SouthWest BENEFITS Association

2021 ANNUAL VIRTUAL CONFERENCE

BENEFIT STRATEGIES FOR THE NEW NORMAL

May 18 – 19 – 20

Tuesday, May 18, 2021

12:30 PM – 1:15 PM

The New Administration, Congress and The Impact on the Employee Benefits Industry

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The New Administration, Congress and the Impact on the Employee Benefits Industry – Retirement Plan Perspective

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Democrats are in control, but with little wiggle room

- Senate is a 50-50 tie, with VP Harris needed as tiebreaking vote

- In House, Democrats have a very small, 6 vote margin (218-212)

- Without change to the filibuster, most legislation needs 60 votes to pass the Senate
  - One exception to this rule is through the budget reconciliation process
  - Under this process, a simple majority will suffice, but can only include spending and revenue measures

Tax Increases in Play, which may impact retirement plans, at least indirectly

- Two large spending proposals from President Biden will dominate the rest of the year legislatively
  - Infrastructure-focused "American Jobs Plan" ($2.3 trillion)
  - "American Families Plan" ($1.8 trillion)
    - Free universal Pre-K
    - Free community college
    - More affordable child care
    - National mandated paid leave (important for this group)
      - Up to 12 weeks for parental, family & personal illness leave

- The second proposal calls for an increase in certain individuals' taxes
  - Top individual rate raised to 39.6%
  - Capital Gains – all-in rate of 43.4% for those making more than $1 million
  - Ends step up in basis on estates' cap gains at death
  - What's not in there – Biden campaign proposal to flatten retirement tax credit, Financial Transaction Tax (FTT)

Retirement legislation one of few significant bills with bipartisan support

- "SECURE Act 2.0", aka "Securing a Strong Retirement Act"
  - Lead sponsors are the Chairman and top Republican on the House Ways & Means Committee
  - Received unanimous support at a committee "mark up" two weeks ago
  - Important provisions include:
    - New plans must have auto-enrollment and auto-escalation up to at least 10%
    - Enhanced credit for employer contributions to small plans
    - RMD age increased from 72 to 75
    - Boosts "catch up" limit for those aged 62-64 to $10,000
    - Employer retirement matching contributions for student loan payments
    - Requires catch-up contributions to be made in Roth form and allows employers to provide participants with option to receive matching contributions on a Roth basis

Retirement legislation (continued)

- Companion bill in Senate (“Retirement Security and Savings Act”)
  - Senators Portman (R-OH) and Cardin (D-MD) aiming to introduce this week
  - Very similar in content to House bill (70-80% overlap)

- Likely to move at end of the year, but possibly could be added to the infrastructure or family plan through reconciliation

- Neal Automatic Retirement Act – requires all but smallest employers to offer a workplace retirement plan

Walsh Installed as DOL Secretary

- Marty Walsh, former Mayor of Boston, is the new DOL Secretary
  - Former union leader expected to focus more on “worker” issues than details of retirement plans
  - Scalia, his predecessor, was top lawyer who litigated Obama Fiduciary rule on behalf of financial services industry
  - EBSA Assistant Secretary yet to be nominated, let alone appointed

DOL Fiduciary Rule Redux?

- Somewhat surprisingly, Biden administration allowed Trump Advice Exemption to become effective in February
  - Aligns closely with SEC's Regulation Best Interest ("Reg BI"), including what constitutes a "recommendation" and standards for mitigating conflicts of interest
  - DOL makes clear that rollover recommendations are fiduciary advice when the ERISA "five-part test" is met
- A DOL Fiduciary rule re-write remains on the radar screen, but doesn't seem to be a top priority
  - Sen. Scott QFR
  - Gensler testimony on Reg BI
  - In an April release, DOL reiterated that it "anticipates taking further regulatory and sub-regulatory actions" in the fiduciary space

Other DOL Priorities

- **ESG**
  - Trump rule will not be enforced, would have required plan sponsors to put economic interests of plan participants ahead of so-called "non-pecuniary" goals
  - further guidance expected
  - Ongoing debate on how to set consistent ESG standards and disclosures

- **Proxy Voting**
  - Trump rule in this area also will not be enforced
  - Would have required fiduciary to determine if proxy advisor recommendations were consistent with fiduciary's obligations

- **"Brokerage Window"**
  - Recently flagged as an issue DOL may revisit – whether these investments need to be tracked

- **Cybersecurity guidance and best practices for plan service providers**
  - Re-affirms that employers have fiduciary responsibility to affirm cyber-safety of vendors
  - Additional work anticipated in this space

- **Automatic 401(k)** – Biden campaign idea that Walsh floated as a priority

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The Biden Administration, Congress and Health Care

Southwest Benefits Association

May 18, 2021

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Agenda

Agenda

- President Biden’s Address to Congress
- ARPA and COBRA Subsidies
- IRS Rules on Cafeteria Plans
- Mental Health Parity

President Biden’s Address to Congress

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American Families Plan

National paid family and medical leave program

- Phased in over 10 years
- Workers would receive partial wage replacement to take time to
  - Bond with new child
  - Care for seriously ill loved one
  - Deal with loved one's military deployment
  - Find safety from sexual assault, stalking, or domestic violence,
  - Heal from serious illness
  - Take time to deal with the death of a loved one
- 12 weeks of paid parental, family, and personal illness/safe leave by year 10
- Workers get 3 days of bereavement leave per year starting in year 1
- Up to $4,000 a month with minimum 2/3's of average weekly wages replaced (80% for lowest wage workers)
- Estimates program will cost $225 billion over a decade
- Require employers to allow workers to accrue 7 days paid sick leave per year to seek preventative care for them or their family

American Families Plan

Health Care Reform

- Make permanent expanded ACA premiums tax credits in ARPA
- Let Medicare negotiate prices
- Create public options for ACA exchanges
- Option to enroll in Medicare at age 60
- Close Medicaid coverage gap

American Rescue Plan Act

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COBRA Premium Subsidy

100% COBRA premium subsidy for AEIs

- Available to “assistance eligible individual,” which includes any qualified beneficiary who qualifies for COBRA due to:
  - Involuntary termination (other than gross misconduct), or
  - Reduction in hours
- Reduction in hours/involuntary termination does not have to be COVID-related
- Reduction in hours may result from
  - Change in hours of operation
  - Temporary leave of absence
  - Lawful labor strike if individual remains an employee
- Each QB (employee, spouse, dependents) has independent right to elect COBRA and is eligible for COBRA subsidy, if within maximum COBRA coverage period
  - This includes a QB who waived or did not elect COBRA when first eligible

COBRA Premium Subsidy

Employer Action Steps

- Decide whether to allow QBs to elect a cheaper plan option for subsidized COBRA
- Identify employees who incurred a subsidy-eligible COBRA event prior to April 1, 2021
- Identify any other QBs prior to April 1, 2021, who would be entitled to a COBRA subsidy;
- Send out required model COBRA notice by May 31, 2021
- Identify employees who incur a subsidy-eligible COBRA event and other QBs during the COBRA subsidy period and provide the required notices
- Send out COBRA subsidy expiration notices on or before September 15, 2021

COBRA Premium Subsidy

- Premium subsidy available from April 1, 2021 until earliest to occur of:
  - End of QB's maximum COBRA coverage period due to involuntary termination of employment or reduction in hours*;
  - Date QB becomes eligible for coverage under Medicare or another group health plan; or
  - September 30, 2021
- Excludes individual from receiving COBRA premium subsidy if individual is eligible for other group health plan coverage or Medicare
- Premium subsidy pays for medical, dental, and vision continuation coverage
  - Does not apply to health FSA
- Other COBRA qualifying events (loss of dependent status, entitlement to Medicare) do not entitle QB to COBRA premium subsidy
- *Generally, 18 months, but QB determined to be Social Security disabled gets additional 11 months
  - Not clear disability determination extends premium subsidy
- Premium subsidy also available during state continuation coverage (CA, CT, NY)
  - Adds another 18 months (CA, NY) or 12 months (CT)
  - Applies to fully-insured plans issued in CA, CT, NY

COBRA Premium Subsidy

AEIs covered under Medicaid or individual health policies

- AEI enrolled in individual health care policy (e.g., purchased through public exchange) or Medicaid must terminate such coverage to receive COBRA subsidy
- Termination is permitted only on a prospective basis, not retroactively
- Individual who enrolls in COBRA as a result of COBRA subsidies will no longer be eligible for a premium tax credit through the exchange during the subsidy period
- Once COBRA subsidy ends, an individual will be eligible for a special enrollment period to purchase individual health care coverage on the public exchange
- Re-enrollment in Medicaid will depend on eligibility

COBRA Premium Subsidy

DOL Issued Five COBRA Model Notices

- Three Model COBRA Notices
  - Used to notify AEIs of COBRA subsidy
- One Model Election Notice
  - Sent with each of the Model COBRA notices
- One Model Notice for Expiration of COBRA subsidy

Penalties for Noncompliance

- Plan that does note provide the appropriate information to AEIs may be subject to excise tax of:
  - $100 per day per QB or
  - $200 per family

  For each day of non-compliance

COBRA Premium Subsidy

Model Notices to Inform QBs of COBRA Subsidy

- For a Qualifying COBRA Event that occurred before April 1, 2021
  - Employer must send notice by May 31, 2021 to
    - AEIs currently enrolled in COBRA and
    - AEIs who could have elected to enroll in COBRA prior to April 1, 2021
  - Goes to AEIs who incurred eligible qualifying event on or before April 1, 2021
    - Could go back as far as October 2019
    - Possibly longer for QBs who are Social Security disabled (November 2018)
- For a Qualifying COBRA Event occurring between April 1 and September 30, 2021
  - Send to AEIs who experience qualifying event during COBRA subsidy period
  - DOL updated COBRA general model notice with information on COBRA subsidies
- Model Notice for Insured Coverage
  - Send to AEIs who have insured coverage and are subject to state continuation coverage requirements between April 1 and September 30, 2021

Model Notice for Election of COBRA Subsidy

- Must be provided with any of the prior model notices
- Allows AEI to
  - Elect coverage (or request coverage if plan fails to provide notice to AEI)
  - Attest to AEI status
  - Inform plan if AEI is not eligible for COBRA subsidies due to other group health plan coverage or Medicare
    - AEI who fails to notify plan that AEI is no longer eligible for COBRA subsidies may be subject to a $250 penalty or, if the failure is fraudulent, 110% of the COBRA subsidy, whichever is greater.
    - No penalty if failure is reasonable and not due to willful neglect.

COBRA Premium Subsidy

Model Notice of Expiration of COBRA Subsidy

- Notify AEIs of expiration of COBRA subsidies 15 to 45 days before
  - September 30, 2021, or
  - If earlier, end of AEI's maximum COBRA coverage period
- Notice must include:
  - Date of expiration of premium subsidy, and
  - Information regarding availability of COBRA without subsidy or other group health plan coverage
- Notice not required if QB is no longer eligible due to other group health plan coverage or Medicare

What are the American Rescue Plan COBRA Notice requirements?

Employer must provide AEIs with notice by

May 31 2021

Timing is not “tolled” under the COBRA subsidy notice and election provisions

AEIs must elect COBRA to obtain the subsidy

Within 60 days of receiving the notice

AEI may elect subsidized coverage prospectively or back to April 1 2021 if QE occurred prior to April 1 2021

Employer Must Provide Additional Notices

Notice that COBRA subsidy is about to end must be provided 15 to 45 days before COBRA subsidy expires

COBRA Subsidy Election Period

- Extended deadline relief does not apply to COBRA subsidy deadlines
- AEI has 60 days after notice is provided to elect subsidized COBRA coverage
  - 60-day election period extend the initial COBRA election period, but it does not extend the maximum COBRA continuation period.
- AEI may begin coverage either
  - Prospectively from date of election or
  - Retroactively to April 1 2021 if qualifying event occurred before April 1
- Employer may allow QBs to elect cheaper benefit option instead of benefit QB had at time coverage terminated if:
  - Premium would be less than coverage individual had at time of qualifying event,
  - Option is also offered to similarly-situated active employees at time of election, and
  - Option is not excepted benefits, a qualified small employer HRA, or health FSA
- AEI has 90 days after date of notice to make permitted changes
- Employers that permit employees to elect new coverage or change options may not prohibit AEIs from doing so

Paying for COBRA Premium Subsidies

- Refundable tax credit on Medicare Hospital Insurance (“HI”) payroll tax to reimburse employers and insurers who paid the subsidized portion of the premium to COBRA subsidy eligible individuals
  - Self-insured plans: Employers claim HI payroll tax credit
  - Fully-insured plans: Employers or insurers claim HI payroll tax credit
  - Multiemployer plans: Plan claims HI payroll tax credit
- QBs are not required to pay COBRA premiums for subsidy period
  - Monthly COBRA premiums are considered paid already
  - AEIs are not required to elect unsubsidized COBRA coverage for period prior to April 1 2021

IRS Rules on Cafeteria Plans

Personal Protective Equipment as Section 213(d) Medical Expenses

IRS Announcement 2021-7

- Personal protective equipment bought for the primary purpose of preventing the spread of COVID-19 are IRC Section 213(d) medical expenses
  - PPE includes masks, hand sanitizer, and sanitizing wipes
  - Includes all expenses incurred after January 1, 2020

- Medical plans, health FSAs, HRAs, and HSAs can reimburse these PPE expenses
  - Check how plan documents are written:
    - Plans are not required to allow these reimbursements, but document language may automatically include all eligible Section 213(d) medical expenses
    - Medical plan, health FSAs, and HRAs may need amendment to permit these reimbursements
  - Contact HSA administrators to determine how they will administer new eligible expenses

Congress Expands Cafeteria Plan Rules for 2020 and 2021

Employers may adopt one of two rules to avoid FSA "use it or lose it" rule

- **Full Carryover:** Carry over unused amounts in health and/or DC FSA at end of 2020 plan year into 2021 and for expenses incurred during 2021 plan year into 2022
  - For future years, IRS carryover limits apparently apply, subject to future guidance
- **Extended Grace Period:** Extend grace periods for plan years ending in 2020 and 2021 for up to 12 months after the end of the plan year.
- **Tax Implications:** Under carryover and grace period rules:
  - Benefits remain excludible from income
  - Benefits are not included in 129 testing

Optional Health FSA Spenddown

- Employer may allow employees who terminate health FSA participation mid-year during 2020 or 2021 to spend down contributed amounts through the end of the plan year
  - DC FSAs can already allow this so long as expenses qualify

Higher DCSA Limit Creates Testing Issues for Employers

- ARPA raised exclusion from income for employer-provided dependent care assistance programs to $10,500 for 2021 ($5,250 for separate married returns)
- Employers considering increasing DCSA limit for 2021 should look at impact to nondiscrimination testing results under 55% average benefits test
  - Review prior year passing margins to determine the extent to which limit can be increased;
  - Determine current year passing margins to determine any need for cutbacks;
  - Permit mid-year contribution increase, then conduct mid-year nondiscrimination test based on new elections to determine current passing margins
- Employers should also consider whether daycare usage will return to pre-pandemic levels
  - Higher limit = higher risk of forfeiture unless carryover or extended grace period adopted
- Limiting increase to NHCEs negates testing issue, but may create employee relations issues

Cafeteria Plan Flexibility

Employers may continue to allow prospective cafeteria plan election changes for health benefits

- Allowable changes include:
  - Enroll in group health coverage if declined at annual enrollment
  - Change elections in group health coverage (benefit or tier)
  - Drop group health coverage if employee attests that they have or will have other coverage
- Relief applies to medical, dental, vision, and FSAs
- Relief applies to all elections during 2021, including retroactively to January 1, 2021
- Changes require a cafeteria plan amendment, and employers may impose restrictions on allowable changes

Questions?

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- Meet with **Naturally Slim** and learn how they achieve long-lasting clinical outcomes, ROI, and scalability
- Meet with J.D. Piro and Kerri Willis, co-hosts of **Aon's** The Bar on Healthcare podcast, and participate in an informal Q&A session on the current landscape of employee benefits legislation