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Leave Sharing Programs and COVID-19

An employer-sponsored leave-sharing program allows an employee to donate accrued hours of paid vacation, sick, or personal leave for the benefit of other employees who need to take more leave than they have available.

Continued on page 2

ACA Deadline Extension and Other ACA Updates

For those gearing up for the 2020 ACA reporting season, the Internal Revenue Service (IRS) recently issued Notice 2020-76, which extends the due date for employers and insurers to provide 2020 Forms 1095-C and 1095-B to individuals.

Continued on page 4

DOL Issues New FMLA Forms

On July 16, 2020, the U.S. Department of Labor (DOL) released revised Family and Medical Leave Act (FMLA) forms for employers to use in their FMLA administration. Employers are not required to use the DOL forms, and may instead use their own versions, so long as the regulatory requirements are satisfied.

Continued on page 6

Retirement Plans Now Have New Options for Electronically Distributing Notices

The Department of Labor (DOL) has released new regulations providing an additional safe harbor for electronic disclosure of pension plan notices effective July 27, 2020.

Continued on page 8

The Impact of *Bostock* on Employer Sponsored Benefit Plans

The U.S. Supreme Court's recent landmark ruling in *Bostock v. Clayton County* prohibits workplace discrimination based on an individual's sexual orientation or gender identity under Title VII of the Civil Rights Act of 1964 (Title VII).

Continued on page 11

2021 Updates to IRS Limits

The chart below highlights the annual cost of living adjustments for certain limitations in the Internal Revenue Code that impact the maximum benefits and contributions to employee benefit plans. These limits are in effect beginning January 1, 2021, and the chart indicates whether the amount is increased from 2020. Employers will want to be sure and update their Summary Plan Descriptions and other materials highlighting the annual dollar limits.

Continued on page 13

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Leave Sharing Programs and COVID-19

There has been a resurgence of interest in these programs during the COVID-19 pandemic as employers are looking for additional ways to help employees in need. However, as with any employer-provided benefit, there are specific requirements and potential adverse tax consequences if the program is not set up correctly.

In a typical leave-sharing program, an employee may donate hours of paid leave to an employer-managed "leave bank," and other employees who have exhausted their accrued leave may request to draw from the leave bank. Generally, the employee seeking to draw from the leave bank must provide the employer with a written application describing the need for such leave. Once the employer approves the application, the employee is eligible to receive additional leave (usually paid at the recipient employee's normal compensation rate) once his or her own accrued leave has been exhausted. The IRS has approved two broad purposes of leave-sharing for special tax treatment: medical emergencies and major disasters. A leave-sharing program may incorporate one or both of these permissible purposes.

Leave-Sharing Program for Medical Emergencies

An employer-sponsored leave-sharing program may permit an employee to donate excess paid leave to another employee in the event of a medical emergency. A medical emergency is defined as "a medical condition of the employee or a family member that will require the prolonged absence of the employee from duty and will result in a substantial loss of income to the employee because the employee will have exhausted all paid leave available apart from the leave-sharing plan." An employee who has exhausted his or her leave may seek to draw from the leave bank if the employee needs more paid leave in the event that he or she experiences a medical emergency, needs to tend to a parent, spouse, or child who has experienced a medical emergency, or needs additional time off for bereavement in the event of the death of a parent, spouse, or child.

For purposes of assisting those affected by the COVID-19 pandemic, this type of leave-sharing may help those employees who need to take additional leave to care for their own positive diagnosis or a family member that has been diagnosed with COVID-19. However, leave necessitated by loss of childcare or transportation due to a shutdown would not constitute a "medical emergency" for these purposes.

Leave-Sharing Program for Major Disasters

An employee may also draw from an employer-sponsored leave bank in the event that the employee experiences a major disaster. A major disaster is defined as: "(a) a major disaster as declared by the President under § 401 of the Stafford Act, 42 U.S.C., section 5170, that warrants individual assistance or individual and public assistance from the federal government under that Act, or (b) a major disaster or emergency as declared by the President pursuant to 5 U.S.C., section 6391, in the case of employees described in that statute." The Stafford Act provides that the determination of whether an event shall be declared a major disaster shall be based "on a finding that the disaster is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary." Guidance released by the IRS earlier this year confirms that COVID-19 is a "major disaster" for these purposes.

An employer-sponsored leave-sharing program for major disasters must comport with the following requirements:

1. The plan must allow a leave donor to deposit unused accrued leave in an employer-sponsored leave bank for the benefit of other employees who have been adversely affected by a major disaster. An employee is considered adversely affected if the disaster has caused severe hardship to the employee or family member that requires the employee to be absent from work.
2. The plan does not allow a donor to specify a particular recipient of his or her donated leave.
3. The amount of leave donated in a year may not exceed the maximum amount of leave that an employee normally accrues during that year.

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4. A leave recipient may receive paid leave from the leave bank at the recipient's normal compensation rate.
5. The plan must provide a reasonable limit on the period of time after the disaster has occurred, during which leave may be donated and received from the leave bank, based on the severity of the disaster.
6. A recipient may not receive cash in lieu of using the paid leave received.
7. The employer must make a reasonable determination of the amount of leave a recipient may receive.
8. Leave deposited on account of a particular disaster may be used by only those employees affected by that disaster. Additionally, any donated leave that has not been used by recipients by the end of the specified time must be returned to the donor within a reasonable time so that the donor may use the leave (unless the amount of leave remaining is so small as to make accounting for it unreasonable or impractical). The amount of leave returned must be in the same proportion as the leave donated.

The IRS does not allow special tax treatment for major disaster leave-sharing plans that do not comply with the above requirements.

Tax Consequences of Participating in a Leave-Sharing Program

If a leave-sharing program satisfies the IRS requirements described above, special tax treatment will apply to leave donors, recipients, and the employer. Donated hours of paid leave pursuant to an eligible medical emergency or major disaster leave-sharing program are not included in the donating employee's income for tax purposes. Thus, employees can donate unused leave without any adverse tax consequences. Instead, the recipient of the donated leave will realize the amounts received in his or her gross income and the amounts of paid leave received will be considered "wages" earned by the recipient employee for employment tax purposes.

However, if a leave-sharing program fails to meet the IRS requirements for medical emergencies or major disasters, the donor employee will be subject to all employment taxes associated with the leave as if the donor employee used the donated leave himself or herself. Compliance with the IRS's eligible leaving-sharing programs avoids this unjust result.

Other Options

The IRS has also released additional relief options specifically in response to the COVID-19 pandemic. IRS Notice 2020-46 allows employees to elect to forgo paid leave in exchange for their employer making contributions to a charitable organization. The employee's foregone pay is not considered taxable wages to the employee if the cash payments are (1) made to a section 170(c) charitable organization for the relief of victims of the COVID-19 pandemic in the affected geographic areas (i.e., the 50 United States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands); and (2) paid to the charitable organization before January 1, 2021.

The donor employee is not entitled to a charitable deduction, but the employer can either take a charitable deduction under Code Section 170 or a business deduction under Code Section 162 for the payment. Importantly, the charity must provide relief for COVID-19 victims and make payments before January 1, 2021. If the donation policy extends beyond the relief provided by the Notice, the employee will be taxed on his or her donated leave and the employer will not be able to take a charitable deduction (though a business deduction would still be available).

What Next?

In light of the financial hardships COVID-19 has imposed on numerous individuals, employers are continually looking for ways to aid employees affected by the pandemic. Some employers may want to establish a tax-favored leave-sharing program to aid employees, while other employers that already have leave-sharing programs may want to expand or amend their leave-sharing program to include COVID-19 as a major disaster.

Employers may also consider other altruistic options to aid employees during the disaster. For example, Section 139 of the Internal Revenue Code allows employers to make qualified disaster relief payments

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directly to employees. These payments, which may be made for reasonable and necessary personal, family, living or funeral expenses arising from a qualified disaster, are not taxable to the recipient and are deductible to the company as ordinary and necessary business expenses. Employers may also consider establishing a tax-qualified Employee Assistance Fund in order to provide aid to employees impacted by COVID-19 through a private or charitable foundation. Donations to the foundation by the employer or employees are tax-deductible, and relief payments by the foundation are generally tax-free to recipients.

The legal requirements for establishing and maintaining these types of programs are complex, and the tax consequences for noncompliance can be severe. Employers should contact their ERISA attorney to assess their options for aiding employees impacted by the COVID-19 pandemic and ensure their continued compliance with applicable IRS requirements.

Back to top

ACA Deadline Extension and Other ACA Updates

This Notice also grants certain relief from furnishing Form 1095-B to individuals and extends certain penalty relief to entities making good faith efforts to comply with the 2020 information reporting requirements.

Additionally, the IRS has released the 2020 instructions for the Forms 1094-C and 1095-C. As compared to prior years, the 2020 instructions have some substantial changes, including how sponsors of an Individual Coverage Health Reimbursement Arrangement (ICHRA) may satisfy their reporting obligations. The 2021 affordability percentage has also been released. The percentage increased to 9.83%, which may assist those employers whose cost of coverage was on the threshold of satisfying the affordability requirements in 2020.

ACA Information Reporting

The Patient Protection and Affordable Care Act (ACA) requires insurers, self-insuring employers, other coverage providers, and applicable large employers (ALEs) to furnish statements to employees and covered individuals with information regarding the health care coverage offered to them. Specifically, Section 6055 of the ACA requires providers to report if they provide minimum essential coverage (MEC), and Section 6056 requires ALEs to report whether they offered MEC to full-time employees and their dependents. Forms 1095-B and 1095-C were designed to satisfy these information reporting requirements under the ACA.

The information reported on these Forms allows individuals to determine whether they are eligible to claim the premium tax credit on their individual income tax returns. Employers and providers are generally required to furnish these information statements to individuals on or before January 31 following the applicable reporting year. Forms 1095-B and 1095-C must also be filed with the IRS, generally on or before February 28 (March 31 if filed electronically) following the applicable reporting year.

Deadline Extension for Furnishing Statements

The IRS has extended the due date for furnishing 2020 Forms 1095-B and 1095-C to employees and covered individuals from January 31, 2021, to March 2, 2021. Employers and providers will not be granted additional extensions for furnishing these forms.

The IRS has not, however, extended the due date for filing 2020 Forms 1095-B and 1095-C with the IRS, which remains March 1, 2021, (since the original due date of February 28 falls on a Sunday) for paper filings and March 31, 2021, for those filing electronically. Employers can still seek an automatic 30-day extension for submitting these forms by filing a Form 8809, *Application for Extension of Time to File Information Returns*, on or before the applicable due date.

Penalty Relief for Furnishing Forms 1095-B

Because the intended purpose of Forms 1095-B and 1095-C was to allow an individual to compute his or her tax liability relating to the individual mandate, for which the penalty has been reduced to zero, the IRS granted relief from furnishing a Form 1095-B to individuals. Specifically, the IRS indicated that it will not assess penalties for failure to furnish a Form 1095-B if two conditions are met:

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1. The reporting entity posts a prominent notice on its website stating that individuals may receive a copy of their 2020 Form 1095-B upon request, along with an email address, physical address, and phone number.
2. The reporting entity furnishes the 2020 Form 1095-B to the responsible individual within 30 days of receipt of any request. The statements may also be furnished electronically if certain additional requirements are met.

Importantly, this reporting relief does not extend to ALEs that are required to furnish Form 1095-C to individuals. However, the relief does generally apply to furnishing the Form 1095-C to participants who were not full-time employees for any month of 2020 if the requirements above are met. This would typically include part-time employees, COBRA qualified beneficiaries, or retirees. Also, ALEs should note that while these requirements for furnishing the 1095-B and 1095-C to individuals has been modified, these forms must still be transmitted to the IRS along with their Form 1094 counterparts.

Penalty Relief for Good Faith Reporting Efforts

The IRS has also extended penalty relief for employers and providers that make good faith efforts to comply with the 2020 information reporting requirements, but that provide incorrect or incomplete information (both for furnishing to individuals and for filing with the IRS). To be eligible for the relief, reporting entities must make reasonable efforts to comply with the 2020 reporting requirements, including timely filing or furnishing of the information returns or statements. No relief is available for entities that fail to file an information return or furnish a statement by the due dates. This relief applies to missing and inaccurate taxpayer identification numbers and dates of birth, as well as other information required on the return or statement. Critically, although this type of relief has regularly been provided in past years, the IRS has indicated that this will be the last year that it will provide this good faith reporting relief.

2020 Forms 1094/1095 Reporting Instructions

The IRS recently released final Forms 1094/1095-B, final Forms 1094/1095-C, and related instructions for the 2020 tax year. Except for information related to ICHRAs, the forms and instructions are mostly unchanged. Though employers will be required to start completing the Plan Start Month box, which was previously optional. ALEs will need to complete the box with the two-digit number (01 through 12) to indicate the beginning of the plan year for the health plan that was offered to the employee. If there is no plan under which coverage is offered to the employee, 00 should be entered in the plan start month.

Effective January 1, 2020, employers could begin offering ICHRAs to employees. The IRS's final regulations on ICHRAs clarified that an employer's offer of an ICHRA could satisfy the requirement to offer health coverage for purposes of the ACA employer mandate, but those regulations did not resolve how an employer could ensure that its ICHRA offer would satisfy the "affordability" and "minimum value" requirements under Internal Revenue Code Section 4980H(b). Additional guidance in this regard was released late last year, and new safe harbors were created to assist ICHRA sponsors with these determinations, but there were still open questions on how exactly reporting ICHRA coverage will work in practice.

For those employers who offered ICHRAs in 2020, the new instructions specify how to identify an ICHRA as the source of employer-sponsored coverage on the Form 1095-B by using a new Code G in Line 8. Also, for Form 1094-C, the instructions confirm that an offer of ICHRA coverage counts as an offer of minimum essential coverage for purposes of Internal Revenue Code Section 4980H(a). If the ALE indicated that the employee received an ICHRA offer, the employee's age as of January 1, 2020, must be entered in a new field in Part II of the form. However, the instructions warn that the employee's age reported in Part II may not be the applicable age to calculate ICHRA affordability or the amount reported on line 15 for non-calendar-year plans or employees who become eligible for the ICHRA during the plan year.

The instructions also explain how age and ZIP code information (along with the ALE's ICHRA contributions) is used to calculate a full-time employee's required contribution for line 15. The employee's contribution is based on the lowest cost

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silver plan for the employee's age offered through an Exchange for the ZIP code of the employee's primary residence (or primary site of employment if the ALE elects to use the corresponding safe harbor). If an affordable ICHRA was offered to a full-time employee, the ZIP code for the employee's primary residence or employment site will be entered on line 17. Employers sponsoring ICHRAs will also be responsible for completing Part III of the Form 1095-C because an ICHRA is considered a self-funded group health plan.

2021 Affordability Safe Harbor

On July 21, 2020, the IRS announced that the ACA affordability percentage for the 2021 calendar year will increase from 9.78% (the 2020 rate) to 9.83% in 2021. Because the increased affordability percentage will allow employers to be able to increase what employees pay for employee-only coverage (and still be affordable in 2021), employers may consider reassessing the cost of coverage charged to employees in the upcoming year.

Next Steps

The 30-day extension for furnishing statements to individuals automatically applies to all entities subject to the ACA's reporting requirements, meaning you don't have to request it. In fact, the IRS will not respond to employers' and providers' individual requests for extensions. If you are subject to ACA reporting requirements, you should already be working with your TPAthird-party administrator or ERISA counsel to gather and prepare required information for 2020 reporting. Timely reporting is crucial to take advantage of penalty relief offered by the IRS. Also, don't forget that the deadline for filing 2020 Forms 1095-B or 1095-C with the IRS has *not* been extended. Employers and providers must still file the 2020 returns with the IRS on or before their regular due date, though a 30-day extension may be available for filing these returns.

Employers also need to discuss any necessary changes to the information that must be reported on their Forms 1094/1095. This is primarily relevant for those employers that offer an ICHRA, which are now required to report information that may have not previously been necessary to gather from employees. Employers looking to implement an ICHRA in 2021 should also have an eye toward collecting this information in anticipation of its 2021 reporting obligations.

Back to top

DOL Issues New FMLA Forms

However, many employers use the forms to ensure compliance with the technical requirements of the FMLA and the DOL generally recommends using its forms. The new forms were effective immediately and are valid through June 30, 2023 (or once new forms are released, if sooner).

The New Forms

The new forms are intended to be more streamlined and user-friendly than the prior forms. At first glance, employers will notice many more check-the-box options and less space for written responses. Additionally, the new forms are available in PDF, are electronically fillable, and have electronic signature features to support contact-free completion and transmission. Other notable changes are summarized below.

- ***Notice of Employee Eligibility and Rights and Responsibilities (WH-381)*** – Rather than providing a single list of employee rights and responsibilities for taking FMLA leave, the updated form reorganizes the rights and responsibilities into six topical sections, such as "Substitution of Paid Leave" and "Return-to-Work Requirements." The updated form also requires employers to provide new information. For example, Section I (Notice of Eligibility) requires employers to specify the number of hours an employee has worked towards the 1,250-hour service requirement, and Section III (Notice of Rights and Responsibilities) requires employers to specify whether FMLA leave will run concurrently with disability, workers' compensation, or any other medical leave provided under state law.

- ***Designation Notice (WH-382)*** – The updated form includes a new section regarding "Incomplete or Insufficient Certification" and provides space for employers to specify what information is needed to make the certification complete and sufficient. This new section may

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result in employers being required to provide multiple Designation Notices in response to an employee's request for leave (e.g., an insufficient certification will result in a Designation Notice that explains the deficiency and, if the employee submits a new certification that fixes the deficiency, a second Designation Notice approving the request will need to be issued). The updated form also expressly states the DOL's position that employers are obligated to designate leave as FMLA leave whenever leave is for an FMLA-qualifying reason, and that FMLA protections will apply regardless of whether the employee or employer want the FMLA to apply.

- ***Leave Certification Forms (WH-380-E, 380-F, 384, 385, 385-V)*** – The new leave certification forms require health care providers to more clearly identify the employee's qualifying medical condition and the amount of leave needed based on the provider's medical knowledge and experience. If the duration of the leave required is unclear, health care providers are now asked to offer their "best estimate," and the form discourages responses suggesting that the duration of incapacity may be a "lifetime," "unknown," or "indeterminate."

The new forms also contain reminders to not return completed forms to the DOL, indicating that this may have been an issue in recent years. Finally, the DOL released a Q&A section addressing the new forms, which is available, along with the new forms, on the DOL's website at https://www.dol.gov/agencies/whd/fmla/forms.

Employers should note that the FMLA does not require the use of any specific form or format for FMLA notices and certifications. The new forms have been revised to enhance usability by employers, leave administrators, healthcare providers, and employees seeking leave, but they convey and collect the same information as the old forms. Thus, FMLA paperwork completed on the old forms is still valid.

Other FMLA Changes May Be Coming

Also, on July 17, 2020, the DOL published a Request for Information (RFI) in the *Federal Register* with a 60-day comment period that solicits feedback on any specific challenges or best practices in the use and administration of FMLA leave. The RFI presented numerous questions to determine what employers would like to see changed in the FMLA regulations to better effectuate rights and obligations under the FMLA. Specific questions included:

- What, if any, challenges have employers and employees experienced in applying the regulatory definition of a serious health condition?
- What, if any, specific challenges or impacts do employers and employees experience when an employee takes FMLA leave on an intermittent basis or on a reduced leave schedule?
- What, if any, specific challenges do employers and employees experience when employees request leave or notify their employers of their need for leave?
- What, if any, challenges employers and employees have experienced with the medical certification process?

The comment period closed on September 15, 2020, and the RFI could mean that more changes are on the horizon.

What Should Employers be Doing?

All in all, the new forms should be easier to complete, evaluate, and submit. In conjunction with switching over to the new forms, employers should review their FMLA policies and procedures to see if any other updates are necessary. However, employers should not reject or require employees to resubmit updated certifications that were originally competed on the old forms (or any other format that meets the FMLA requirements).

Employers should also continue to monitor for regulatory changes that may come out of the DOL's RFI regarding FMLA best practices and shortcomings. Employers should consult their ERISA or employment law counsel to ensure that their FMLA processes and procedures remain compliant and that they stay on top of future changes.

Back to top

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Retirement Plans Now Have New Options for Electronically Distributing Notices

This new rule provides a faster and cheaper alternative to paper disclosure and may be easier for plans to administer than the long-standing electronic disclosure safe harbor.* While this change is a welcome relief for plan administrators, there are several requirements that should be noted.

Unfortunately, welfare plans currently cannot rely on the new disclosure methods, but the DOL has signaled that it may allow them to do so in the future. Also, the new rule does not limit welfare and retirement plans' ability to continue making ERISA-required disclosures under the old safe harbor. Regardless, the new rule finally brings the DOL's disclosure requirements into the modern era and creates new opportunities for retirement plans to save administrative costs.

What Is the New Rule About?

The new rule completes a two-year initiative to expand electronic media use in retirement plan administration by creating a safe harbor for compliance with Title I of ERISA's requirement to distribute certain notices and disclosures to participants, beneficiaries, and other intended recipients. Plan administrators may now fulfill these duties through either a notice-and-access process or through email delivery. The notice-and-access process requires properly notifying participants that they may access disclosures on a website, while email delivery provides the documents directly to the intended recipient. Each of these methods is discussed more fully below.

Although the new rule provides significant changes, several aspects of furnishing ERISA-required disclosures remain the same. First, the new rule does nothing to change the timing requirements of ERISA. If plans choose to take advantage of the new safe harbor, they must still comply with all applicable deadlines. Second, if a plan administrator uses a third party to electronically distribute notices, it is still required to monitor that service provider to ensure compliance with the new rule. Lastly, participants retain the right to opt out of these procedures and receive paper copies instead. Thus, plans should maintain the ability to produce and distribute paper disclosures when necessary.

What Is Covered by the New Rule?

The new rule applies to "covered individuals" and "covered documents." Covered individuals include participants, beneficiaries, or any other individual entitled to covered documents, but only if they have a legitimate pathway for electronic communication with the plan administrator. Individuals who are assigned employee email addresses as part of their employment will meet this requirement. Also, individuals who voluntary provide email addresses or smart phone numbers to the employer, plan sponsor, or plan administrator are included. Covered documents are those documents required to be furnished under Title I of ERISA. However, they do not include documents that must be furnished only upon request.

To utilize electronic disclosure methods under the new rule, plan administrators must first notify recipients of their rights to opt out of electronic disclosure. Crucially, this initial notice must be provided in hard copy. The notice must also be written in a manner calculated to be understood by the average plan participant and include the following information:

- The email address that will be used for the individual;
- Any instructions necessary to access the covered documents;
- A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right;
- A statement of the right, free of charge, to opt out of electronic delivery for all covered documents and receive only paper versions, and an explanation of how to exercise this right; and
- A cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a new version of the covered document.

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How Does the New Safe Harbor Work?

After the initial notice is provided, plan administrators have two alternatives to provide electronic disclosure: (1) posting the disclosure on a website and notifying the individual of the posting ("notice-and-availability" disclosure) or (2) direct email disclosure.

Notice-and-Availability Disclosure

Notice-and-availability disclosure allows plan administrators to post documents to a website and then notify the recipients how to obtain the documents by electronic means. Each aspect of this method is closely regulated, and plan administrators must take reasonable measures to ensure any personal information is kept confidential for all covered individuals. Also, plan administrators must have backup delivery procedures in place in the event of a website failure. As soon as a plan administrator knows (or reasonably should know) that covered documents are unavailable, they must take prompt action to make the covered documents available as soon as practicable.

When posting documents to the website, plan administrators must ensure that the covered document:

- Is available on the website by the date on which it must be furnished under ERISA;
- Remains available on the website for at least one year (even if it is superseded by a new version);
- Is presented in a manner that is easily understood by the average plan participant;
- Is presented in a widely available format (or formats) that is suitable both to read online and can be printed clearly on paper;
- Can be searched electronically; and
- Can be permanently retained in an electronic format.

For each disclosure, plan administrators must notify recipients that the document has been posted. This notice is called the notice of internet availability (NOIA). NOIAs must be written in plain language so the average plan participant can understand them. Administrators can deliver NOIAs electronically, including through email and text message. However, the method for furnishing the NOIA must alert the administrator of any invalid email addresses, and the plan administrator must take prompt corrective action for any failed deliveries. The NOIA itself must include:

- The following statements:
  - "Disclosure About Your Retirement Plan" (must be stated prominently, such as in the NOIA's title or subject)
  - "Important information about your retirement plan is now available. Please review this information."
- The name of the covered document (and a brief description if the name does not reasonably convey the nature of the covered document)
- Website address, or hyperlink to the address, where the covered document is available (should lead directly to the document – requiring recipients to click through an unreasonable number of webpages to reach the document will not satisfy this requirement)
- A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right
- A statement of the right, free of charge, to opt out of electronic delivery for all covered documents and receive only paper versions, and an explanation of how to exercise this right
- A cautionary statement that the covered document is not required to be available on the website for more than one year or, if later, after it is superseded by a new version of the covered document
- A telephone number to contact the plan administrator or other designated representative

Administrators may also use combined NOIAs that cover multiple documents in a single annual disclosure. For these purposes, annual means within 14 months of a previously provided combined annual notice. However, only the following documents may be included in a combined NOIA: summary plan

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description (SPD), covered documents or information that must be furnished annually, any other covered document authorized by the Secretary of Labor, and any applicable notice required by the Internal Revenue Code if authorized by the Secretary of the Treasury. For all other documents, a separate notice must be provided for each.

Email Disclosure

Alternatively, plan administrators may choose to email covered documents directly to recipients. Disclosures may be provided either in the body of the email or as attachments. Such emails must follow the same timing and plain language requirements as NOIAs. Also, like the NOIA, the email must include:

- A subject line that reads: "Disclosure About Your Retirement Plan"
- The name of the covered document (and a brief description if identification by name does not reasonably convey the nature of the covered document)
- A statement of the right to request and obtain a paper version of the covered document, free of charge, and an explanation of how to exercise this right
- A statement of the right, free of charge, to opt out of electronic delivery for all covered documents and receive only paper versions, and an explanation of how to exercise this right
- A telephone number to contact the administrator or other designated representative of the plan

Administrators using email to furnish disclosures must take reasonable measures to protect the confidentiality of personal information. Also, where the plan administrator uses an employer-assigned email address for electronic delivery and employees lose access to that email following termination, the plan fiduciary must obtain a new email address to allow the participant to continue receiving covered documents electronically.

Does the New Safe Harbor Satisfy IRS Electronic Delivery Rules?

The new safe harbor applies only to disclosures required by ERISA and not those required under the Internal Revenue Code (e.g., auto enrollments notices, safe harbor notices, 204(h) notices, and 402(f) notices). The DOL's preamble indicates that the rule is intended to align with the IRS's electronic delivery rules, but the DOL did not obtain formal IRS confirmation that following the rule will satisfy the IRS's electronic delivery standard. We anticipate additional guidance in this regard.

The new safe harbor will also supersede sub-regulatory guidance previously issued by the DOL that allows certain ERISA disclosures to be furnished under the IRS electronic disclosure standards. The July 27, 2020, effective date for the new regulations marks the beginning of an 18-month phase-out period for this guidance, including FAB 2006-03, FAB 2008-03, and TR 2011-03R. After this period, plan administrators may no longer rely on this guidance.

What's Next?

The new safe harbor rule is a welcome relief to plan administrators. While applicability of the new rule is limited to retirement plans for now, it still provides a great opportunity for plans to streamline electronic disclosure of ERISA-required notices and reduce administrative costs. There are several factors plan administrators should consider when taking advantage of the new rule.

First, plan administrators looking to utilize electronic disclosure methods under the new rule should discuss implementation with any third-party service providers that distribute notices and disclosures on behalf of the plan to ensure compliance. Administrators may also need to review their service contracts to ensure that any new services (or changes to existing services) being provided because of the new processes are captured. Procedures for failed email deliveries should be reviewed as well.

Next, although the new rule does not require recipients to affirmatively acknowledge receipt of ERISA-required disclosures, plan administrators may

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consider including such safeguards. The Supreme Court recently held that the "actual knowledge" required to trigger the three-year statute of limitations period under ERISA does not exist where a plan participant received documents but did not read them. Thus, requiring recipients to acknowledge that they have reviewed certain disclosures may assist in limiting the plan's legal exposure.

Adoption of the new safe harbor may also complicate certain aspects of administration for employers with retirement and welfare plans. As mentioned, the new rule does not apply to welfare disclosures, nor does it eliminate the 2002 safe harbor. This shifting landscape may create different disclosure requirements and procedures for documents under different plans. Plan sponsors with consolidated administration under their retirement and welfare plans should pay special attention when updating their processes under the new rule.

Finally, as discussed, the DOL will be phasing out sub-regulatory guidance that allowed plan administrators to rely on IRS electronic disclosure standards. Plan administrators should review their processes to determine whether they use the IRS electronic disclosure standards, and if so, update their disclosure process to meet DOL requirements.

* The 2002 safe harbor for electronic disclosures is set forth in 29 CFR § 2520.104b-1(c) and provides different requirements for plan administrators depending on whether "access to the employer's or plan sponsor's electronic information system is an integral part of" the recipient's job duties.

[Back to top](#)

The Impact of *Bostock* on Employer Sponsored Benefit Plans

The Court's ruling takes effect immediately and not only impacts employers' written policies and handbooks, but also their employee benefit plans. What do employers need to know in order to avoid discrimination in their benefit plans?

Unfortunately, welfare plans currently cannot rely on the new disclosure methods, but the DOL has signaled that it may allow them to do so in the future. Also, the new rule does not limit welfare and retirement plans' ability to continue making ERISA-required disclosures under the old safe harbor. Regardless, the new rule finally brings the DOL's disclosure requirements into the modern era and creates new opportunities for retirement plans to save administrative costs.

Group Health and Welfare Plans

Title VII prohibits discrimination on the basis of race, color, religion, sex, and national origin in the hiring, firing, compensation, and other terms, conditions or privileges of employment. The terms and conditions of employment include employer-sponsored health and welfare benefits. Prior to *Bostock*, Title VII's "because of … sex" prohibition prevented employer-sponsored health plans from discriminating based on pregnancy and ensured coverage applies equally to males and females. In 1978, the Pregnancy Discrimination Act (PDA) amended Title VII to directly prohibit pregnancy discrimination. The PDA required employer-sponsored health plans to cover pregnancy, childbirth, and related medical conditions. In 1983, the Supreme Court ruled in *Newport News Shipbuilding Co. v. EEOC* that employer-sponsored group health plans must extend comprehensive coverage to both sexes under Title VII.

While *Bostock* specifically involved the wrongful termination of three individuals based on their sexual orientation or gender identity, the Court's ruling also applies to discrimination in employer-sponsored group health plans. Employers should consider taking the following steps to ensure that their group health plans do not discriminate on the basis of sexual orientation or gender identity.

- Review plan documents to determine whether the plan's terms limit care for employees based on the individual's sex assigned at birth, gender identity, or designated gender on government forms. Transgender care may include treatment for gender dysphoria, such as mental health therapy, psychotherapy, gender-affirmation surgeries, and related services.
- Review insurance policies to determine whether the carrier is permitted to deny coverage for transgender employees or charge transgender employees a higher premium for coverage.

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- Review long-term and short-term disability benefits to determine if coverage is provided for gender dysphoria or gender-affirmation surgeries.
- Review employee assistance programs (EAPs) and other behavioral services to determine whether they offer specific care for LGBTQ employees.
- Review the health plan's provider network to ensure access to providers knowledgeable about LGBTQ health care.
- Ensure that coverage is provided equally for same-sex and opposite-sex spouses and domestic partners.
- Review plans to determine if family planning benefits, such as adoption assistance, foster care, and reproductive technology assistance, are covered for LGBTQ employees.

Section 1557 Final Regulations

The Court's ruling in *Bostock* came three days after the Department of Health and Human Services (HHS) issued final regulations for Section 1557 of the Affordable Care Act (ACA). Section 1557 prohibits covered health programs or activities that receive federal funds from discriminating on any grounds protected by federal civil rights statutes (i.e., Title VI and Title IX of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975). In 2016, HHS put forth initial regulations that interpreted the meaning of discrimination on the basis of sex to include gender identity (the "2016 Rule"). The 2016 Rule defined gender identity as "one's internal sense of gender, which may be male, female, neither, or a combination of male and female."

The 2016 Rule applied Section 1557 to insurers and some group health plans: retiree medical plans receiving federal funds, medical plans sponsored by hospitals receiving Medicare funding, and any plan of an insurer participating on the public exchanges were subject to Section 1557. The 2016 Rule also provided a private right to sue and seek damages for Section 1557 violations to the same extent provided under the federal civil rights statutes.

However, the recent Section 1557 final regulations (the "New Rule") rolled back the 2016 Rule. HHS stated that the New Rule conforms Section 1557 to the text of federal civil rights statutes, meaning "discrimination on the basis of sex" does not include gender identity or sexual orientation. The New Rule also limits Section 1557's application to entities principally engaged in healthcare and the healthcare activities of other entities to the extent those activities are funded by HHS. Under the New Rule, Section 1557 does not apply to employer-sponsored health plans that do not receive federal financial assistance and are not principally engaged in the business of providing healthcare.

The New Rule has already faced challenges in court. Lawsuits filed in federal court in New York and Washington, D.C., challenging the validity of the New Rule in light of *Bostock* resulted in preliminary injunctions preventing the New Rule's operation. The New Rule was scheduled to go into effect on August 18, 2020. The preliminary injunctions stopped the New Rule from going into effect while the lawsuits continue to work their way through the courts. The federal judges in New York and Washington, D.C., found that HHS failed to take into account the impact of the Supreme Court's decision in *Bostock* when it drafted the New Rule. So, for now, the New Rule still has not gone into effect.

Because the New Rule's validity is under question in light of the Supreme Court's ruling in *Bostock*, it is important for employers to review their group health and welfare plans now to ensure they do not discriminate based on sexual orientation or gender identity.

Conclusion

Bostock has a significant impact on employers' benefit plans, even in states where workplace protections for LGBTQ employees already existed under state law. For this reason, employers should review their employer-sponsored health and welfare plans with fresh eyes to ensure they do not make discriminatory distinctions based on employees' sexual orientation or gender identity. Employers should wait to make any changes to their benefit plans under the New Rule and watch for future developments while the courts determine whether the New Rule is valid. Additionally, employers that plan to avoid compliance with the new requirements based on strongly held religious beliefs should

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consult with their attorney to ensure any available religious exclusions are met.

Back to top

2021 Updates to IRS Limits

Retirement Benefits

Updated Limit	2021 Limit Amount	Change
Basic limit on elective deferral amounts	$19,500	No change
Limitation on catchup contributions for participants over age 50	$6,500	No change
Elective deferral limit for SIMPLE plans	$13,500	No change
Limitation on catchup contributions for participants over age 50	$3,000	No change
IRA maximum contribution limit	$6,000	No change
Limitation on catchup contributions for participants over age 50	$1,000	No change
457 elective deferral limit	$19,500	No change
Annual dollar limit on includable compensation	$290,000	Up from $285,000
Annual additional dollar limit on contributions	$58,000	Up from $57,000

Additionally, with traditional IRAs, the amount that can be contributed may be reduced depending on filing status and income. Below are the phase-out ranges for 2021:

- For single taxpayers covered by an employer retirement plan, is $66,000 to $76,000, up from $65,000 to $75,000.
- For married couples filing jointly, where the spouse making the IRA contribution is covered by an employer retirement plan, the phase-out range is $105,000 to $125,000, up from $104,000 to $124,000.
- For an IRA contributor who is not covered by an employer retirement plan and is married to someone who is covered, the deduction is phased out if the couple's income is between $198,000 and $208,000, up from $196,000 and $206,000.
- For a married individual filing a separate return who is covered by an employer retirement plan, the phase-out range is not subject to an annual cost-of-living adjustment and remains $0 to $10,000.

Welfare Plans and Fringe Benefits

Updated Limit	2021 Limit Amount	Change
Health FSA limit	$2,750	No change
Health FSA carryover limit (amount that can be carried over from 2020 into 2021)	$550	Up from $500
DCAP limit		
Unless married and filing separately	$5,000	No change
Married and filing separately	$2,500	No change
HDHP minimum annual deductible		
Self-only coverage	$1,400	No change
Family coverage	$2,800	No change
HDHP Out-of-pocket maximum		
Self-only coverage	$7,000	Up from $6,900
Family coverage	$14,000	Up from $13,800
HSA maximum contribution limit		
Self-only coverage	$3,600	Up from $3,550
Family coverage	$7,200	Up from $7,100
Catch-up contribution for participants over age 50	$1,000	No change

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Updated Limit	2021 Limit Amount	Change
Dollar limitation for definition of a “key employee”		
Officer group	$185,000	No change
More-than-1% owner	$150,000	No change
Dollar limitation for definition of a “highly compensated employee”	$130,000	No change

Back to top

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