



31st Annual Benefits Compliance Conference

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

SESSION 1: DOL National Office Update

Introduction: **Patti Hedgpeth**, Shareholder, Polsinelli PC

Speakers: **Jeanne Klinefelter Wilson**, Acting Assistant Secretary, Department of Labor, EBSA

Timothy Hauser, Deputy Assistant Secretary for National Office Operations, Department of Labor, EBSA



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Today's Speakers

As Acting Assistant Secretary, **Jeanne Wilson** serves as agency head for the Employee Benefits Security Administration at the Department of Labor. Ms. Wilson has served at EBSA since her initial appointment in November 2017. Since that time she has served as Acting Assistant Secretary (from June 2020 to now, and previously from November 2017 to January 2018). She also served as EBSA's Deputy Assistant Secretary for Policy (November 2017 to May 2019), and Principal Deputy Assistant Secretary (May 2019 to May 2020). Before her appointment, Ms. Wilson served as counsel to plan sponsors and fiduciaries for over fifteen years. Prior to her graduation from law school, Ms. Wilson worked for seven years at a national accounting firm where she audited employee benefit plans and provided employee benefit plan compliance advice.

Timothy D. Hauser is the Deputy Assistant Secretary for National Office Operations and as such is the chief operating officer of the agency. Mr. Hauser closely coordinates with the Assistant Secretary, Principal Deputy Assistant Secretary, and Deputy Assistant Secretary for Regional Office Operations in the formulation and development of EBSA policies, objectives, and goals to ensure comprehensive, integrated, and effective regulatory, compliance assistance, education, reporting, and enforcement programs. Mr. Hauser joined the Department of Labor in 1991 as a trial attorney for the Plan Benefits Security Division (PBSD), where he represented the Department in federal district court and appellate litigation. From November 2000 until November 2013, Mr. Hauser was the Associate Solicitor of the Division. As the head of PBSD, he was responsible for all of the Department's legal work under ERISA.





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SESSION 2: COVID-19 Return to Work Issues

Introduction: **Chris Beinecke**, National Practice Leader, Marsh

Speakers: **Kelli Cubeta**, Partner, Cubeta Law Group

Dara Wanzer, Senior Vice President, Human Resources Director, BancFirst

Eric Smith, Partner, Conner & Winters, LLP



Today's Speakers

Kelli Cubeta is a Partner at the Cubeta Law Group, a law firm based in San Antonio, Texas that focuses exclusively on representing businesses in the areas of litigation, employment, and transactional matters. For over 16 years, Kelli has represented businesses of all sizes including serving as General Counsel and head of Human Resources for two publicly traded companies. Kelli has been recognized nationally by the Association of Corporate Counsel as one of the top 10 business attorneys in the nation and by the San Antonio Business Journal as one of the top business leaders in San Antonio. Kelli is a proud wife and mother of two precious girls and serves on several non-profit Boards.

Dara Wanzer is a Senior Vice President and the Director of Human Resources with BancFirst, the largest state chartered bank in Oklahoma. Prior to her employment with BancFirst, Dara served, amongst other responsibilities, as a labor and employment and employee benefits attorney for INTEGRIS Health, providing legal support and guidance to INTEGRIS' Health's human resources professionals. Prior to joining INTEGRIS Health's legal department, Dara worked as an associate attorney specializing in labor and employment law at Oklahoma's largest law firm, McAfee & Taft. Dara has been active in her community, currently serving as a board member for the Oklahoma Center for Nonprofits, ReMerge, and the Southwest Benefits Association, and a former board member for the Girl Scouts of Western Oklahoma, Sharing Tree, and the Mary Abbott Children's House. Dara has also served as a volunteer attorney for Oklahoma Lawyers for Children.

Eric S. Smith regularly advises clients regarding the design and implementation of all types of retirement plans, including 401(k) plans, 403(b) plans, 457(b) plans and nonqualified deferred compensation plans. He also advises clients regarding the design and management of welfare benefit programs, including health plans and cafeteria plans. He assists clients with day-to-day administrative, nondiscrimination and fiduciary issues, including operational and reporting corrections under the Internal Revenue Service and Department of Labor voluntary correction programs. Prior to joining Conner & Winters, Eric was a shareholder of Blackwell Smith, P.C. He also practiced with another respected Tulsa firm in the areas of corporate law, business transactions, tax exempt organizations and health law, as well as employee benefits law.



COVID-19 Return to Work Issues



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Return to Work: Best Practices

- Policies, Policies, Policies
 - Practical content
 - Realistic administration
 - Communication
 - Strike a balance
 - Media is your worse enemy
 - Remote Working
 - Be objective
 - Consistent
 - Different skillset required
-

C-19 LABOR LAWS



- FFCRA
 - What is NOT leave
 - Documentation
- OSHA
 - Reportable injury
 - Workers' Comp
- Traditional FMLA



C-19 Testing



- CDC guidelines
- Accessibility
- Rapid test v. PCR test



SouthWest Benefits Association Benefits Compliance Conference

COVID-19 Return to Work Issues

November 10, 2020

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RETIREMENT PLANS

PARTICIPATION ISSUES

- Review plan document rules regarding participation following a leave of absence or a termination.
- Confirm the status of employees who are returning to work.
- If a “break in service” has occurred, determine impact.
- If plan uses automatic enrollment, determine whether a returning employee will be newly subject to automatic enrollment.

HOURS OF SERVICE

- Hours of service crediting potentially impacts:
 - Eligibility
 - Vesting
 - Benefit accrual
- How are hours of service credited under the plan document?

HOURS OF SERVICE

- Actual hours – generally, (i) each hour for which an employee is paid for the performance or duties; and (ii) an employee is paid on account of certain periods when no duties are performed (e.g., vacation, layoff, leave of absence; subject to 501 hour limit).
- Equivalency – a fixed number of hours is credited for a period if one hour would be credited under the actual hours method during that period.
- Elapsed time – credits service based on length of time employed without regard to hours worked.

IRS Q&A RE PARTIAL TERMINATION

- IRS Q&A clarifies that, generally, employees are not treated as having an employer-initiated severance for partial termination purposes if they are rehired by the end of the applicable period.
- Thus, employees terminated due to COVID-19 and rehired by the end of 2020 generally would not be treated as having an employer-initiated severance for purposes of determining whether a partial termination occurred during the 2020 calendar year plan year.

CARES ACT

- Options for “Qualified Individuals”
 - Coronavirus-Related Distributions
 - Loan Payment Deferrals
 - Increased Loan Limits (no longer available)
- 2020 RMD Waiver

CORONAVIRUS-RELATED DISTRIBUTIONS

- Aggregate CRDs may not exceed \$100,000 from all plans maintained by an employer and any member of the employer's controlled group.
- Distribution must be made by December 30, 2020 (not December 31).
- A qualified individual can treat a distribution as a CRD on his or her tax return even if an employer does not treat a distribution as coronavirus-related under the employer's plan.

CORONAVIRUS-RELATED DISTRIBUTIONS

- The 10% additional tax on early distributions does not apply to a CRD.
- CRD can be included in income ratably over a 3-year period, starting with year of distribution.
 - Employee can choose to include entire distribution in income for 2020.
- A CRD may be repaid to an IRA or a plan at any time during the 3-year period beginning on the day after receipt of the distribution.

LOAN PAYMENT DEFERRALS

- If a loan is outstanding on or after March 27, 2020, and any repayment on the loan is due from March 27, 2020, to December 31, 2020, that due date may be delayed under the plan for up to one year.
- In determining the 5-year maximum term of the loan, the 1-year delay is disregarded.

LOAN PAYMENT DEFERRALS

- Notice 2020-50 provides repayment safe harbor:
 - Suspension ends at 12/31/20.
 - Loan term extended by 1 year from date loan was originally due to be repaid.
 - Loan payments at end of suspension period are reamortized to repay loan over extended term.

LOAN PAYMENT DEFERRALS

- IRS acknowledges other administration options, such as:
 - Suspension period ends at 1-year anniversary.
 - Payments begin at 1/2020 in original amount.
 - When suspension period ends, payments reamortized to repay loan over extended term.

INCREASED LOAN LIMITS

- Applies for plan loans made to a qualified individual from March 27, 2020, to September 22, 2020.
- \$50,000 loan maximum can be increased to \$100,000.
- 50% of vested benefit loan limitation can be increased to 100% of the vested benefit.

2020 RMD WAIVER

- Applies to defined contribution 401(a) plans, 403(a) and 403(b) plans, governmental 457(b) plans and for IRAs.
- Plan sponsors need to confirm approach to implementation.
- IRS has provided model amendments for plan sponsor use.

CARES ACT AMENDMENTS

- Amendment deadline is last day of first plan year beginning on or after 1/1/22.
- Governmental plan deadline is 2 year later.
- Must operate plan in accordance with CARES Act elections and requirements.
- Work with vendor to clearly document operation.
- Participant notices still required.

INCENTIVE PLANS

- How will a furlough / leave of absence impact vesting?
- Do performance targets need to be reconsidered?
- Will a change to an award trigger application of Code Section 409A?
- Who has authority to make changes to awards?

WELFARE PLANS



PARTICIPATION ISSUES

- Review plan document rules regarding participation following a leave of absence or a termination.
- For insured benefits, must confirm that eligibility decisions are supported by carrier. (Self-funded plans have stop loss considerations.)
- For life and disability, consider whether new evidence of insurability will be required.

ACA CONSIDERATIONS

- Employer mandate still applies!
- Review method for determining FTEs (monthly measurement period or look-back measurement method).
- If using look-back method, continued coverage during furlough may have been required.
- Reduction in pay may impact “affordability” and create potential for “(b)” penalties.
- Prepare early for 1094/1095 reporting to properly reflect furloughed employees.

ACA CONSIDERATIONS

- Rehires after termination or resumption of service after other absence.
- Returning employee can be treated as a new employee only if the employee did not have an hour of service for at least 13 consecutive weeks (26 for educational organization).
- If a continuing employee, must be offered coverage no later than first day of calendar month following return.
- Rule of parity potentially reduces time period.

ACA CONSIDERATIONS

- Hour of service for ACA purposes includes each hour for which an employee is paid, or entitled to payment for:
 - The performance of duties for the employer, and
 - A period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence. (No 501 hour limit)
- Equivalencies allowed for non-hourly employees.
- Special rules for unpaid FMLA, military and jury duty.

COVID-19 LEGISLATION

- Families First Coronavirus Response Act (“FFCRA”) – signed into law on March 18, 2020.
- Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) – signed into law on March 27, 2020.
- The FFCRA and CARES Act include several provisions impacting health and welfare plans.

COVID-19 TESTING

- Group health plans must cover:
 - COVID-19 diagnostic testing approved by the U.S. Food and Drug Administration (and certain other testing); and
 - Items and services furnished during an office, telehealth, urgent care center, or emergency room visit relating to the test or evaluation of the need for the test.
- Must provide coverage without cost-sharing (such as deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements.

COVID-19 TESTING

- A plan must reimburse the provider at the rate that the plan had negotiated before the public health emergency.
- If no negotiated rate, the plan must reimburse at the cash price listed by the provider on a public website (or negotiate a lower price).
- Providers must publish the cash price on a public website or potentially be subject to penalties.
- Per FAQ 43, this applies to testing but not other items and services.

FAQ GUIDANCE ON TESTING

- If other tests are performed during a visit, and the visit results in COVID-19 testing, the plan must provide coverage for the related tests without cost-sharing.
 - Examples of other tests are influenza tests and blood tests.
 - Coverage must be provided when medically appropriate, as determined by the attending provider.
- These requirements apply to items and services furnished by out-of-network providers.

FAQ GUIDANCE ON TESTING

- Plans may not impose cost-sharing requirements, prior authorization requirements or medical management requirements for mandated benefits.
- “Items and services must be covered without cost sharing when medically appropriate for the individual, as determined by the individuals’ attending health care provider in accordance with accepted standards of current medical practice.”

FAQ GUIDANCE ON TESTING

- FAQ 43 issued on June 23 provides additional guidance:
 - Health care provider does not have to be “directly” responsible for providing care to patient to be considered an attending provider, if provider makes an individualized clinical assessment of the individual.
 - At-home testing must be covered if other requirements are satisfied.

FAQ GUIDANCE ON TESTING

- FAQ 43 issued on June 23 provides additional guidance:
 - Coverage without cost-sharing not required for testing conducted to screen for general workplace health and safety (such as employee “return to work” programs), for public health surveillance, or for any other purpose not primarily intended for individualized diagnosis or treatment.
 - Multiple tests must be covered if other requirements are satisfied.

FAQ GUIDANCE ON SBCs AND NOTICES

- Plans must normally provide 60 days advance notice of material modifications affecting the terms of a summary of benefits and coverage (“SBC”).
- The agencies will not take enforcement action against a plan that makes a change without providing 60 days advance notice to provide greater COVID-19 coverage or improve telehealth benefits.
- Plans must provide notice of the changes as soon as reasonably practicable.

FAQ GUIDANCE ON SBCs AND NOTICES

- The agencies will take action against plans that limit other benefits or increase cost-sharing to offset the costs of increasing COVID-19 benefits.
- If a plan reverses benefit changes when the public health emergency ends, a plan will have satisfied its obligation to provide advance notice of a material modification if the plan had previously given notice of the general duration of the changes (e.g., only during the public health emergency) or provides such notice within a reasonable timeframe before reversal.

CARES ACT – HSAs, FSAs AND HRAs

- The CARES Act permits the following items to qualify for tax-favored reimbursement from HSAs, HRAs, and health FSAs:
 - Over-the-counter drugs without a prescription; and
 - Menstrual care products.
- These changes are effective for expenses incurred after December 31, 2019.

CARES ACT – TELEHEALTH

- HDHPs may cover telehealth and other remote services without applying a deductible and without jeopardizing a participant's ability to make HSA contributions.
- This change is effective March 27, 2020 and applies for plan years beginning on or before December 31, 2021.

CARES ACT – PREVENTIVE SERVICES AND VACCINES

- CARES Act requires group health plans to cover COVID-19 preventive services and vaccines without cost-sharing.
- Under the ACA, a plan is not required to cover a preventive service or item until a year or more after the service or vaccine receives the required recommendation for coverage.
- For COVID-19 preventive services and vaccines, the CARES Act requires non-grandfathered plans to cover these services and vaccines within 15 business days after the required recommendation.

CARES ACT – PREVENTIVE SERVICES AND VACCINES

- Interim Final Regulation issued on 10/28/20
- Plans must cover COVID-19 preventive services and vaccines without cost-sharing for in-network and out-of-network providers.
- If no negotiated rate, must reimburse at “reasonable” amount. Preamble indicates that Medicare amount is reasonable.
- Plans must cover both the COVID vaccine and its administration.

EXTENSION OF CERTAIN PLAN DEADLINES

- DOL/IRS “notification of relief” requires benefit plans to disregard the “Outbreak Period” when determining whether certain deadlines have been satisfied.
- “Outbreak Period” – March 1, 2020 until 60 days after the announced end of the COVID-19 national emergency or such other date announced by the DOL and the IRS in a future notice.
- The plans subject to the relief are group health plans, disability plans, other welfare plans and retirement plans subject to ERISA or the Code.

EXTENSION OF CERTAIN PLAN DEADLINES

- Affected plans must disregard the Outbreak Period in determining:
 - The 30-day period (or 60-day period for certain rights relating to Medicaid and CHIP) to request special enrollment.
 - The 60-day election period for COBRA continuation coverage.
 - The date for making COBRA premium payments.
 - The date for individuals to notify the plan of a qualifying event or determination of disability with respect to COBRA coverage.

EXTENSION OF CERTAIN PLAN DEADLINES

- Plans subject to the notification must disregard the Outbreak Period in determining:
 - The date within which individuals may file a benefit claim.
 - The date within which claimants may file an appeal of an adverse benefit determination.
 - The date within which claimants may file a request for an external review.
 - The date within which a claimant may file information to perfect a request for external review upon a finding that the request was not complete.

CAFETERIA PLAN GUIDANCE

- Notice 2020-29:
 - Expands the mid-year election changes permitted under cafeteria plans with respect to employer-sponsored coverage, health FSAs, and dependent care FSAs during calendar year 2020.
 - Permits extension of claims period for health FSA or dependent care FSA at the end of a grace period or plan year ending in 2020.
- December 31, 2021 amendment deadline.

CAFETERIA PLAN GUIDANCE

- Notice 2020-33 adjusts the maximum health FSA carryover to an amount equal to 20% of the maximum health FSA contribution for that plan year.
- The maximum amount that can be carried over from a plan year starting in 2020 is \$550 (20% of \$2,750, the indexed 2020 health FSA limit).
- Plan amendments:
 - Generally must be adopted on or before the last day of the plan year from which amounts may be carried over;
 - For the 2020 plan year, must be adopted on or before December 31, 2021 and may be effective retroactively to January 1, 2020.

The foregoing presentation is a summary of applicable legislation and guidance. As with any summary, some details are omitted.

This summary should not be relied upon for legal or tax advice for particular situations.