHPs: The Council advocated for and obtained guidance from the Treasury Department and the Internal Revenue Service (IRS) allowing HSA-eligible HDHPs to provide coverage for COVID-19 testing and treatment pre-deductible. In response to the urgency expressed by Council employer members, this guidance was obtained over the course of just one week early in the COVID-19 crisis.

Other COVID-19 Guidance: The Council advocated for and obtained multiple rounds of clarifying guidance from DOL, Treasury, and HHS on the provisions in the Families First Coronavirus Response Act (FFCRA) and the CARES Act, including the scope of the requirement that group health plans cover COVID-19 testing without cost sharing and relief from the summary of benefits and coverage advance notice requirements to allow employers to quickly provide mid-year benefit enhancements during the public health emergency.

HEALTH CARE POLICY

NON-PANDEMIC POLICY VICTORIES

Transparency: Advocated for and obtained in the CAA the Lower Health Care Cost Act provision prohibiting “gag clauses” on health care price and quality information, thereby facilitating efforts of plan sponsors to drive value-based care. The Council also advocated for greater cost and quality transparency in response to proposed regulations by the Departments of Treasury, Labor and HHS regarding transparency requirements for group health plans and health insurers. The Council filed extensive comments, and many of the Council’s recommendations were adopted by the agencies in the final rules, including delaying the effective date for parts of the rule and narrowing the scope of the medical items and services covered by the requirements, on a transitional basis.

Surprise Billing: Advocated for a median in-network benchmark as opposed to arbitration to resolve “surprise” medical billing disputes. Although the final surprise billing legislation adopted an arbitration model, the Council succeeded in maintaining and strengthening “guardrails” to provide that the arbitrator must consider the median in-network rate and cannot consider the provider’s billed charges.

All-Payer Claims Databases: The Council protected ERISA preemption by successfully obtaining language added to the all-payer claims databases (APCD) provision in the CAA to specify that self-funded plans’ submission of data to state APCDs is voluntary.

ACA Reporting: The Council advocated for and obtained furnishing delays and good faith relief regarding Affordable Care Act reporting for employers and insurers for 2020 coverage.

COBRA Notice Class Actions: Over the last few years many lawsuits have been brought against large employers alleging meritless COBRA notice violations and seeking substantial damages. The Council filed an amicus brief in *Bryant v. Walmart*, a putative COBRA class action lawsuit, which weeks later was voluntarily dismissed by the parties, hopefully giving pause to plaintiffs' lawyers in other similar cases and helping to deter additional cases being filed.

RETIREMENT POLICY

PANDEMIC/COVID-19 RELIEF

Defined Benefit Funding Reform: The economic strain caused by the pandemic, coupled with historically low interest rates to respond to those economic conditions, exacerbated serious pension funding obligations for defined benefit pension plans caused by the phase-out of prior funding relief laws. The Council established a coalition of its member companies to advocate for more stable funding rules. The Council coordinated numerous efforts by the CEOs of major employers to advocate with Congress and the White House for enactment of the reforms. The proposals developed by the Council coalition passed the House of Representatives twice. This action has laid the groundwork for possible final passage in 2021 and the Council-developed reforms are included in the pandemic relief legislation now under consideration in Congress.

Due Date for Pension Contributions: To help pension plan sponsors struggling as a result of the economic consequences of the pandemic, the CARES Act delayed the date by which plan sponsors would need to make 2020 contributions until January 1, 2021. At the Council's diligent urging, this date was moved to January 4 to implement the CARES Act provision more effectively by ensuring that the payments would not bear negatively upon companies' 2020 financial condition.

Pandemic Relief from Variable Rate Premium: Consistent with advocacy by the Council, the Pension Benefit Guaranty Corporation (PBGC) announced in September that a variable rate premium refund will be available to account for employer contributions received by the plan during the extended period provided under pandemic-related relief legislation. This allows employers to take full advantage of the delayed due date for contributions.

Physical Presence of Notary: As the Council recommended, the Internal Revenue Service (IRS) issued Notice 2020-42, providing temporary relief from the requirement that spousal consents of certain plan participant elections must be witnessed in the "physical presence" of a notary or plan representative through December 31, 2020, and then issued Notice 2021-03 extending the relief through June 30, 2021.

Guidance on CARES Act Distributions: Pursuant to the Council's requests, the IRS expanded the pool of individuals eligible to receive a coronavirus-related distribution (CRD) under the CARES Act. The guidance also confirmed that the CARES Act relief was optional, offered good faith relief for the CARES Act's loan relief, and recognized self-certification for CARES Act loans.

Guidance on CARES Act Waiver of 2020 RMDs: Consistent with clarifications and relief requested by the Council, IRS Notice 2020-51 answered important questions surrounding the CARES Act's waiver of required minimum distributions (RMDs) from defined contribution plans for 2020 and provided rollover relief for amounts that otherwise would have been treated as RMDs.

IRS Guidance on Mid-Year Contribution Reductions for Safe Harbor Plans: Responding to the Council's call for flexibility for plan sponsors, the IRS issued Notice 2020-52, clarifying the requirements applicable to safe

harbor 401(k) and 401(m) plans that adopt mid-year changes. The guidance permits employers to suspend or reduce safe harbor contributions to those plans after March 13, 2020, for the balance of the year.

Treasury/IRS Deadline Relief: As requested by the Council, the Treasury and the IRS extended the deadlines for performing various time-sensitive acts that are imposed on retirement plans and participants in light of the disruptions created by the pandemic.

DOL Deadline Relief: In response to the Council's advocacy, DOL provided good faith relief for plan sponsors and service providers struggling to deliver various notice and disclosures required by ERISA. This included requirements to furnish an Annual Funding Notice and quarterly benefit statements to retirement plan participants. DOL also provided good faith enforcement relief for other ERISA requirements relevant to retirement plan administration.

RETIREMENT POLICY

NON-PANDEMIC POLICY VICTORIES

Electronic Delivery Expansion: DOL finalized two new safe harbors for electronically delivering notice and disclosures to retirement plan participants: (1) the notice and access safe harbor; and (2) the direct email safe harbor. The Council has long-supported legislative and regulatory efforts to expand the use of electronic delivery.

Lifetime Income Illustrations: In August the DOL issued an interim final rule under the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which requires defined contribution plan administrators to provide lifetime income illustrations of a participant's account balance. At the Council's urging, the DOL rule includes important clarifications for plan sponsors.

Safe Harbor Changes: As requested by the Council, preliminary guidance from the IRS clarifies that the statutory increase in the maximum deferral percentage for automatic enrollment safe harbor plans (from 10% to 15%) is voluntary.

Pooled Employer Plans: The final regulations regarding pooled plan provider (PPP) registration addressed some of the Council's concerns with registration deadlines for PPPs by eliminating the proposed condition that would have required PPPs to register before they "market" a PEP and temporarily eliminating a 30-day waiting period for PPPs that register before February 1, 2021.

Other SECURE Act Guidance: As sought by the Council, the IRS issued Notice 2020-68, providing important guidance on certain provisions of the SECURE Act, including clarification of the new participation rules for long-term part-time employees and the new tax penalty relief for qualified birth and adoption distributions.

ESG Rules: The Council has emphasized "the importance of plan fiduciaries acting in accordance with ERISA's prudent and loyalty responsibilities when making investment decisions." Many of the Council's recommendations were adopted by the DOL in its final regulations governing environmental, social and governance (ESG) investing under ERISA.

Proxy Voting: The DOL final regulations establishing a regulatory framework for ERISA fiduciaries to follow when exercising shareholder rights, including proxy voting, eliminate some of the more troubling aspects of the proposed rule identified by the Council and use a more principles-based approach. The Council continues

to work to address additional burdens imposed on plan fiduciaries in connection with the exercise of shareholder rights.

Year-End Legislation: The year-end CAA included several retirement policy provisions supported by the Council, including (1) relief for certain transfers of surplus defined benefit pension assets for retiree health benefits, (2) an extension of CARES Act in-service coronavirus-related distribution provisions to money purchase pension plans, (3) an extension of the ability of employers to make tax-free student loan repayments for employees, up to an overall annual cap of \$5,250 (until the end of 2025), and (4) pension plan partial termination relief that would otherwise trigger 100% vesting.

Section 162(m) Pay-for-Performance Rules: The Council’s dialogue with the IRS helped to improve final regulations with respect to performance pay, which limits the deduction for certain employee remuneration of more than \$1,000,000 for federal income tax purposes.

Excise Tax on Volunteers Serving Related Not-for-Profit Entities: At the Council’s urging, final regulations issued by the IRS provide exceptions that will exempt from a 21% excise tax any compensation paid to highly compensated executives by a related for-profit company under certain circumstances. In particular, the proposal incorporates the Council’s suggested “limited hours” exception and “nonexempt funds” exception.

PBGC Lump Sum Assumptions: The Pension Benefit Guaranty Corporation (PBGC) incorporated a number of modifications requested by the Council when it formally replaced the interest rate and mortality assumptions used to calculate lump sum payments in PBGC-trusted, terminated, single-employer defined benefit pension plans.

California Privacy Rule Exemption for Employment-Related Information: The Council worked with the California Chamber of Commerce to craft a temporary amendment – and then extended to January 1, 2021 – that exempted personal information collected by a business solely for job applications, employment or benefits administration from the California’s expansive privacy measure.

Required Minimum Distribution Life Expectancy: The Council supported the issuance of Treasury and IRS final regulations updating the life expectancy and distribution period tables used to calculate required minimum distributions (RMDs) for retirement plans and IRAs. At the Council’s recommendation, the effective date for these regulations was pushed back to calendar years that start on or after January 1, 2022.

Escheatment of Retirement Benefits: Responding to the Council’s concerns, new IRS guidance clarifies the tax reporting and withholding rules applicable to certain payments made from plans to state unclaimed property funds and simplifies the rollover rules for individuals who have had their balances escheated.

Qualified Plan Loan Offset: As recommended by the Council, Treasury and IRS issued final regulations to address the extended rollover period for a qualified plan loan offset, as permitted by the Tax Cuts and Jobs Act of 2017.

Bipartisan Legislation: The Council continues to work closely with our congressional champions in development of a “next generation” set of retirement plan reforms including issues raised by our members such as simplifying correction mechanisms, easing notice requirements, increasing catch-up contributions and allowing broader use of student loan matching programs in 401(k) plans. The bipartisan legislation was introduced at the end of 2020 and will be reintroduced this year.

Retirement Plan Fee Litigation: By late summer 2020, retirement plan fee lawsuits filed were more than double the number of cases filed in all of 2019. As these lawsuits surged, the Council continued to advocate for

employers by filing amicus briefs in cases once they reach the appellate level. Since 2017, the Council has filed eight amicus briefs in fee litigation and imprudent investment cases including in *Divane v Northwestern*, which was dismissed and the appeal denied by the Seventh Circuit Court of Appeals; in *Ellis v Fidelity*, and *Barchock v. CVS*, which were dismissed and the appeals denied by the First Circuit Court of Appeals; and in *White v. Chevron*, which was dismissed and the appeal denied by the Ninth Circuit Court of Appeals.

Pension Plan Investment Lawsuits. The Council successfully argued that plaintiffs in *Thole v. U.S. Bank* lacked standing to challenge particular investments made in their defined benefit plan. The Supreme Court decision in favor of U.S. Bank agreed with the Council that “[w]in or lose, they would still receive the exact same monthly benefits they were already entitled to receive.”