The Latest on Employee Benefits Policy: Legislative, Regulatory and Judicial Update

The Next Phase of Pandemic Relief/Recovery Legislation

July 28, 2020, 2 p.m. ET
Health Policy
House of Representatives passed $3 trillion HEROES Act (H.R. 6800) on May 15

Senate Republicans release bill on July 27

Debate over cost and scope of legislation

Target for passage of compromise bill before August recess
COBRA Subsidies

- Employer-provided health coverage under scrutiny
- COBRA subsidies
  - 100% COBRA subsidies included in the HEROES Act
  - Prospects in the Senate uncertain – *Not included in Senate Republican bill*
  - Differences over “Hyde Amendment”
- Public Opinion Strategies polling: 90% of voters support the federal government taking action to help those who have lost their job preserve their employer coverage
- Alliance to Fight for Health Care
COVID-19 Testing

• FFCRA/CARES Act: group health plans and issuers must cover COVID-19 testing without cost-sharing
  • No prior authorization or medical management
  • Tri-agency guidance: requirement does not cover testing for employment or surveillance purposes

• Role of testing in return to the workplace/public health surveillance
  • Diagnostic tests for current infections/serology tests for antibodies
  • Council webinar July 23; upcoming webinar on August 3

• Potential cost, funding and who pays?
  • HEROES Act - $75 billion for testing and contact tracing
Surprise Billing

COVID-19 related surprise billing issues

• CARES Act - “Cash Price” for testing by OON providers
• Mandate to cover COVID-19 treatment without cost-sharing included in HEROES Act
• HHS prohibition on balance billing COVID-19 patients tied to CARES Act provider fund; similar prohibition in HEROES Act

Broader surprise billing legislation

• White House proposal for straight ban on surprise billing
• Comprehensive proposal a priority for HELP Committee Chairman Lamar Alexander (R-TN) in next COVID bill
Telehealth

- Dramatic rise in utilization of telehealth services during pandemic
- COVID-19 related temporary relief
  - CARES Act – Allows HSA-eligible HDHPs to cover telehealth pre-deductible; Effective through plan years beginning in 2021
  - Tri-agency guidance provides relief regarding ability to offer standalone telehealth to non-benefits eligible employees and certain advance notice requirements
  - Medicare changes to originating site rule and expanded coverage
  - Efforts underway to make relief permanent
- State barriers to telehealth adoption
- Legislation to mandate telehealth coverage and payment parity
  - Distinctions between different types of telehealth, telemedicine, virtual visits, etc.
COBRA Guidance

• COBRA time frame extension guidance

  • DOL/Treasury guidance tolls a number of plan participant time frames between March 1, 2020, and 60 days after the end of the national emergency

  • Time frames include COBRA election period and deadline for paying COBRA premiums

  • Adverse selection concerns, administrative burden and potential negative consequences for participants

  • Potential future action and interaction with COBRA subsidy legislative efforts
Over a dozen COBRA class action cases filed against large employers for alleged technical errors in COBRA election notices

- Many meritless cases are brought by the same plaintiffs’ firm
- Due to potential for major damages, many settle early on

In June, the Council filed an *amicus* brief in *Bryant v. Walmart*

- In a substantial positive step for employers, the case was voluntarily dismissed in July

Considering additional efforts to stem the tide of these cases

COBRA to continue to be a key issue during pandemic
COVID Regulatory Relief

Substantial relief has been provided

- Health and dependent care FSAs, mid-year election changes, EAPs covering testing, HDHPs cover testing/treatment, standalone telehealth

More guidance is likely needed

- Health and dependent care FSA relief for 2021
- ACA reporting relief in 2021
- Commuter benefits? Other?
Wellness Plans

- Proposed rules imminent regarding wellness plan incentives under the Americans with Disabilities Act
  - On June 11, EEOC voted 2-1 to approve draft proposed regulations
  - Regulations not yet public, undergoing inter-agency review
- May provide some consistency with HIPAA incentive limit rules but may impose new/additional requirements for participatory wellness plans
- Follows from 2016 final regulations which, following litigation, were vacated by a district court and then removed by EEOC
Price Transparency

- Tri-agencies proposed price transparency requirements for group health plans and insurers in 2019, in response to executive order
  - Internet based self-service tool for pre-service cost-sharing estimates (individual specific and based on negotiated rates)
  - Public, machine readable files of negotiated rates and historical out-of-network allowed amounts
- Over 25,000 comments filed
- Administration priority; DOL regulatory agenda lists September 2020 release date; not yet at OIRA
- Legislative efforts
Drug Pricing

- Series of July 24 executive orders address drug pricing; follows failed efforts to address drug pricing through legislation

- Directs finalization of rule disallowing rebates under Medicare Part D; would allow “point of sale” rebates
  - HHS must confirm will not increase Medicare Part D premiums, proposed rule projected $50 billion increase in Medicare Part D premiums

- “Most favored nations” rule applied to Medicare Part B drugs; EO held until August 24 to allow negotiations with drug companies

- EOs also address drug importation and federal health centers
Other Regulatory Activity

- Agencies have issued a number of less significant pieces of guidance as well
  - Proposed rules on direct primary care arrangements
  - Health FSA carryover guidance
  - Proposed rules on grandfathered health plans
  - Annual update guidance (PCORI, HSAs, etc.)
  - Updates to mental health parity compliance tool
At issue - whether the ACA’s individual mandate (with a $0 penalty) is constitutional, and if not, whether the whole ACA must fall

- District court - the individual mandate is unconstitutional and the ACA must fall
- Appeals court - agreed regarding constitutionality but district court must do more analysis as to whether parts of the ACA can stand

Supreme Court has agreed to hear the case (November 2020?)

Department of Justice - the whole ACA must fall
Supreme Court: PCMA v. Rutledge

At issue - whether ERISA preempts an Arkansas statute regulating the amount plans and their administrators must pay pharmacies for generic drugs, and imposing other related requirements

• District court and appeals court found that the statute is preempted by ERISA
• Department of Justice and 33 states assert no ERISA preemption

Council filed an amicus brief in support of ERISA preemption

Supreme Court oral arguments scheduled for October 6, 2020
Paid Leave Policy
Mandatory Paid Leave

- FFCRA emergency paid sick leave and emergency paid family and medical leave
  - Only applies to employers with fewer than 500 employees; continued efforts to expand to larger employers; HEROES Act would extend to larger employers
  - Expires at the end of 2020

- State and local action
- Reignited calls for federal paid leave mandate and need for nationwide uniformity
- Department of Labor request for information on paid leave
Paid Leave Atlas Updates

- Now includes paid family leave laws
- Now includes special COVID-19 leave
Retirement Policy
Status and Timing of Retirement Policy Legislation

- Unclear if retirement provisions will be included in the final pandemic relief package.
- Provisions included in House-passed HEROES Act.
- Senate leadership preference to focus solely on issues related to pandemic.
- Non-retirement policy issues continue to control the process.
Defined Benefit Pension Funding Stabilization

- Single-employer funding stabilization
  - Interest rate stabilization
  - Longer amortization period to recognize losses
  - Proposals included in HEROES Act
  - Proposals could be made temporary
  - Action continues to be tied to inclusion of multiemployer plan relief proposals
Other Retirement Proposals

- Unlikely many will be included in stimulus legislation
- Difficult to establish that the proposals are related to the pandemic and limited time to find agreement
- Examples of possible items for inclusion: relief for 2019 required minimum distributions, tax credit for not reducing benefits, partial termination relief for DC plans, expansion of those eligible for coronavirus distributions
Developing Bipartisan Legislation in the House

- Being developed by Ways and Means Committee Chairman Richard Neal (D-MA) and Ranking Member Kevin Brady (R-TX), introduction postponed until September

- Next generation legislation, many proposal, such as:
  - Matching student loan repayments
  - Ability to self-correct inadvertent plan violations without IRS submission
  - Higher catch-up contributions at age 60
Missing Participants

- Bipartisan bicameral legislation introduced
- Creates a data registry that would be searchable by participants and beneficiaries
- Uncashed checks less than $1,000 could be transferred to Treasury Department
- Directs DOL, Treasury, IRS and PBGC to develop a safe-harbor for plan sponsors
- May be included in next generation legislation being developed in the House of Representatives
Other Legislative Proposals Affecting Retirement Plans

- Plan loan insurance
- Required distribution age proposed to be raised to 75
- Fiduciary rules affecting general accounts
What Ideas Should We Be Thinking More About?

- Draft Democratic Party platform released; while not what is enacted, many of the ideas can already be seen in existing proposals
- Access
- Emergency savings
- Tax treatment of retirement benefits
- Participant and beneficiary protections/more vulnerable populations
Judicial Issues

- Executive Order 13924, "Regulatory Relief to Support Economic Recovery"
  - Council letters – fee litigation/pleading standards

- Current issues
  - Laurent v. PWC
  - Jander v. IBM
  - Rozo v. Principal
Recent guidance from regulatory agencies

- Environmental, social and governance investments (ESG) guidance
- PBGC Q&As on CARES Act
- Suspension of safe harbor contributions
- Lifetime income disclosure guidance
- RMD guidance under CARES Act and SECURE Act
- CARES Act guidance on CRDs, loans and limited non-qualified deferred compensation relief
- Fiduciary rule
Thank You!