SouthWest BENEFITS Association

31st Annual Benefits Compliance Conference

Scheduled in 2 Hour Segments during
November 2020 Produced Virtually via Zoom

SESSION 1:
IRS National Office Update

Introduction: **Misty Leon**, Partner, Wilkins Finston Friedman Law Group
Speakers: **Eric Slack**, Director, Employee Plans, Internal Revenue Service
Lou Leslie, Technical Advisor to the Employee Plans Director, Internal Revenue Service

A Special Thanks to our Sponsors

SWBA

Our 45th Annual Conference

Today's Speakers

Eric Slack is the Director of Employee Plans in the IRS Tax Exempt and Government Entities division. He is responsible for EP's Examinations, Determinations, Voluntary Compliance and Technical programs. He will guide EP in implementing changes required by the recently enacted Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019. Eric Slack was serving as the Director of Field Operations - West for the Western Compliance Practice Area in the Large Business and International Division. He formerly was the Senior Tax Law Specialist in EP. Prior to this, he was the Acting Area Manager, Mid-Atlantic, overseeing examinations of qualified plans in the area from Philadelphia to South Carolina and west to Ohio and West Virginia. Before leading the Mid-Atlantic Area, Eric served as Detailed Tax Counsel to the Senate Finance Committee under Ranking Member, Senator Ron Wyden (D-OR), where he worked on tax issues including the negotiation of the omnibus spending and tax extender bill of December 2015. Eric is a graduate of Washburn University of Topeka with a bachelor's degree in English and Spanish. He has a J.D. degree from George Washington University and an LL.M. degree in Taxation from Georgetown University in Washington, DC.

Lou Leslie serves as the Technical Advisor to the Director, Employee Plans. He provides advice in all matters relating to the IRS Employee Plans function within the Tax Exempt and Government Entities Division. Lou assists with oversight of the IRS comprehensive tax administration program for over one million retirement plans to ensure compliance with a broad range of complex tax laws and fairness in enforcement activities. Lou previously served in a similar position for the Director, Employee Plans Rulings and Agreements. Lou's held a variety of positions in his 25+ years at the IRS. He began his career as an EP Tax Law Specialist and gained experience in Determinations, Voluntary Compliance, and Examinations. Lou also spent seven years in private practice at national law firms and accounting firms.

SWBA 31st Annual Compliance Conference
IRS National Office Update

Learn …

- The TE/GE Program Letter for FY 2021
  - IRS.gov/ProgramLetter
- Priorities for FY 2021
  - Compliance Strategies
  - Data Driven Approaches
  - Referrals, Claims and Other Casework
  - Compliance Contacts
  - Determinations
  - Voluntary Compliance and Other Technical Programs

EP Compliance Strategies

- Compliance Strategies are used to identify, prioritize and allocate resources within the EP taxpayer base
- TE/GE Compliance Governance Board approves issues in the Compliance Strategy
- TE/GE Compliance Governance Board consists of:
  - TE/GE Commissioner
  - TE/GE Deputy Commissioner
  - EP Director
  - EO Director
  - TE/GE Division Counsel
  - TE/GE Senior Technical Advisor
- EP will update compliance strategies throughout FY 2021

EP Compliance Strategies FY 2021

- **Required Mandatory Distributions in One Participant Plans** – determine if owner-employees are taking the required minimum distribution
- **403(b) plans** – Examine universal availability, excessive contributions and proper use of the age 50 and 15-year catch-up contributions under IRC Section 414(v)
- **457(b) plans –** Examine excessive contributions and proper use of special 3-year catch-up contribution rule
- **Participant Loans** – determine if plans are complying with the requirements for participant loans
- **ESOPs** - determine whether the employer stock has been properly valued

EP Compliance Strategies FY 2021

- **Exam Closing Agreement Follow-Up** – Examine plans that have previously executed a closing agreement with EP to determine if the same or similar issue reoccurred
- **Fully Insured Defined Benefit Plans** – determine whether fully insured plans are complying with IRC 412(e)(3).
- **IRC 404(a)(7) Deduction Violations** – determine if plans are exceeding the deduction limit where there is a combination of a defined contribution and defined benefit plan.
- **Required Minimum Distributions** – determine if plans are complying with IRC section 401(a)(9).

Data Driven Audits

- Data-Driven Audits use quantitative criteria to select work
- Allows agents to focus on issues that have the greatest impact
- EP collaborates with IRS Research to sample the results of data queries and models to test indicators of noncompliance for various plan types using the Form 5500 series and other retirement related forms and information received by the IRS.

Referrals, Claim, Other Casework

- **Referrals** – Info from internal sources, private practitioners, participants and other agencies
- **Claims** – Requests for refunds or credits of overpayments of amounts already assessed and paid
- **Other casework -** investigate nonbank trustees (NBT) to verify that they have satisfied the NBT regulations and pursue promoter investigations.

Compliance Contacts

- **Compliance Contacts** are used to address potential noncompliance, primarily using correspondence contacts with a goal to increase voluntary compliance
  - Compliance checks
  - Soft letters
- A **compliance check** is correspondence with plan sponsors to determine if recordkeeping and reporting requirements are being met
  - Not considered an examination, but may be situations when a compliance check is referred for an examination
  - Matches information from returns or other information items to resolve errors
  - Educate plan sponsors about reporting and filing requirements

Compliance Contacts

- A **soft letter** is correspondence that notifies plan sponsors that we've noticed something that indicates their plan could have an issue
  - You should check to make sure your plan doesn't have that issue
  - A response to these soft letters is not expected. However, responses may be received and converted into a compliance check.
  - These contacts allow TE/GE to establish a presence in the taxpayer community in a manner that reduces the cost to the IRS while limiting taxpayer burden.

Compliance Contacts FY 2021

- Final Return with Assets
- Deduction Exceeds 25% of Participant Compensation
- SIMPLE IRA Plans - Eligible Sponsors
- Indirect Service Requirements
- EOY/BOY Assets Mismatch
- DB Plans Missing Required Actuarial Information
- SEP IRA RMD
- IRC 457(b) Plan Excess Deferrals
- Form 5500-EZ First Return Filer

Examination Process

There are three parts to the TE/GE examination process:

- New starts
- Identifying and developing issues
- Processing case for closure

Examination Process

New starts

- Determine the scope of the audit
- Initial interview discussions establish the groundwork of the audit – practices and procedures in place
- Working together in a transparent environment will lead to resource savings for both TE/GE and the taxpayer

Examination Process

Identifying and developing issues

- Issue development includes
  - determining the facts,
  - applying the law to those facts, and
  - understanding the various tax implications of the issue
- Using Information Document Request (IDR) process to develop the facts

Examination Process

Processing case for closure

- Goal of the resolution phase is to reach agreement
  - EPCRS (Employee Plans Compliance Resolution System
  - Issue a Revenue Agent Report (RAR) to the plan sponsor or appropriate taxpayer
- From issue development through resolution, discussions are crucial for a complete understanding of the merits of the issue

Examination Error Trends

- Improper contribution and forfeiture allocations
  - Not using compensation as defined in the plan
  - Improperly calculating self-employment earned income
  - Incorrect matching contributions
- Late deposits of employee deferrals resulting in a prohibited transaction

Examination Error Trends

- Excluding otherwise eligible employees
- Not timely amending the plan
- Assets not titles in name of the trust
- Top-heavy minimum contributions and proper vesting not provided
- Safe harbor 401(k) notice not timely
- Unallocated forfeiture accounts

Determinations

- EP continues to accept determination letter applications for
  - individually designed plans for both initial and terminating plans
  - merged plans
- The window for amended hybrid plans just closed on August 30, 2020, and we received just over 700 applications.

Determinations Error Trends

- IRC Section 411
  - Improper forfeitures resulting from noncompliant cash-out provisions
  - Application indicates elimination or removal of protected benefits (without documentation)
- IRC Section 401(a)(35)
  - Plan invested in employer securities but didn’t meet any exemptions in Section 401(a)(35), so diversification requirements were not satisfied

Determination Error Trends

- IRC Section 401(b)
  - Non amender and late amender failures
- IRS Section 410
  - Bad plan language issues involving the exclusions of temporary, summer or seasonal, and part-time employees
- User Fee
  - Incorrect user fees paid

Voluntary Compliance Programs

- **Self-Correction Program (SCP)** – You can correct many plan mistakes for free without ever contacting IRS
- **Voluntary Correction Program (VCP)** – Make a submission and pay a compliance fee to correct mistakes not eligible for SCP
- **Audit CAP** – If already under exam, much larger sanction to make correction and keep your plan qualified

Voluntary Compliance Recent Changes

- All VCP application submissions, including user fees, must be submitted electronically using Pay.gov
- EPCRS – Rev. Proc. 2019-19 expanded the types of plan mistakes that can be corrected using the Self-Correction Program

Voluntary Compliance Recent Guidance

Rev. Proc. 2019-19 expanded mistakes that can be corrected using SCP

- Correct certain Plan Document Failures
- Correction options and possible relief from deemed distributions associated with specified failures involving plan loans
- Additional opportunities for correcting certain operational failures by plan amendment
- Correction for failure to obtain spousal consent for distributions and plan loans

Retirement Plans Recent Guidance

Notice 2020-79:

- Provides list of dollar limitations for qualified retirement plans, adjusted for cost-of-living adjustments for 2021.

Revenue Ruling 2020-24:

- Clarifies withholding/ reporting obligations that apply when payment is made from a qualified plan to a state unclaimed property fund.

Revenue Procedure 2020-46:

- Added 'a distribution made to a state unclaimed property fund' to the list of permissible reasons for a taxpayer to self-certify eligibility for a waiver of the 60-day rollover requirement in Rev. Proc. 2016-47.

Notice 2020-68:

- Provides further information regarding certain provisions of the SECURE Act of 2019 and the Bipartisan American Miners Act of 2019. A grab bag of questions and answers to clarify issues related to those provisions.

Retirement Plans Recent Guidance

Notice 2020-61

- Provides guidance regarding the special rules relating to single-employer defined benefit pension plans under § 3608 of the CARES Act.
- Under these special rules, a contribution that would otherwise be required to be made to such a plan during 2020 is required to be made by January 1, 2021, and
- Special interest adjustment rules apply to a contribution that is made after the otherwise applicable deadline.
- In addition, an employer may elect to apply the benefit restrictions for underfunded plans under § 436 of the Code for the 2020 plan year (or a fiscal plan year that contains any part of 2020) using the plan's funded status for the last plan year ending in 2019.

Retirement Plans Recent Guidance

Notice 2020-62

- Administrators of qualified retirement plans are required to provide a written explanation of tax consequences when making distributions that are eligible for rollover.
- The explanation is often referred to as the “402(f) notice” after the relevant section of the Internal Revenue Code governing the requirement.
- The model notices as modified by this Notice 2020-62 take into consideration certain legislative changes, including changes related to the Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. 116-94 (SECURE Act).

Retirement Plans Recent Guidance

Notice 2020-51:

- Provides guidance relating to the waiver in 2020 of required minimum distributions (RMDs) from certain retirement plans and IRAs due to the amendment of IRC Section 401(a)(9) by § 2203 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, P.L. 116-136.
- This notice provided
  - rollover relief (including an extension of the 60-day rollover period to August 31, 2020) with respect to waived RMDs and certain related payments,
  - permits certain repayments to inherited IRAs, and
  - sets out Q&A's to answer anticipated questions regarding the waiver of 2020 RMDs.

Retirement Plans Recent Guidance

Notice 2020-50:

- Provides guidance relating to the application of § 2202 of the CARES Act for qualified individuals and eligible retirement plans. Under § 2202 of the CARES Act, qualified individuals receive favorable tax treatment with respect to distributions from eligible retirement plans that are coronavirus-related distributions.
  - A coronavirus-related distribution is not subject to the 10% additional tax under Code Section 72(t) (including the 25% additional tax under § 72(t)(6) for certain distributions from SIMPLE IRAs),
  - Generally includible in income over a 3-year period, and
  - To the extent the distribution is eligible for tax-free rollover treatment and is contributed to an eligible retirement plan within a 3-year period, will not be includible in income.
- CARES Act § 2202 increased plan loan amount under § 72(p) of the Code and permits a suspension of payments for plan loans outstanding on or after March 27, 2020, made to qualified individuals.

Taxpayer Digital Communications

- EP is rolling out Taxpayer Digital Communication (TDC)
- TDC uses a secure online portal to exchange information with taxpayers
- Almost 400 EP Exam employees could participate in the pilot

Small Entity Compliance Initiative

- Expanded outreach efforts to the small employer and underserved customers
  - Encourage them to adopt a plan that best fits their needs
  - Focus on more outreach
  - Updating website and include more information for this group in our newsletter
  - Educate them about their responsibilities and how to maintain their plan and keep it in compliance
- Contact us at TEGE.Outreach@irs.gov if you have a speaking opportunity

Resources

- Publication 3998, Choosing a Retirement Solution for your Small Business
- IRS.gov/retirement
- IRS.gov/COVID19
- IRSvideos.gov
- Employee Plans News
  - Subscribe at IRS.gov/RetirementNews
- TEGE.Outreach@irs.gov

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SESSION 2:
Hot Topics for Compliance in Welfare Plans, Title VII Discrimination Cases and More

Introduction: **Ellen Adams**, Shareholder, GableGotwals
Speakers: **Paula Williams**, GableGotwals
Mark Bodron, Partner, Baker Botts LLP

Today's Speakers

Paula Williams is a shareholder in the Oklahoma City office of GableGotwals. She represents employers in a wide range of labor and employment law, including claims involving wage and hour disputes, family/medical leave, sexual harassment, retaliation, age, race, pregnancy and disability discrimination, and wrongful termination. She handles claims involving enforcement of non-competition and confidentiality agreements, breach of employment contracts, and personnel policy violations. In addition to litigating, Paula regularly advises employers regarding best employment practices and effective methods to avoid employment-related claims. She counsels employers on issues such as hiring, discipline, termination, policies and procedures, drug/alcohol testing, workplace safety, anti-discrimination and anti-harassment, responding to complaints, employment contracts, and managerial training.

Mark Bodron is a partner in the Houston office of Baker Botts. His practice concentrates on the areas of employee benefits and executive compensation. Mr. Bodron advises clients on all aspects of qualified retirement plans, including 401(k) plans, ESOPs and cash balance plans, nonqualified plans, stock-based plans and deferred compensation and other executive compensation arrangements, including issues related to Section 409A deferred compensation rules and Section 162(m) performance-based compensation. Mr. Bodron's practice also includes advising clients on health and welfare plan matters, including compliance and reporting issues related to the Affordable Care Act, COBRA and HIPAA. He frequently advises clients on ERISA fiduciary and prohibited transaction matters and represents clients before the IRS, DOL and PBGC on matters related to employee benefits.

Hot Topics for Title VII Discrimination Cases and More

SWBA

31st Annual Benefits Compliance Conference

Paula M. Williams

GABLE GOTWALS
COUNSEL

What we'll cover:

1. The Fair Labor Standards Act

- DOL's Proposed Test for Independent Contractors
- Implications for Getting it Wrong

2. Title VII of the Civil Rights Act

- LBGTQ Discrimination & Harassment
- Racial Discrimination & Harassment
- Diversity & Inclusion

3. Americans with Disabilities Act (ADA)

- Brand new precedent
- Is COVID a disability?
- Masks
- Reasonable Accommodations
- Returning to Work
- Employee Leave

Fair Labor Standards Act ("FLSA")

- Minimum Wage and Overtime
- DOL-WHD Investigation or Lawsuit
- Individual Lawsuit or Collective Action
- Civil Penalties
- Criminal Penalties
- Treble Damages + Attorney Fees

Employee or Independent Contractor?

Economic Reality Test

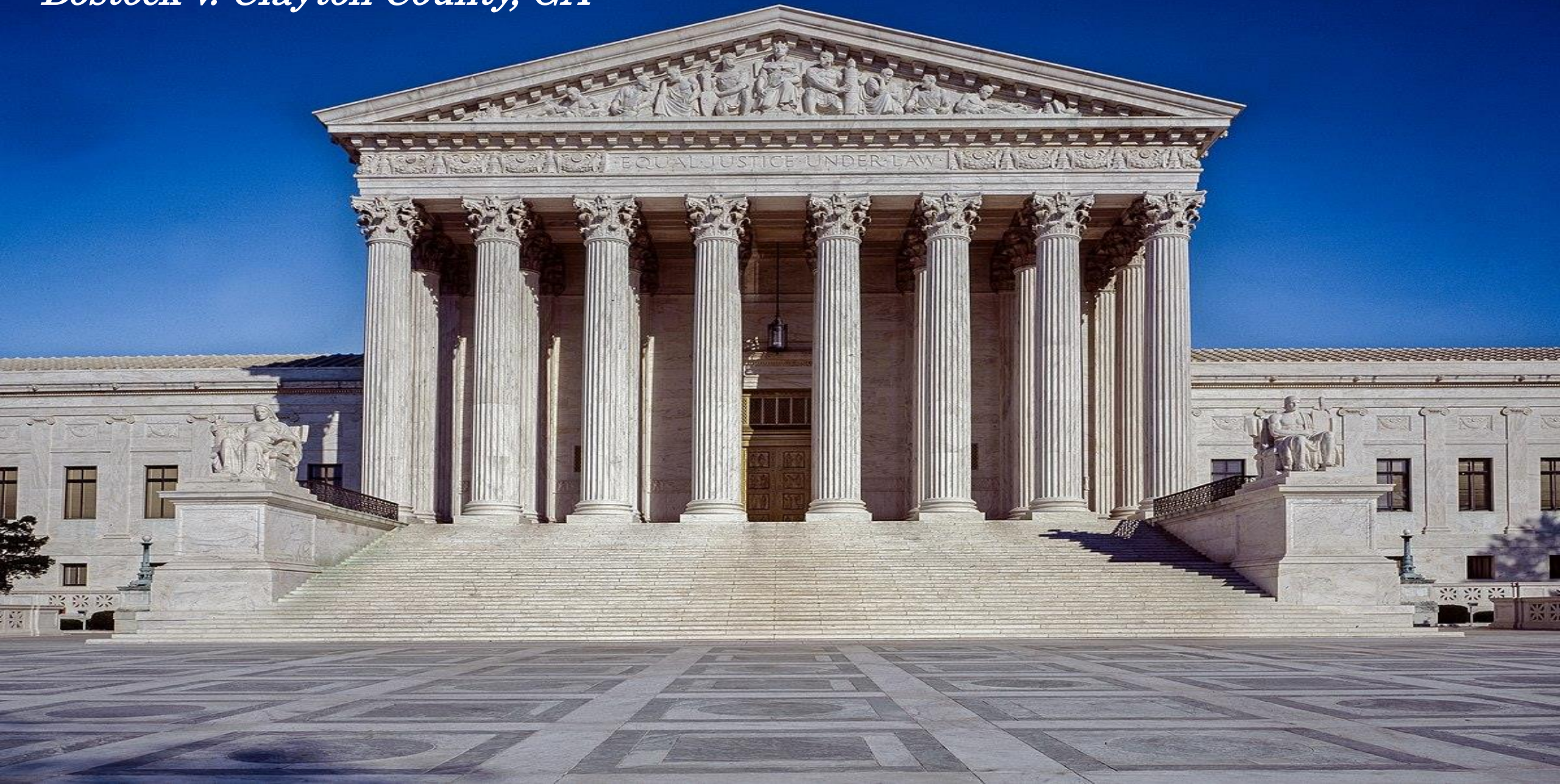
1. **The nature and degree of the worker's control over the work;**
2. **The worker's opportunity for profit or loss;**
3. The worker's skill required for performance;
4. The permanence of the working relationship;
5. The extent to which the work is part of the integrated unit of production.

Title VII of the Civil Rights Act

Protected Classes:

[COMPANY] is committed to equal employment opportunity. [COMPANY] strives to ensure equal employment opportunity in connection with all terms and conditions of employment. Accordingly, [COMPANY] will not tolerate any form of discrimination based on race, color, ancestry, national origin, citizenship, sex, gender, gender identity, sexual orientation, pregnancy, marital status, religion, age, disability, genetic information, medical marijuana license holder status, veteran status or any other characteristic protected by law, including association with a member of a protected class.

Bostock v. Clayton County, GA



Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

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Know the Basic Definitions

- Gender Identity
- Gender Expression
- Sexual Orientation
- LGBTQ or LGBTQIA+

Implications of *Bostock* for Employer Health Plans

Same-sex spousal coverage:

- A plan that offers coverage to opposite-sex spouses must offer coverage to same-sex spouses.

Transgender coverage issues:

- May an employer benefit plan deny coverage for medical services sought by transgender employees?
  - Ex: hormone therapy, sex-change surgery, and counseling or psychotherapy services.
- May an employer deny preventive services?

Racial Discrimination in the Workplace

Tulsa, OK

Dallas, TX

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Racial Discrimination and Speech in the Workplace

A South Jersey Wawa employee was told to take off his Black Lives Matter mask. He quit, and Wawa is examining its uniform policies.

by Erin McCarthy, Updated: June 15, 2020

COURTESY ANDRE LYNCH JR.

OKLAHOMA'S NEWS 4 | NEWS | HISPANIC HERITAGE MONTH | WEATHER | SPORTS | WATCH | VIDEO CENTER | LINKS

Texas woman says she was fired by Whataburger for wearing a Black Lives Matter mask

FOOD

Taco Bell says employees can wear Black Lives Matter masks after a worker was fired for wearing one

Kelly Tyko USA TODAY

Published 11:54 a.m. ET Jun. 18, 2020 | Updated 2:54 p.m. ET Jun. 18, 2020

kxan | NEWS | COVID-19 | WEATHER & TRAFFIC | INVESTIGATIONS | SPORTS | STUDIO 512 | SIMPLE HEAL

Texas teacher placed on leave after complaints about Black Lives Matter, LGBTQ posters in her virtual classroom

(Courtesy of Taylor Lifka)

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Discrimination & Harassment: Two Perspectives

- **LEGAL** Perspective: **Discrimination or Harassment**
- **POLICY** Perspective: **Misconduct** that should not be tolerated and should result in swift, severe discipline or discharge whether or not it rises to the level of discrimination or harassment.

Discrimination and Speech in the Workplace

- No 1A right to free speech in private employment
- But, check your policies:
  - Anti-bulling
  - Anti-discrimination
  - Anti-harassment
  - Diversity & Inclusion
  - Corporate Values / Code of Conduct
  - Uniform Policy
  - Professionalism Policy
- Ensure equal application and treatment under your policies.
- Document, Document, Document

How to Respond

- **Update Policies**
- **Training**
  - Management
  - Other Employee Groups
- **Evaluate current diversity/equity/inclusion efforts.**
- **Take complaints seriously.**
  - Show no tolerance for discriminating or harassing behavior.
  - Take effective corrective action if appropriate.
- **Ensure leaders at the top take an active, visible lead in promoting and encouraging discrimination and harassment prevention efforts.**

ADA
Americans with Disabilities Act

30 years
1990–2020

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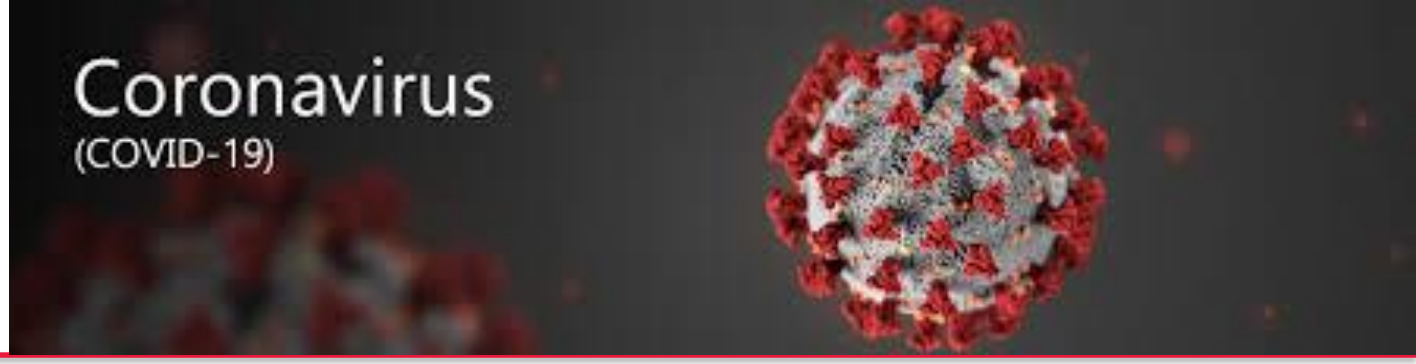
ADA + COVID-19

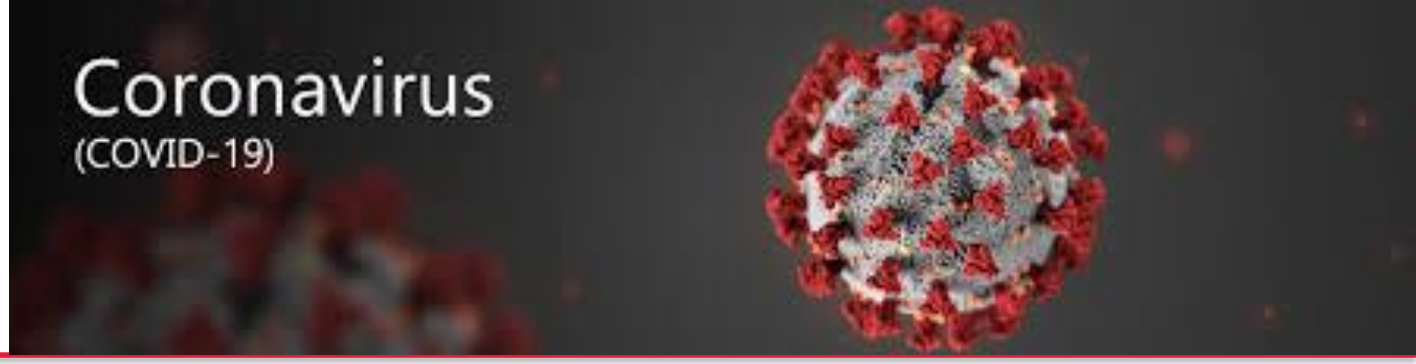


Step 1: Is the health condition an ADA-recognized disability?

- ***Actual*** disability
- ***Record of*** disability
- ***Regarded as*** disabled

Step 2: Can the employer make a reasonable accommodation?

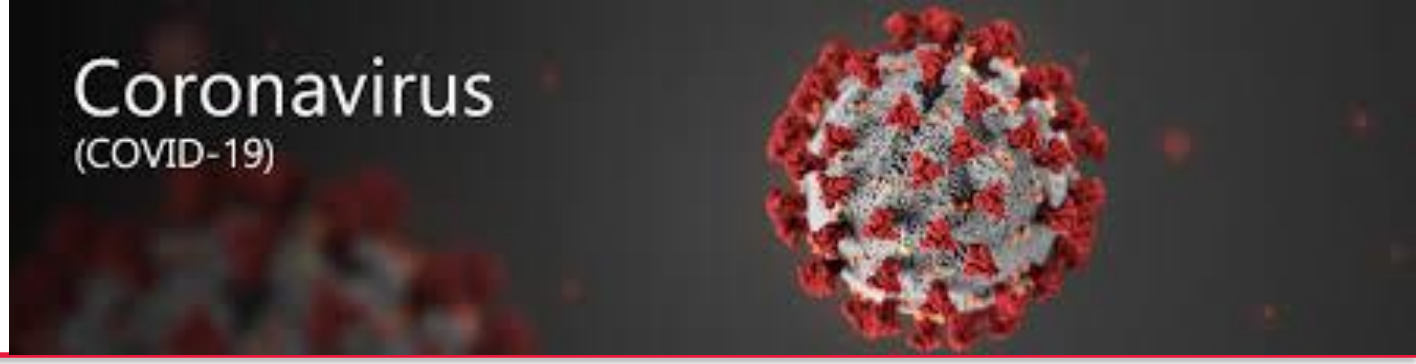
ADA + COVID-19



Long-term COVID-19 symptoms/effects:

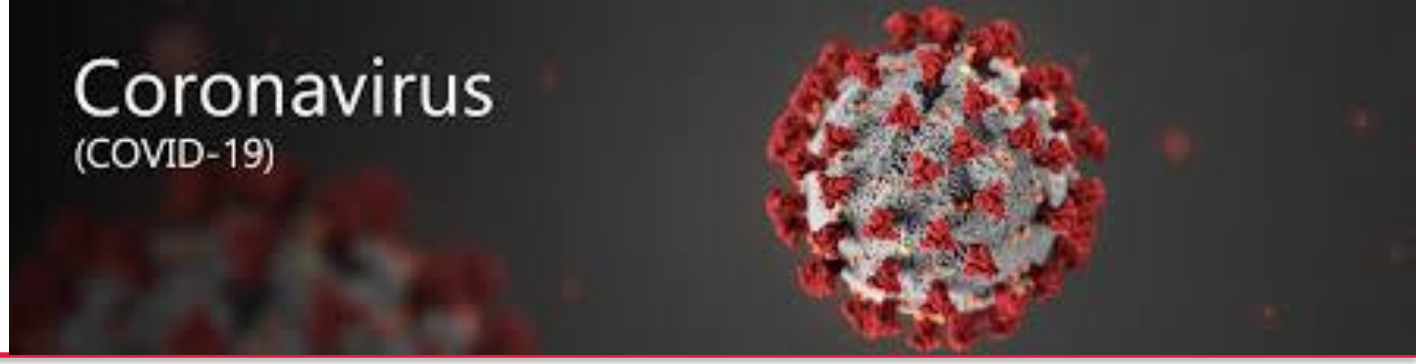
- Fatigue (extreme fatigue is the most common long-term complication)
- Shortness of breath
- Headache
- Cough
- Joint pain
- Damage to heart muscle
- Scar tissue in the alveoli of the lungs
- Blood clots

ADA + COVID-19



- **What is reasonable accommodation?**
  - Job restructuring
  - Acquiring, modifying equipment
  - Reassignment to a vacant position

ADA + COVID-19



- **Is an employee with a disability exempt from my mandatory mask policy?**
  - No.
  - But, accommodation may be needed.
- **Follow your interactive accommodations protocol that should be familiar to you.**

HOW CAN I HELP YOU?

Paula M. Williams

405-568-3302

pwilliams@gablelaw.com

This is legal education and not legal advice.

You should consult your lawyer before taking any action that has legal consequences.

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COUNSEL

Hot Topics for Compliance in Welfare Plans, Title VII Discrimination Cases and More

SWBA 31st Annual Benefits Compliance Conference, November 12, 2020

Mark A. Bodron, Baker Botts L.L.P.

BAKER BOTTS

Hot Topics for Compliance in Welfare Plans - Agenda

- COVID-19
  - Families First Coronavirus Response Act (FFCRA)
  - Coronavirus Aid, Relief, and Economic Security Act (CARES Act)
  - Furloughs vs Layoffs
  - Impact on Patient Protection and Affordable Care Act (ACA) and COBRA
  - DOL and IRS Guidance on COVID
- Plan Amendments and Notices
- 2020 Forms 1094 and 1095
- Employer Shared Responsibility Penalty and IRS Letters
- ACA Section 1557
- Updated COBRA Notices
- ACA Cadillac Tax
- Future of ACA? Supreme Court Review in *California v. Texas* (5th Cir. 2019)
- Future of Balance or Surprise Billing
- 2021 HSA, HDHP and FSA Limits

COVID-19 Legislation

- FFCRA
  - COVID-19 testing requirements for group health plans and health insurers
  - IRS Notice 2020-15 allows free COVID-19 testing and treatment before meeting HDHP deductible
- CARES Act
  - Health savings account (HSA) permitted to cover telehealth services prior to a participant reaching the required deductible
  - HSAs and Flexible Spending Accounts (FSAs) can be used to purchase over-the-counter medical products, including those needed in quarantine and social distancing, without a prescription from a physician
  - Under ERISA Section 518, as amended by CARES Act Section 3607, following a Presidentially declared disaster or a public health emergency declared by the HHS, DOL may postpone for up to one year deadlines for notices and filings for employee benefit plans
    - Section 518 further provides that no plan shall be treated as failing to be operated in accordance with plan terms due to complying with the postponement of a deadline

COVID-19 Legislation

- COVID-19 Testing and Cost
  - Group health plans required to offer free COVID-19 testing
    - Insured/self-insured
    - State/local government plans
    - Grandfathered plans under ACA
    - Church plans
    - Individual/student insurance
  - Plans not required to offer free COVID-19 testing
    - Retiree-only
    - Short-term insurance
    - Plans excepted from ACA (for example, standalone dental or vision)
  - COVID-19 Testing
    - Approved by FDA or for which emergency approval is being sought
    - Serological antibody tests intended for use to diagnose current or past infection
    - Other tests to determine if COVID-19 testing is needed, such as flu test
    - Vaccines/testing without cost-sharing
    - Drive-through testing

COVID-19 Legislation

- COVID-19 Testing Costs
  - In-network negotiated in effect before public health emergency will remain in place
  - Out-of-network price is the cash price listed on a public website by provider or a lower negotiated rate
  - Penalties of up to $300/day if providers do not make the cash price public
- Can you prevent a participant from getting the test from stand-alone emergency care?
- Can you limit the number of tests per participant?

COVID-19 Impact On Welfare Plans

- Employer Responses to Impact of COVID-19
  - Reductions in salaries and wages
  - Furloughs vs Layoffs
- Furloughs versus Layoffs and Welfare Plan Considerations
  - A furlough is not a termination of employment
    - Basically, an employee on paid or unpaid leave of absence or reduction of hours
  - Furloughed employee may still have coverage under the employer's group health plan
    - ACA stability period may require continued coverage
  - Plan terms will govern whether the coverage terminates or continues
  - If an insured plan, employer should confirm whether reduction in hours will end coverage for furloughed employees under the terms of the policy
  - A furlough is not a COBRA event unless the employee loses of coverage
    - If coverage is lost, COBRA is required to be offered (note extended COBRA coverage election period under Joint Notice discuss below)
  - Potential for penalties under Code Section 4980H if furloughed employees cause affordable coverage not to be offered to 95% of full-time employees

COVID-19 Impact On Welfare Plans

- Furloughed Employees (con't)
  - For furloughed employees on COBRA who pay the full COBRA premium, the coverage will most likely not be "affordable" for ACA purposes
  - Long furlough period may impact who is a full-time employee for 2021 plan year coverage
    - If a stop-loss policy, confirm treatment of furloughed employees
    - Furloughed employees out for a long period of time may be "new employee" in 2021 when they return to work
  - Consider issue of premium payment for employees on unpaid furloughs –alternatives taken by employers
    - Reduced or waived in full employee portion of premium
    - Required full payment of employee portion of premium during furlough period
    - Employer paid employee portion of premium during furlough period and employee repays employer once he or she returns to work
  - For non-medical welfare benefits (life, ADD, LTD), coverage will turn on policy terms

Agency Guidance

- IRS Guidance
  - IRS Notice 2020-15 [HDHP/HSA Can Pay Cost for Testing/treatment of COVID-19 Without Application of a Deductible or Cost Sharing]
  - IRS Notice 2020-23 [Delays Filing Date for Form 5500s Due Prior to July 15, 2020]
  - IRS Notice 2020-29 [Flexibility for 125 Plans/Health and Dependent Care FSAs]
  - IRS Notice 2020-33 [Increases FSA Carry-over Amount from $500 to $550]
- DOL Guidance
  - EBSA Disaster Relief Notice 2020-01
- Joint Guidance Issued by DOL, IRS and Treasury, May 4, 2020
- FAQs posted by IRS and DOL

Agency Guidance

- EBSA Notice 2020-01
  - Delays or postpones due dates for certain required ERISA notices and filings applying to employee benefit plan and responsible plan fiduciary pursuant to ERISA Section 518, as amended by CARES Act Section 3607
  - No violation of ERISA for failure to timely furnish a notice, disclosure, or document that must be provided between March 1, 2020 and 60 days after the announced end of the COVID-19 National Emergency (the Outbreak Period) if the plan and responsible fiduciary act in good faith and furnish the notice, disclosure, or document as soon as administratively practicable under the circumstances
  - Good faith includes the use of electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites
  - Relaxed compliance standards and relief period applies to SPDs, SMMs and other notices and disclosures required by ERISA

Agency Guidance

- EBSA Notice 2020-01 (con't)
  - Extends to July 15, 2020 the filing date for Forms 5500 and Forms M-1 that have filing dates between April 1, 2020, and July 14, 2020 in concert with IRS guidance
  - From ERISA fiduciary standpoint
    - Plans must act reasonably, prudently, and in the best interest of the covered workers and their families
    - DOL expects plan fiduciaries to make reasonable accommodations to prevent the loss of benefits or undue delay in benefit payments and to attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes
  - Enforcement actions
    - Compliance assistance, grace periods, and other relief where appropriate
    - Physical disruption to a plan or service provider's principal place of business makes compliance with pre-established timeframes for certain claims' decisions or disclosures impossible

Agency Guidance

- Joint Notice & DOL FAQs
  - DOL, IRS and Treasury Joint Notice and DOL FAQs address extended timeframes for certain required notices with respect to group health plans, disability and other welfare plans and pension plans during the Outbreak Period
  - Group health plans, disability and other welfare benefit plans disregard the Outbreak Period for plan participants, beneficiaries, qualified beneficiaries, or claimants in determining the periods and dates of actions relating to:
    - Special enrollment for group health plans
    - COBRA continuation coverage elections and premium payments
    - Claims procedures and external review processes
  - Can employer require election and payment of the COBRA premiums before paying benefits to providers?
  - Extended periods do not apply to employers
    - Plan response time requirements for claims and appeals are not extended

Agency Guidance

- IRS Notice 2020-29
  - Relaxed requirements for cafeteria plan, including health flexible spending accounts and dependent care flexible spending accounts
    - 125 plan may allow employees to make certain prospective mid-year election changes during 2020, regardless of whether the employees experience a change event provided under the regulations
    - In the employer's discretion whether to amend the 125 plan to allow changes
    - Changes permitted include
      - Make an election if initially declined to elect employer provided health coverage
      - Revoke an existing election and make a new election for different coverage
      - Revoke an existing election if employee attests in writing that employee is enrolled, or immediately will enroll, in other "comprehensive" health coverage not sponsored by the employer.
      - With respect to a health or dependent care FSA, make or revoke an election or increase or decrease an election
- IRS Notice 2020-33
  - Increases carryover limit for health and dependent care FSAs from $500 to $550

Plan Amendments and Notices

- Plan Amendments, SPDs, SMMs and SBCs
  - Employer will need to amend its welfare plans to reflect voluntary and legally required changes
  - If separate from the plan document, Employer will need to update and provide to employees updated summary plan descriptions ("SPDs") and/or summaries of material modification ("SMMs") notifying employees of the plan changes
  - Employer will need to timely update and distribute to employees the summaries of benefits and coverage ("SBCs")
    - Tri-Agency FAQ 42, Q&A 9: Due to COVID-19, IRS, DOL and HHS will not take enforcement action against any plan or issuer that makes material modification to plan or coverage to provide greater coverage related to the diagnosis and/or treatment of COVID-19, without providing the requisite 60 days advance notice, however, the notice of the changes is provided as soon as reasonably practicable

2020 Forms 1094 and 1095

- Notice 2020-76 extends the deadline for delivery - but not filing - of 2020 Forms 1094 and 1095
  - Deadline to furnish Forms 1095-B and 1095-C statements to employees is extended from February 1, 2021 to March 2, 2021
  - Filing deadline for Form 1094-C and 1094-B remains March 1, 2021, if filed in paper, and March 31, 2021, if filed electronically (required if 250 or more forms)
- Employees do not have to file Form 1095-B or 1095-C with federal income tax return (since no tax will be due)
  - No penalty for failure to furnish Form 1095-B if employer posts notice on website employee can request form and form is provided within 30 days of such request
  - Penalty will apply for failure to furnish Form 1095-C to full time employees
- Employers must file with IRS copies of 2020 Forms 1095-B and 1095-C with applicable Form 1094-B or 1094-C Transmittal Form
- Last year for penalty relief for data errors if employer can demonstrate "good faith" effort to comply

Employer Shared Responsibility Penalty & IRS Letters

- Beginning in 2017, IRS has issued Letter 226J to employers to notify them of a potential violation of the employer shared responsibility penalty (ESRP) under Code Section 4980H and proposed amount to be assessment
  - Letter 226-J is based on information in Forms 1094-C and 1095-C
  - Employer has 30 days to respond to the letter
    - Many times the issue is mistakes on the forms
  - Letter 227-K issued when IRS agrees no ESRP and case is closed
  - Letter CP220J issued when IRS determines ESRP is owned
- IRS Letter 5699 if missing information on From 1094-C or 1095-C
- IRS Letter 5005A if failure to file Forms 1094-C and 1095-C and/or furnish Form 1095-C to employees
  - IRS Letter 972CG assess late filing penalty
  - Employer has 45 days to respond

Employer Shared Responsibility Penalty & IRS Letters

- Office of IRS Chief Counsel issued a memorandum on February 21, 2020, opining that there is no statute of limitations that applies to failures to comply with Code Section 4980H
  - IRS reasoned that the lack of a filed return that included the needed information to calculate any penalty prevents the statute of limitation from running
- Employers should ensure all information needed to support compliance with Code Section 4980H is retained and available to provided timely to IRS should they receive a Letter 226J
  - Suggested that employers develop procedures to ensure that any Letter 226J received by the employer is timely forwarded to appropriate person or group at employer

Updated Model COBRA Notice and Election Forms

- DOL published an updated model COBRA notice and election forms on May 1, 2020
  - Purpose of updated notices is DOL to help qualified beneficiaries better understand interactions between Medicare and COBRA
- Note that there has been a number of lawsuits filed in 2020 against employers for allegations of deficient COBRA notices
  - Allegations include that notices were confusing or misleading, did not identity the plan administrator or did not have sufficient information so that the individual could know how to elect COBRA
- If an employer elects not to use the DOL model forms, it should confirm that all information required to be disclosed to qualifying beneficiaries is in the notice
  - If a third-party has been engaged to provide the notices, an employer should review the form of notice provided by that third-party for completeness

ACA Section 1557 After *Bostock*

- ACA Section 1557 prohibits discrimination on basis of race, color, national origin, sex, age, or disability by "health programs or activities" that receive "federal financial assistance"
- 2016 final rule issued by HHS ("2016 Rule")
  - Defined discrimination "on the basis of sex" to include discrimination on the basis of sex stereotyping, gender identity, and termination of pregnancy
    - Federal district court in Texas issued a nationwide preliminary injunction barring enforcement by HHS of 2016 Rule's prohibition against discrimination on basis of "gender identity" and "termination of pregnancy"
  - Defines "health programs and activities" expansively to include those that (i) received federal financial assistance through HHS (such as Medicaid, Medicare and student health plans; (ii) are administered by HHS; and (iii) are administered by entities under ACA Title I (such as, state-based marketplaces)

ACA Section 1557 After *Bostock*

- HHS issued a proposed rule in June 2019 that became a final rule in June 2020 ("2020 Rule"), replacing the 2016 Rule, to be effective August 18, 2020
  - 2020 Rule provides, among other changes, that Section 1557 does not apply to sexual orientation and gender identity
    - Eliminates requirement for health coverage for transgender participants and self-selected gender identity treatment
  - Narrows definition of "health programs and activities" to those that directly receive funding from HHS
    - 2020 Rule excludes employer-sponsored plans that do not receive funding from HHS
  - Few days after 2020 Rule is issued, Supreme Court issued *Bostock v Clayton County, Georgia*
    - As used in Title VII, "sex" includes sexual orientation and gender identity and thus Title VII protects employees against discrimination due to sexual orientation or gender identity.
    - Title VII is violated if employee is fired for being gay or lesbian or transgender for traits or actions the employer would not have questioned in members of a different sex

ACA Section 1557 After *Bostock*

- Prior to effective date of 2020 Rule, two federal district courts issued nationwide preliminary injunctions
  - Courts stopped implementation of exclusion of sex stereotyping from sex discrimination claims
    - One court also blocks blanket religious exemption from sex discrimination claims
  - Due to injunctions by courts, 2016 Rule is still in effect
    - Note that 2016 Rule does not include gender identity in definition of sex discrimination due to a court ruling
- Where does this leave us with welfare plans?
  - Consider whether after *Bostock* welfare health plans can deny coverage to transgender employees, charge transgender employees a higher premium, or not provide medically necessary mental health benefits, hormone therapy, and gender-affirmation surgical benefits for transgender employees

Death of ACA "Cadillac Tax"

- ACA "Cadillac Tax" imposed a 40% excise tax on "rich" employer-sponsored health plans that provide a coverage value of more than $10,200 for an individual and $27,500 for a family
- Effective date of tax had been delayed by Congress, most recently until 2022
- "*Further Consolidated Appropriations Act, 2020*" (HR 1865), signed into law on December 20, 2019, repeals the Cadillac Tax effective January 1, 2020
  - Tax was opposed on a bi-partisan basis
- Repeal of the Cadillac Tax results in revenue loss of $197 billion
- Also repealed was the medical device tax – a loss of $25.5 billion in revenues

California v Texas: Does ACA Survive?

- 5th Circuit Decision (2-1 Decision):
  - In *National Federation of Independent Business v. Sebelius* (NFIB), Supreme Court held the ACA individual mandate penalty is a tax and not a command and as a tax is a proper exercise of Congressional power, and thus held the ACA constitutional
  - When Congress later reduced the penalty tax to zero, the mandate is no longer a tax as it does not raise revenue for the Treasury and thus the individual mandate is not a tax but rather an unconstitutional command
  - Case remanded to district court to consider whether other ACA provisions survive under the severability doctrine and, if not, the entire ACA is unconstitutional
  - Dissent: There is no legal consequence for individuals who do not buy insurance, plaintiffs do not have standing to bring the case, and assuming standing, the individual mandate is constitutional and severable from other ACA provisions

California v Texas: Does ACA Survive?

- Issues Before the Supreme Court:
  - Whether the plaintiffs have standing to challenge the ACA minimum-coverage provision
  - Whether reducing the amount of individual mandate penalty to zero caused the mandate to be an unconstitutional command instead of a constitutional tax
  - If the mandate is unconstitutional, is the individual mandate penalty severable from the remaining provisions of the ACA
- Case Is Scheduled to be heard by the Supreme Court on November 10, 2020
  - Thoughts from oral arguments

Future of Balance or Surprise Billing

- When hospital and treatment physician are in-network but radiologist or anesthesiologist are out-of-network and participant receives a bill for the out-of-network providers
- Proposed legislation
  - "*Lower Health Care Costs Act of 2019*" (S 1895) - applies in-network cost-sharing requirements to certain emergency and related nonemergency services provided out-of-network and prohibits health care facilities and practitioners from billing above the applicable in-network cost-sharing rate for such services
  - "*End Surprise Billing Act of 2019*" (HR 861) - requires critical access hospital or other hospital, as a condition of participation in Medicare, to provide notice (1) if hospital or any providers furnishing services at the hospital is out-of-network and (2) if so, estimated out-of-pocket costs of for services
  - "*Ban Surprise Billing Act*" (H.R. 5800) - limits cost-sharing to participant plan's in-network rate and prohibits out-of-network providers balance billings that exceed in-network rate; and requires plans to have up-to-date/accurate provider directories and more transparency of in-network and out-of-network deductibles and out-of-pocket limitations

Future of Balance or Surprise Billing

- Many states are also addressing the balance/surprise billing issue
  - See The Commonwealth Fund review of state laws addressing balance billing as of September 2020 (https://www.commonwealthfund.org/publications/maps-and-interactives/2020/sep/state-balance-billing-protections)
    - Generally address with benchmarking or using arbitration
  - New Texas law – "*Out-of-Network Provider Surprise Billing*" (SB 1264)
    - On and after January 1, 2020, limited application to state-regulated insurance plans and coverage through the state employee or teacher retirement systems (about 20% of Texans) - does not apply to self-insured plans, Medicare or non-Texas health plans
    - Prohibits balance bills for
      - Services provided by out-of-network providers practicing at in-network hospitals, birthing centers, ambulatory surgical centers and free-standing emergency medical care facilities
      - Emergency services provided by out-of-network physicians and facilities, including free-standing emergency medical care facilities
      - Out-of-network diagnostic imaging and laboratory services provided in connection with service from an in-network provider
    - For above services plan issuer pays usual and customary rate or agreed rate

2021 COLA Limits for HSAs, HDHPs, Health FSA & ACA Out-of-Pocket Compliance

	2020	2021
HSA Contribution Limit	$3,550 (Self) $7,100 (Family)	$3,600 (Self) $7,200 (Family)
HSA Catch-Up Limit	$1,000	$1,000
HDHP Minimum Deductibles	$1,400 (Self) $2,800 (Family)	$1,400 (Self) $2,800 (Family)
HDHP Max OPP (Deducts & Co-Pays)	$6,900 (Self) $13,900 (Family)	$7,000 (Self) $14,000 (Family)
Health FSA Limit	$2,750	$2,750
Health FSA Carryover	$500	$550
Plan OOP Max for ACA Compliance	$8,150 (Self) $16,300 (Family)	$8,550 (Self) $17,100 (Family)

Transparency in Coverage Final Rule

Supplement to Hot Topics For Compliance in Welfare Benefit Plans

SWBA 31st Annual Benefits Compliance Conference, November 12, 2020

Mark A. Bodron, Baker Botts L.L.P.

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Transparency in Coverage Final Rule

Overview of the Final Rule

- On October 29, 2020, Treasury, DOL and HHS issued the Transparency in Coverage (the "Final Rule") under the Affordable Care Act ("ACA")
  - Requires group health plans and health insurance issuers in individual and group markets to disclose cost-sharing information upon request to participants, beneficiaries and enrollees (together "participants"), including an estimate of an individual's cost-sharing liability for covered items or services furnished by a particular provider
    - Applies to insured and self-insured group health plans; excludes grandfathered plans, HRAs, health FSAs, excepted benefits (dental and vision) and short-term duration plans
    - In response to the June 24, 2019 executive order Improving Price and Quality Transparency in American Healthcare to Put Patients First and compliments Hospital Price Transparency final rule, issued November 15, 2019 and effective January 1, 2021
      - Hospital Price Transparency final rule requires hospitals to make public a certain pricing information
- Final Rule effective dates - three-year, phased-in approach:
  - January 1, 2022 – Plan's provider rates disclosure to public
  - January 1, 2023 – Plan's cost-sharing disclosure to participants for 500 items and services
  - January 1, 2024 – Plan's cost-sharing disclosure to participants for all items and services

Transparency in Coverage Final Rule

Provider Rate Disclosure Requirement

- Effective for plan years beginning on and after January 1, 2022, plans are required to disclose their negotiated rates and allowable out-of-network charges on a public website that is updated monthly through three machine-readable files
  - First file discloses payment rates negotiated between plans or issuers and providers for all covered items and services
    - In-network rates and out-of-network
  - Second file discloses the unique amounts a plan or issuer allowed, as well as associated billed charges, for covered items or services furnished by out-of-network providers during a specified time period (historic information)
  - Third file discloses pricing information for prescription drugs
    - Designed to reduce the complexity and burden of including prescription drug information in the first file
- Disclosures must be free and publicly available
  - Cannot require a user account, password, personally identifiable information to access

Transparency in Coverage Final Rule

Cost-Sharing Disclosure Requirement

- Effective for plan years beginning on and after January 1, 2023, plans are required to provide participants and beneficiaries (or authorized representatives) upon request information that is designed to help them understand their healthcare costs and expenses before obtaining the service or treatment
  - Limited to 500 services initially; expands to all services effective January 1, 2024
  - A separate disclosure notice at same time cost-sharing information is provided addressing balance (or surprise) billing and notes that the provided information does not mean that plan benefits are not guaranteed
- Cost-sharing information to be provided:
  - Estimated cost-sharing liability for a particular item or service
    - Based on in-network rates, out-of-network allowed amounts, and deductibles and out-of-pocket limits for the participant
  - Accumulated amounts
  - Negotiated rates
  - Out-of-network allowed amounts
  - A list of items and services subject to bundled payment arrangements
  - A notice of prerequisites (prior authorization or step-therapy), if applicable
  - Disclosure notice

Transparency in Coverage Final Rule

Cost-Sharing Disclosure Requirement

- Basically the same information included in an EOB after health care services are provided, but provided prior to providing services
- Cost-sharing information includes medical items and services, durable medical equipment and prescription drugs
- Cost-sharing information must be provided at no cost to the participant through a self-service tool on a public website that provides real-time responses based on cost-sharing information that is accurate at the time of the request
  - At participant's request the information can be provided in paper form that must be mailed within two business days of the request
  - Cost-sharing information must be disclosed in "plain language," that is, written and presented in a manner calculated to be understood by the average participant

Transparency in Coverage Final Rule

Responsibility and Enforcement

- Plans may allocate the disclosure responsibility to insurers, third-party administrators or pharmacy benefit managers
  - Allocation is by written contracts or agreements for one or both disclosures
  - If an insured plan, the issuer is liable for noncompliance
  - If self-insured plan, the plan sponsor is liable for noncompliance
- Non-compliance can trigger enforcement and civil monetary penalties that applies to group health plans under the Employee Retirement Income Security Act ("ERISA") and Public Health Service Act ("PHSA")
  - If errors or omissions or temporary inaccessibility to public website, a plan will not be non-compliant if the plan is acting in "good faith and with reasonable diligence" and corrects the issue as soon as possible
  - If disclosed information is provided by a third-party and that entity fails to provide the information, a plan will not be non-compliant if the plan that acts in "good faith and with reasonable diligence" to correct the issue, unless the plan knows or reasonably should have known the information is incomplete or inaccurate

Transparency in Coverage Final Rule

Action Items for Plan Sponsors

- If a plan sponsor hasn't already started, it should begin gathering and reviewing required information currently provided to participants
  - Confirm negotiated in-network rates and out-of-network covered charges may take some time
  - Review current contract terms with service providers/vendors
- Engage with service provides/vendors to discuss compliance requirements
  - Develop an implementation plan with service providers/vendors
  - Implementation plan should be sufficiently comprehensive to demonstrate good faith and reasonable diligence
  - Contract updates will likely be required to address compliance requirements, including allocation of responsibility for disclosures

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