Updates
December 30, 2020
Employee Benefit Provisions in the Consolidated Appropriations Act, 2021

President Donald Trump signed into law the Consolidated Appropriations Act, 2021 (the Omnibus Bill) on December 27, 2020. The Omnibus Bill has received a great deal of media coverage due to its massive size (nearly 6,000 pages long and inclusive of approximately $1.4 trillion in appropriations) and its various COVID-19 relief provisions (with relief totaling approximately $900 billion) that Congress and the White House spent months negotiating. The Omnibus Bill also creates novel requirements for group health plans and healthcare providers relating to surprise medical billing for general healthcare, air ambulance, and emergency services delivered by certain non-network providers. In this update, we highlight a few of the Omnibus Bill's provisions specific to employee benefit plans and summarize recent COVID-19 relief in IRS Notice 2021-03. For a summary of other employee benefits legislation earlier in 2020, including the Coronavirus Aid, Relief, and Economic Security (CARES) Act, please refer to our prior update.

Retirement Plan Provisions

- **Coronavirus-Related Distributions for Money Purchase Pension Plans (Division N, Title II, Subtitle Title B, Sec. 280).** The CARES Act established Coronavirus-Related Distributions (CRDs), a new-form of in-service distributions for certain retirement plans. The Omnibus Bill extends CRDs to money purchase pension plans, including with respect to the exemption from early distribution penalties, the three-year ratable taxation, and the option to repay CRDs over three years. Sponsors of money purchase pension plans have the option, but are not required, to offer CRDs.
- **Partial Plan Termination Relief (Division EE, Section 1, Title II, Sec. 209).** As defined by the Omnibus Bill, a tax-qualified retirement plan will not be treated as triggering a partial plan termination for any plan year that includes the period of March 13, 2020, through March 31, 2021, if the number of active participants covered by the plan on March 31, 2021, is at least 80% of the number of covered active participants on March 13, 2020. Potentially, this relief could help plan sponsors to avoid triggering full vesting due to COVID-19 turnover.
- **Qualified Disaster Relief (Division EE, Title III).** The Omnibus Bill provides optional retirement plan distribution relief for non-COVID-19-related federal disasters declared after January 1, 2020, and ending 60 days after the enactment of the Omnibus Bill.
    - **Qualified Disaster Distributions.** Qualified disaster distributions of up to $100,000 may be taken if a participant's principal residence is (1) within the federally declared disaster area and (2) the participant sustained an economic loss due to the federally declared disaster. For those taking this distribution, the amount is not subject to the mandatory 20% withholding. Any amount of the distribution that must be included in income may be spread over a period of three years. Participants also have three years to repay the amount of the distribution. If these rules are satisfied, a plan will be treated as satisfying the distribution rules.
    - **Principal Residence Hardships.** Retirement plan participants may request a distribution to purchase or construct a principal residence in a qualified disaster area. These distributions are limited to hardship distributions or first-time homebuyers, and the amount must be repaid between the first day of the disaster incident and no later than 180 days after the enactment of the Omnibus Bill.
    - **Principal Residence Loans.** If a borrower's principal residence meets the requirements of the qualified disaster distributions described above, a participant who takes a loan within 180 days after the enactment of the Omnibus Bill may take a loan of up to the lesser of $100,000 or the participant's vested account balance. This is an increase in maximum loan limits.

- **Loan Repayments.** For retirement plan loan repayments due between the first day of the federally declared disaster period and 180 days after the enactment of the Omnibus Bill, participants may delay repayment for one year or, if later, 180 days after the enactment of the Omnibus Bill. The loan terms are extended by the period of the delay.

Plan sponsors seeking to implement any of the qualified disaster relief distributions options must amend their plans by the end of the 2022 plan year.

Section 125 Cafeteria Plan Provisions

- **Temporary Special Rules for Health and Dependent Care Flexible Spending Arrangements (Division EE, Section 1, Title II, Sec. 214).** The Omnibus Bill provides for the following relief related to health care and dependent care Flexible Spending Account plans (FSAs), each of which is optional—FSA sponsors are not required to adopt or provide such relief:
  - **Carryovers.** FSAs may permit a carryover of all unused benefits in plan years ending in 2020 into the plan year ending in 2021. Similar relief is available for carrying over unused FSA benefits for plan years ending in 2021 into the plan year ending in 2022.
  - **Grace Periods.** FSAs providing for a grace period associated with the plan year ending in 2020 or 2021 may extend the grace period from 2-1/2 months to 12 months after the end of the plan year.
  - **Other Reimbursement Relief.** FSAs may permit an employee who ceases participation midyear in the 2020 or 2021 plan year, e.g., due to termination of employment, to continue to receive reimbursements of unused contributions through the end of the plan year in which their participation ceased (including any grace period permitted under the FSA's terms, as modified by the above-described extension).
  - **Midyear Election Changes.** For plan years ending in 2021, FSA participants may be allowed to prospectively modify their FSA contribution elections without first incurring a change in status.
  - **Dependent Care FSA Coverage.** For dependent care FSAs, age 14 may be substituted for age 13 as the applicable age for which a qualifying dependent "ages out" of coverage if: (1) the participant was enrolled in the dependent care FSA for a plan year where the enrollment period was on or before January 31, 2020; (2) the participant had one or more dependents who attained age 13 during the plan year; and (3) the participant had an unused balance for a plan year that will be carried forward to the subsequent plan year.

FSA sponsors seeking to implement the Omnibus Bill's optional relief provisions must amend their FSA plan documents no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment becomes effective, e.g., December 31, 2022 for amendments to a calendar year plan effective in 2021, provided the plan is operated consistently with the terms of such amendment between the amendment's effective and adoption dates.

Health and Welfare Plan Provisions

- **No Surprises Act (Division BB, Title I) for Private Health Insurance.** The Omnibus Bill provides protections to help prevent healthcare consumers from incurring surprise medical bills for general healthcare, air ambulance, and emergency services. One set of protections imposes requirements on group health plans and health insurance issuers; another set focuses on requirements for providers. The following are key highlights for group health plans:
  - **Emergency Services.** Group health plans that offer group or individual coverage for emergency services must provide such services without prior authorization requirements or other limitations,

regardless of whether the healthcare provider is considered a participating provider or whether the emergency facility is a participant emergency facility in the participant's network.
    - **Nonemergency Services.** Group health plans that have contractual relationships with a healthcare facility must not impose additional cost-sharing requirements for nonemergency services provided by out-of-network providers beyond cost-sharing requirements that would be imposed for similar services performed by an in-network provider at the same facility.
    - **Out-of-Network Services.** Additional notification and continued coverage requirements will apply to certain participants or beneficiaries receiving services from out-of-network providers at contractually engaged health care facilities.
    - **Primary Care Providers.** Group health plans that require or provide for participant, beneficiary, or other enrollee designation of a primary care (or pediatric care) provider must permit each participant, beneficiary, or other enrollee to designate any participating primary care provider acceptable to the enrollee.
    - **Obstetrical or Gynecological Care.** Group health plans may not require prior authorization or referral for obstetrical or gynecological care provided by a participating healthcare professional with relevant specialization.
    - **Air Ambulance Services.** Group health plans that provide coverage for air ambulance services may not impose greater cost-sharing requirements for out-of-network providers as would be imposed for in-network providers of such services. Importantly, the Omnibus Bill also eliminates surprise balance billing by air ambulance services on individuals covered by group health plans or health insurance and imposes new reporting requirements on these providers (and group health plans), in addition to prompt payment, arbitration, and external review requirements.
    - **Identification Cards.** Group health plans must include on any physical or electronic plan or insurance identification card issued to participants or beneficiaries a clear description of: (1) any deductible applicable to the plan, (2) any out-of-pocket maximum applicable to the plan, and (3) a telephone number and internet website that can be used to obtain consumer assistance information.
    - **Price Comparisons.** Group health plans must offer price comparison guidance by telephone and on relevant internet websites so that participants, beneficiaries, and other enrollees may compare the cost-sharing amount they would be responsible for with respect to services performed by potential providers.
    - **HDHP Protection.** For plan years beginning on or after January 1, 2022, high-deductible health plans (HDHPs) will not lose their HDHP status by providing medical care coverage as required by the Omnibus Bill.
    - **External Review.** Beginning January 1, 2022, group health plans must comply with expanded external review processes in the case of adverse benefit determinations and with advance cost estimate notification and explanation of benefits procedures detailed in the Omnibus Bill.
    - **Provider Directories.** Beginning January 1, 2022, group health plans must establish: (1) a provider information directory verification process, (2) a response protocol for answering questions on whether a health care provider or facility has a contractual relationship with the plan, and (3) a database on a public website for the plan that lists each healthcare provider and facility with which the plan has a direct or indirect contractual relationship for furnishing items and services under the plan, in addition to a provider directory with respect to each provider and facility.
- **Health Cost Transparency (Division BB, Title II).** The Omnibus Bill provides additional protections for healthcare consumers by enhancing the transparency of service provider claims, cost, and compensation data. For example, group health plans are prohibited from contracting with healthcare providers or other third parties in a manner that would restrict a plan, directly or indirectly, from providing provider-specific cost or quality of care information, accessing de-identified claims and encounter information for each enrollee, or sharing either category of information. Moreover, group health plans must adhere to revised reporting requirements related to the disclosure of pharmacy benefit coverage and prescription drug costs

submitted annually to the secretaries of the U.S. Departments of Health and Human Services (DHHS), Treasury, and Labor (DOL). Further, group health plans that are subject to mental health parity requirements and impose non-quantitative treatment limitations could be required by a state agency or DHHS to perform a comparative analysis confirming parity in design and application of such limitations.

Other Benefit Plan Provisions

- **Employer Student Loan Payments (Division EE, Title I).** The CARES Act permitted the exclusion from an employee's gross income of payments of up to $5,250 per year toward an employee's student loans through December 31, 2020. The Omnibus Bill extends this provision through December 31, 2025.

IRS Notice 2021-03

In other recent guidance responding to the COVID-19 pandemic, the Internal Revenue Service (IRS) issued an extension of prior temporary relief in Notice 2020-42, which had relaxed the physical presence requirement under Code Section 417 (regarding notarized signatures for qualified joint and survivor annuity elections and spousal consent) by allowing for remote notarization in states that permit this or where plan representatives used certain safeguards, as specified in the notice. Notice 2021-03 extended this relief through June 30, 2021.

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