



COVID-19 FAQs: For Employee Benefits & Executive Compensation

March 2020

SUMMARY

INTRODUCTION

EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION

Coronavirus (COVID-19) raises serious concerns for employers of all shapes and sizes, across all industries and in every business sector. As the impact of COVID-19 continues to grow, many employers are faced with new challenges that affect not only their businesses and their employees, but the health and welfare, retirement and executive compensation plans and programs on which those employees rely. These new issues are arising in addition to the myriad benefit plan challenges that employers face each day.

Below, we address a number of frequently asked questions regarding health and welfare, retirement and executive compensation issues in the COVID-19 era. This includes not only questions about issues employers are currently facing, but questions about issues employers may face going forward. Given the rapidly evolving nature of the crisis, McDermott's Employee Benefits and Executive Compensation team will periodically update these FAQs to provide you with the most up-to-date information. We will also continue to keep you informed of the latest developments and provide comprehensive insights to help you navigate these and related concerns.

Click the linked questions below to see their answers:

HEALTH AND WELFARE PLAN AND PROGRAM FAQs

COVID-19 is changing how employers think about their health and welfare benefit plans and the coverage they must offer. Employers must ensure they are covering appropriate testing and treatment for COVID-19 when required and consider obligations related to any workforce reductions or furloughs. These include issues related to:



Health Plan Coverage

As the number of employees impacted by COVID-19 continues to grow, so do the coverage and cost considerations for employers. Many employers are interested in finding ways to assist employees and provide needed testing and treatment for COVID-19. There are a number of items for employers to consider, including recent legislation and guidance.

- [1. Are employers required to provide coverage for COVID-19 testing?](#)
- [2. Will health savings account \(HSA\) eligibility be disrupted by COVID-19 testing and treatment?](#)
- [3. Can employers use telemedicine to provide care during the COVID-19 pandemic?](#)
- [4. Are there state-mandated requirements to provide COVID-19 coverage?](#)

Health Plan Considerations for Employees Laid Off or On Furlough

As the number of employees impacted by COVID-19 continues to grow, many employers are concerned about the impact of furloughs, hours reductions and layoffs on employer-provided health coverage and other benefits. Importantly, when considering the rules that apply to employees who are furloughed, on layoff or terminated, employers should consider the meanings of such status designations under their health and welfare plans and applicable law.

For example, the word “furlough” means something different for many employers and may include a termination of employment or result in employees remaining on the books as active employees but with reduced or no hours of work. For purposes of the considerations below, furlough is meant to refer to employees who are treated as active employees on the company’s books but are no longer working and are therefore typically unpaid. However, understanding how this distinction applies to an employer’s actual workforce is critical in determining the employer’s obligations.

- [1. Are employers required to provide ongoing health plan coverage for employees who are furloughed or have a reduction in hours?](#)
- [2. Are terminated or furloughed employees eligible for COBRA coverage during the COVID-19 crisis?](#)
- [3. Should employers review policies regarding the order of payroll deductions?](#)
- [4. How will employees with reduced hours and wages pay premiums for ongoing medical plan coverage?](#)
- [5. Are ongoing employees permitted to make benefit election changes?](#)

Special Considerations for Employers with Union Workforces

The response to COVID-19 can present additional challenges for employers with union workforces.



1. [Are employers required to negotiate changes to plans covering union employees?](#)

Miscellaneous Concerns for Other Health and Welfare Benefits

Employers should also consider how the response to COVID-19 impacts other health and welfare benefits.

1. [Are other health and welfare benefits impacted by the COVID-19 crisis?](#)

RETIREMENT PLAN FAQs

There are a number of important retirement plan matters to consider in light of the market disruption resulting from COVID-19:

Providing Employees Greater Access to Plan Accounts and Benefits

As the number of employees impacted by COVID-19 continues to grow, many employers are interested in finding ways to assist employees that may be placed on furlough or have their hours reduced, by providing those employees access to their retirement savings.

1. [Can plans permit hardship withdrawals for COVID-19-related expenses?](#)
2. [Can plans provide greater access to loans?](#)
3. [Can plans provide greater access to in-service withdrawals and distributions?](#)

Reducing, Delaying or Eliminating Employer Contributions

As business disruptions associated with COVID-19 increase, many employers are considering reducing, delaying or eliminating matching and profit-sharing contributions under their retirement plans to help reduce costs and preserve cash. In so doing, employers must keep in mind a number of important considerations.

1. [Can employers reduce or eliminate safe-harbor matching and/or non-elective contributions?](#)
2. [Can employers reduce or eliminate non-safe harbor matching and/or non-elective contributions?](#)
3. [Will modifying employer contributions impact non-discrimination testing?](#)
4. [Will modifying employer contributions curtail nondiscrimination testing transition relief following a corporate transaction?](#)

Workforce Reductions, Layoffs and Furloughs



Employers reducing their workforces, reducing employee hours and/or furloughing employees to address health and safety concerns, as well as reduced demand for services, will need to consider the impact of these reductions/furloughs on employer-provided benefits in a number of different ways. Importantly, when considering the rules that apply to employees who are furloughed, on layoff or terminated, employers should consider the meanings of such status designations under their retirement plans and applicable law.

For example, the word “furlough” means something different for many employers and may include a termination of employment or result in employees remaining on the books as active employees but with reduced or no hours of work. For purposes of the considerations below, furlough is meant to refer to employees who are treated as active employees on the company’s books but are no longer working and are therefore typically unpaid. However, understanding how this distinction applies to an employer’s actual workforce is critical in determining the employer’s obligations.

- [1. Should employers review policies regarding the order of payroll deductions?](#)
- [2. Can employers suspend loan repayments for furloughed employees?](#)
- [3. Can employers provide repayment alternatives, such as ACH, for furloughed or terminated employees?](#)
- [4. Can plans allow furloughed employees to receive distributions of their plan benefits?](#)
- [5. How will reductions in the hours worked by employees impact service earned toward plan eligibility, vesting or benefits?](#)
- [6. Can reductions in force \(RIFs\) or layoffs cause a partial plan termination and accelerated vesting?](#)

Plan Investments, Funding and Service Provider Performance

The economic turmoil caused by COVID-19 is taking its toll on the stock market and, in turn, on retirement plan investment performance. Now more than ever, plan fiduciaries need to carefully monitor investment performance, request guidance from their investment advisors and consultants, and document any actions taken to respond to the changing situation.

- [1. Should plan fiduciaries assess plan investments and investment policies in light of recent market changes?](#)
- [2. Should plan fiduciaries review service provider policies regarding service level guarantees and performance requirements?](#)
- [3. Should plan fiduciaries address the timing of planned investment changes and the impact on plan participants?](#)

Special Considerations for Employers with ESOPs

The economic turmoil caused by COVID-19 may have significant impact on ESOP-owned employers. Such



companies should review and monitor compliance issues, the valuation process, distribution requirements, and the impact on other compensation programs that may be sponsored by the employer.

- [1. Should trustees and plan fiduciaries review and understand how the 2019 annual valuation is completed in light of recent economic changes?](#)
- [2. Should plan fiduciaries consider whether an interim valuation date is declared?](#)
- [3. Should plan fiduciaries review the current distribution policy?](#)
- [4. Should the employer consider participant communications regarding certain changes?](#)
- [5. Are there other programs and impacts an ESOP-owned company should take into consideration given the current economic environment?](#)
- [6. Should an ESOP-owned company review its administrative and fiduciary processes?](#)

Special Considerations for Employers with Union Workforces

The response to COVID-19 can present additional challenges for employers with union workforces.

- [1. Are employers required to negotiate changes to plans covering union employees?](#)
- [2. Will reductions in force \(RIF\) and layoffs cause a partial withdrawal from multiemployer pension plans?](#)

EXECUTIVE COMPENSATION PLAN AND PROGRAM FAQs

The adverse impact of COVID-19 crisis also extends to executive compensation in several ways, including:

Changing Deferral Elections and Unforeseeable Emergency Withdrawals

Employers maintaining Section 409A nonqualified deferral arrangements that are evaluating potential alternatives to assist participants with their cash flow needs are considering a number of ways to do so and the related impacts of these methods.

- [1. Can 2020 deferral elections be cancelled?](#)
- [2. Can employers allow unforeseeable emergency withdrawals?](#)
- [3. Can employers link employee loans to deferred compensation?](#)

Setting and Adjusting Performance Metrics and Targets

Public and private employers are grappling with the impact of COVID-19 on budgeting, including performance goals for equity awards.



- [1. What steps should employers consider when structuring performance-based compensation in light of COVID-19?](#)
- [2. Should employers consider adjusting 2020 performance targets?](#)

Sales, Changes in Timing of Grants, Awards and Bonuses, and Related Assumptions

Employers may want to review the impact of the COVID-19 crisis on issues involving sales, changes in timing of grants, awards and bonuses, and other relevant assumptions.

- [1. Should public company employers confirm that sales of company stock comply with insider trading policies?](#)
- [2. Are employers considering staggering grants and incentive pay?](#)
- [3. Should employers consider the impact of COVID-19 when weighting fair market value assumptions for grants and awards?](#)
- [4. Can employers delay bonus payments?](#)

Share Capacity

The COVID-19 crisis may have a significant impact on the share capacity under equity plans.

- [1. Should employers review their equity plans and determine if sufficient authorized share capacity exists?](#)

HEALTH AND WELFARE PLAN AND PROGRAM FAQs

ARE EMPLOYERS REQUIRED TO PROVIDE COVERAGE FOR COVID-19 TESTING?

Yes. As part of the Families First Coronavirus Response Act, Congress eliminated patient cost-sharing for COVID-19 diagnostic testing and related services provided under employer-sponsored group health plans. This impacts all employer plans, insured and self-funded, of all sizes. However, the new law does not require coverage of treatment for COVID-19 on a first-dollar basis or address care through telemedicine. (See our [On the Subject](#) for more information).

WILL HEALTH SAVINGS ACCOUNT (HSA) ELIGIBILITY BE DISRUPTED BY



COVID-19 TESTING AND TREATMENT?

No, provided coverage is amended to the full extent of optional changes in recent guidance. HSAs allow eligible individuals to use pre-tax dollars to pay for eligible health care expenses. One requirement to participate in an HSA is that an individual be covered under a high deductible health plan (HDHP) and have no “disqualifying health coverage.” As a general rule, any benefits covered under the HDHP before the minimum deductible is satisfied constitute disqualifying health coverage.

However, under a recently issued IRS notice, individuals covered by a HDHP may receive benefits associated with testing for and treatment of COVID-19 without a deductible, or with a deductible below the minimum deductible for a HDHP, prior to the individual meeting the minimum deductible without disqualifying them from making or receiving HSA contributions. This change will allow individuals to pursue testing and treatment for COVID-19 without fear of jeopardizing their ability to contribute or receive contributions to their HSA for necessary care that may otherwise be more difficult to afford. (See our [On the Subject](#) for more information).

CAN EMPLOYERS USE TELEMEDICINE TO PROVIDE CARE DURING THE COVID-19 PANDEMIC?

Yes and no. Many employers are seeking to expand the use of telemedicine and other forms of virtual care during the COVID-19 pandemic to alleviate pressure on the health system and to allow their employees to remain home and reduce their risk of being exposed. This expansion of care is not typically an issue for PPOs and other health care plans that are not a HDHP.

However, HDHPs have limits on the type of care that can be provided on a first-dollar basis to avoid disqualifying individuals from making (or receiving) HSA contributions. As a result, telemedicine visits are typically provided at fair market value for employees covered under a HDHP, which most of our clients usually set around \$30 or \$40 per primary care doctor visit. As described in [Question 2](#), the IRS recently relaxed these rules as it relates to testing and treatment for COVID-19, which includes the provision of telemedicine at no cost to individuals enrolled in HDHPs. But the relief stops there (so far). Telemedicine services for other forms of treatment or care outside of and not related to COVID-19 would not be covered by the IRS relief except to the extent already permitted under earlier guidance. (Discussions of telemedicine coverage are included in our *On the Subjects* [here](#) and [here](#) for more information).



ARE THERE STATE-MANDATED REQUIREMENTS TO PROVIDE COVID-19 COVERAGE?

Yes, but only for certain states. Several states, including, for example, California, New York, Maryland and Washington, have mandated that insured health plans (and self-funded health plans that are not subject to ERISA) provide without cost-sharing certain medically necessary screening and testing (and, in certain cases, care and treatment) for COVID-19. These state mandates apply only to insured health plans and other plans not subject to ERISA. Some large health insurers have already announced their intention to comply with these mandates. Self-funded group health plans are subject to federal law under ERISA, which generally preempts state law as applied to self-funded group health plans. Many employers with self-funded group health plans, however, have sought ways to expand health plan coverage in line with the state guidance.

ARE EMPLOYERS REQUIRED TO PROVIDE ONGOING HEALTH PLAN COVERAGE FOR EMPLOYEES WHO ARE FURLOUGHED OR HAVE A REDUCTION IN HOURS?

Maybe. As detailed above, sometimes the ACA may require ongoing coverage for furloughed employees. The ACA does not, however, require coverage be provided to all employees and does not require coverage be provided to terminated employees. When the ACA does not require coverage for a terminated or furloughed employee, the next place to look is COBRA. An employer may be required (or may choose if not otherwise required) to offer health coverage to employees who are furloughed or otherwise have a reduction in hours. Failure to offer adequate coverage when required by the Affordable Care Act (ACA) may trigger costly penalties for the employer.

- *Required Coverage for Stability Period.* ACA regulations provide two measurement methods for an employer to determine whether an employee is a full-time employee: the monthly measurement method and the look-back measurement method. Most employers use the look-back measurement method and a discussion of the monthly measurement method is beyond the scope of this summary. Under the ACA's look-back measurement method, an employer determines an employee's full-time status during a future period known as the "stability period" based upon the employee's hours of service in a prior period referred to as the "measurement period." For ongoing employees, employers determine full-time employee status by reference to hours worked during a "standard measurement period" that is between three and 12 months long. The definition of a full-time employee for purposes of potential penalty tax liability is 130 hours per month (*i.e.*, not 30 hours per week as referenced in the ACA statute). Each ongoing employee who is determined to be a full-time employee during the standard measurement period is treated as a full-time employee during the subsequent stability period and must be offered coverage even if they are working less



than full-time hours during that stability period. Employers can be more generous than the ACA requires and may want to consider how any reduced hours for COVID-19 may impact health plan eligibility for future plan years.

- *Voluntary Coverage.* The ACA's 130-hour full-time employee test and corresponding coverage requirement described above are threshold requirements—an employer can always choose to be more generous. Accordingly, even if an employer is not required to continue to offer coverage under the ACA, the employer may voluntarily choose to offer coverage to employees on furlough, despite the employees not meeting the ACA requirement. This type of change would require a closer look at plan documents and may require a plan amendment, nondiscrimination testing and updated plan summaries.

ARE TERMINATED OR FURLOUGHED EMPLOYEES ELIGIBLE FOR COBRA COVERAGE DURING THE COVID-19 CRISIS?

Maybe. COBRA is a double-trigger statute, meaning that to be eligible for COBRA, an individual must experience both a loss of coverage and another triggering event. For employees who are furloughed or laid off, the reduction in hours or termination of employment may trigger COBRA for all group health plans if accompanied by a loss of coverage. Some employers choose to subsidize COBRA coverage by continuing to pay a portion of the required premium to ease the transition for employees to more costly coverage. For COVID-19, providing COBRA coverage will offer unique challenges for non-traditional group health plan benefits such as an on-site clinic.

SHOULD EMPLOYERS REVIEW POLICIES REGARDING THE ORDER OF PAYROLL DEDUCTIONS?

Probably. Employers generally take payroll deductions for things such as FICA/FUTA, health plan premiums, retirement plan contributions, loan repayments and nonqualified plan contributions, in a set order each pay period. However, employees who are furloughed or working a reduced schedule may no longer have sufficient wages to take all such deductions. Employers should review their payroll deduction ordering rules to ensure that deductions are being taken in the appropriate order, both legally and practically.



HOW WILL EMPLOYEES WITH REDUCED HOURS AND WAGES PAY PREMIUMS FOR ONGOING MEDICAL PLAN COVERAGE?

It depends. For employees whose employment and medical plan coverage are not terminated, the employer must determine how employees with reduced hours and wages will pay for ongoing medical plan coverage. Typically, this is handled through payroll deduction, but that may not be an option if an employee on furlough is not being paid or if the medical plan premiums exceed the amount of any paycheck. As a general rule, employers can choose to subsidize all or a portion of required premiums (or offer a premium holiday) or permit the employee to pre-pay, pay by check or ACH while on leave or furlough, or make up missed premiums after returning to work.

ARE ONGOING EMPLOYEES PERMITTED TO MAKE BENEFIT ELECTION CHANGES?

Maybe. The plan document controls the permissibility of benefit election changes and employers should determine whether impacted employees will be entitled to an election change under either the cafeteria plan or HIPAA special enrollment rules. The change in status rules are optional and some employers may not have adopted all permissible options, particularly some allowed under more recent guidance. In addition, whether a change in status election is permitted is highly dependent on the individual's facts and circumstances and, for example, may be impacted by their spouse's coverage or their entitlement to Medicare or Medicaid.

Common changes that may be implicated by the COVID-19 pandemic could include a change in a dependent's coverage under another employer's plan, enrollment in other coverage due to reduction in hours, or enrollment in marketplace coverage. Finally, the change in status rules do allow for an employee to drop coverage if his or her hours are reduced and the individual is in a stability period, but the individual prefers to drop coverage due to cost.

ARE EMPLOYERS REQUIRED TO NEGOTIATE CHANGES TO PLANS COVERING UNION EMPLOYEES?

Probably. Many employer-provided benefits are considered terms and conditions of employment that cannot be changed without notifying and potentially negotiating with the union. As a result, employers should carefully discuss any planned changes with their labor counsel.



ARE OTHER HEALTH AND WELFARE BENEFITS IMPACTED BY THE COVID-19 CRISIS?

Yes. While a full analysis is beyond the scope of this summary, virtually all other health and welfare benefits beyond major medical would also be impacted by any layoff or furlough resulting from employer actions for COVID-19. For example, all group health plans are subject to COBRA, the same eligibility rules and premium payment obligations that apply to major medical coverage and related considerations often apply to other health and welfare benefits, and benefit elections may be permitted in other cases. In addition, employers should consider the impact of COVID-19 on caregiver benefits, dependent care assistance programs, on-site clinics, short-term disability plans and life insurance.

This also is a good time to remind employees of available employee assistance programs (EAPs) and ensure employees have access to mental health resources.

RETIREMENT PLAN FAQs

CAN PLANS PERMIT HARDSHIP WITHDRAWALS FOR COVID-19-RELATED EXPENSES?

Maybe. Plans may permit hardship withdrawals for certain medical and other expenses that may arise as a result of COVID-19, but not for all COVID-19 expenses (yet). Recent IRS regulations changed the safe harbor for hardship withdrawals to allow participants to take hardship withdrawals for expenses related to certain federally declared disasters. To date, COVID-19 has been declared a national emergency. However, COVID-19 has only been declared a disaster in the following areas:

Disaster Area*	Date of Disaster Declaration	Applicable Period for Relief
New York	March 20, 2020	Beginning January 20, 2020. Relief ongoing, no current end date



		specified.
California	March 22, 2020	Beginning January 20, 2020. Relief ongoing, no current end date specified.
Washington	March 22, 2020	Beginning January 20, 2020. Relief ongoing, no current end date specified.
Iowa	March 24, 2020	Beginning January 20, 2020. Relief ongoing, no current end date specified.
Louisiana	March 24, 2020	Beginning January 20, 2020. Relief ongoing, no current end date specified.

**This table will be updated as new relief becomes available to additional states and localities. Please check back for updates.*

Therefore, absent further guidance, a disaster-related hardship withdrawal may not be available for most individuals impacted by COVID-19 without a showing of additional individualized hardship.

Trade associations have requested guidance that COVID-19, by itself, is sufficient basis for a hardship distribution, and efforts are underway to include technical changes as part of COVID-19 proposed legislation. In the meantime, participants outside declared disaster areas may still be able to receive hardship withdrawals under the existing rules to prevent eviction or pay for certain medical expenses associated with COVID-19.

Importantly, employers should review their plans to confirm what types of hardship withdrawals are permitted (*i.e.*, whether the plan uses the broadest possible definition of hardship), amend plans as appropriate to allow participants expanded access to their accounts, and check on the steps the plan's recordkeeper has taken to facilitate hardship withdrawals.

CAN PLANS PROVIDE GREATER ACCESS TO LOANS?

Yes. Many plans limit the number of loans participants may receive, how often participants may request new loans and the contribution sources available for loans. In the face of the COVID-19 pandemic, employers may want to amend their plans to provide participants greater access to plan loans. These changes could include increasing limits on the number of outstanding loans available from the plan (some plans limit loans to one residential and one



general purpose loan), reducing or eliminating waiting periods between loans, and expanding the contribution sources available for the plan loans, at least for the remainder of this year.

Keep in mind that the right to borrow from a retirement plan is not a protected benefit, and the right to receive additional plan loans may be modified, expanded or restricted from time to time.

CAN PLANS PROVIDE GREATER ACCESS TO IN-SERVICE WITHDRAWALS AND DISTRIBUTIONS?

Yes. Many plans limit the number and type of in-service withdrawals (such as hardship withdrawals and age 59-1/2 distributions) that a participant may take each year. In addition, some plans limit the contribution sources available for in-service withdrawals.

Employers may want to amend plans to increase the number of in-service withdrawals a participant may receive and add new in-service withdrawal options, at least for 2020. Employers could even consider expanding their hardship withdrawal to cover non-safe harbor hardship events, something employers historically have been reluctant to do, in hopes of covering COVID-19 related hardships.

In addition, although most employers view this type of relief as specific to their defined contribution plans (401(k), 403(b)), employers who sponsor defined benefit pension plans may also consider adding an age-62 in-service distribution feature to their plans. Unlike loans, providing greater access to in-service withdrawals (other than hardship withdrawals) and distributions generally will be subject to anti-cutback rules, so employers may want to limit any enhanced rights to 2020.

CAN EMPLOYERS REDUCE OR ELIMINATE SAFE-HARBOR MATCHING AND/OR NON-ELECTIVE CONTRIBUTIONS?

Maybe. An employer typically cannot suspend or reduce safe harbor contributions under its safe harbor 401(k) plan mid-year. However, there are two primary exceptions: an employer may reduce or suspend safe harbor contributions mid-year if the employer is operating at an “economic loss,” or if the employer includes a special statement in the plan’s annual safe harbor notice regarding the employer’s authority to make such a change. Importantly, in either case, the employer must notify all eligible employees of the change at least 30 days before the



change becomes effective. In addition, reducing or suspending safe harbor contributions mid-year will subject the plan to ADP/ACP.

CAN EMPLOYERS REDUCE OR ELIMINATE NON-SAFE HARBOR MATCHING AND/OR NON-ELECTIVE CONTRIBUTIONS?

Probably. Employers that sponsor non-safe harbor 401(k) plans often have considerably more flexibility to change employer contributions under their plans than safe harbor plan sponsors. Typically, an employer only needs to amend the plan—and if employer contributions are entirely discretionary, an amendment may not be required at all.

But there are limits to amending the plan. Anti-cutback rules under the tax code generally prohibit an employer from retroactively eliminating employer contributions. Plan documents (and collective bargaining agreements) also may impose additional limits. Employers should exercise particular care when amending plans under which employer contributions are made on an annual (rather than payroll-by-payroll or other periodic) basis and who require employees to be employed on the last day of the plan year.

WILL MODIFYING EMPLOYER CONTRIBUTIONS IMPACT NON-DISCRIMINATION TESTING?

Maybe. Modifying employer contributions may directly or indirectly impact nondiscrimination testing. Reducing or suspending employer contributions may directly (for safe harbor plans) or indirectly (for non-safe harbor plans) adversely impact a plan's ability to pass required non-discrimination testing, especially if lower-paid workers reduce their plan contributions.

As a result, employers should plan in advance for the potential impact of any plan changes on non-discrimination testing, as non-discrimination testing failures can necessitate additional contributions, a return of contributions to highly paid employees or other remedial measures. Employers should consider asking their recordkeepers to perform preliminary testing so that they can properly consider and address any compliance challenges.



WILL MODIFYING EMPLOYER CONTRIBUTIONS CURTAIL NONDISCRIMINATION TESTING TRANSITION RELIEF FOLLOWING A CORPORATE TRANSACTION?

Maybe. Tax-qualified retirement plans must satisfy certain nondiscrimination testing requirements. Because nondiscrimination testing is performed on a controlled-group-wide basis, changes to the structure of an employer's controlled group—for example, the addition of new employees and plans—can affect nondiscrimination testing results for an employer's plans (and the plans it acquires). To help address this concern, the tax code includes a special transition rule under which certain plans are deemed to pass coverage testing until the end of the plan year following the plan year in which a corporate transaction occurs. However, if there is a "significant change" to the plan's coverage or its terms during this transition period, the transition relief will end as of the date of the change, and the plan will be required to pass coverage testing by taking into account the new combined controlled group. Changes that impact plan eligibility or contributions are more likely to be considered significant changes that may curtail an employer's ability to rely on the transition relief period.

SHOULD EMPLOYERS REVIEW POLICIES REGARDING THE ORDER OF PAYROLL DEDUCTIONS?

Probably. Employers generally take payroll deductions for things such as FICA/FUTA, health plan premiums, retirement plan contributions, loan repayments and nonqualified plan contributions in a set order each pay period. However, employees who are furloughed or working a reduced schedule may no longer have sufficient wages to take all such deductions. Employers should review their payroll deduction ordering rules to ensure that deductions are being taken in the appropriate order, both legally and practically.

CAN EMPLOYERS SUSPEND LOAN REPAYMENTS FOR FURLOUGHED EMPLOYEES?

Maybe. IRS regulations allow loan repayments to be suspended for up to one year during a leave of absence if an employee's pay is reduced to the point that it is insufficient to repay the loan. As a result, employers may be able to provide furloughed employees with the flexibility to suspend their loan repayments.



CAN EMPLOYERS PROVIDE REPAYMENT ALTERNATIVES, SUCH AS ACH, FOR FURLOUGHED OR TERMINATED EMPLOYEES?

Maybe. Employers may want to provide repayment alternatives (such as ACH) for furloughed or terminated employees. Employers typically require employees to repay outstanding loans through payroll deduction. In addition, after employees are terminated, many employers require employees to repay their outstanding loan balance in full at the time they terminate employment to avoid a default on the loan (making it taxable). Employers may wish to allow furloughed and terminated employees to continue making loan repayments on a periodic basis through ACH or direct payment to provide employees and former employees greater flexibility.

CAN PLANS ALLOW FURLOUGHED EMPLOYEES TO RECEIVE DISTRIBUTIONS OF THEIR PLAN BENEFITS?

Probably not. Plans typically cannot allow furloughed employees to receive distributions of their plan benefits unless they formally terminate employment. Furloughed employees typically remain active employees of the employer and are therefore ineligible to receive plan distributions that are only available upon termination of employment. However, in-service withdrawals (such as hardship withdrawals, age 59-1/2 distributions or loans) may be available to furloughed employees.

HOW WILL REDUCTIONS IN THE HOURS WORKED BY EMPLOYEES IMPACT SERVICE EARNED TOWARD PLAN ELIGIBILITY, VESTING OR BENEFITS?

It depends. Some retirement plans require employees to complete a certain number of hours of service each year to earn service toward eligibility, vesting, and even benefit accruals or contributions. Employees typically do not earn hours of service for periods during which they do not perform services and for which they do not receive compensation. As a result, employees generally will not earn hours of service for furlough periods.

In addition, employees who have their work schedules reduced may also earn less service toward plan eligibility, vesting and benefits. If an employee is not able to accumulate the requisite hours of service for the year, the employee may not be entitled to a year of service for eligibility, vesting or benefit purposes under the plan.



CAN REDUCTIONS IN FORCE (RIFs) OR LAYOFFS CAUSE A PARTIAL PLAN TERMINATION AND ACCELERATED VESTING?&NBSP;

Maybe. Reductions in force and layoffs may cause a partial plan termination, requiring accelerated vesting for affected employees. A partial plan termination occurs if there is a significant decrease (generally 20% or more) in the number of participants covered by a plan during a plan year due to employer-initiated terminations of employment. This means RIFs and employer layoffs due to adverse economic conditions may cause a partial plan termination.

If a partial plan termination occurs, affected employees must be fully vested in their plan benefits as of the date of the partial plan termination. Employers should not undertake significant changes in the workforce without analyzing the potential cost of a partial plan termination and the restructuring alternatives that may be available to avoid it.

SHOULD PLAN FIDUCIARIES ASSESS PLAN INVESTMENTS AND INVESTMENT POLICIES IN LIGHT OF RECENT MARKET CHANGES?

Yes. Plan fiduciaries should discuss the impact of recent market volatility on the plan's investment options and document any actions taken (as well as decisions not to take action) in response to the evolving market conditions. Plan fiduciaries should meet with their investment managers to determine whether any changes should be made to the plan's investment policy. For defined benefit plans, plan fiduciaries may need to reevaluate asset allocation restrictions, to provide investment managers flexibility to manage assets prudently in response to volatile markets.

SHOULD PLAN FIDUCIARIES REVIEW SERVICE PROVIDER POLICIES REGARDING SERVICE LEVEL GUARANTEES AND PERFORMANCE REQUIREMENTS?

Yes. Plan fiduciaries should review service provider policies regarding service level guarantees and performance requirements. Among other issues, plan fiduciaries may want to discuss the impact of increased call volume and participant inquiries on service standards and technology infrastructure with their recordkeepers and other service



providers.

SHOULD PLAN FIDUCIARIES ADDRESS THE TIMING OF PLANNED INVESTMENT CHANGES AND THE IMPACT ON PLAN PARTICIPANTS?&NBSP;

Yes. Plan fiduciaries should address the timing of planned investment changes and the impact on plan participants. Plan fiduciaries considering investment line-up changes or service provider transitions that require a blackout period during which participants will have limited access to plan investments and funds should carefully document decisions to continue or delay planned changes in response to existing market conditions.

SHOULD TRUSTEES AND PLAN FIDUCIARIES REVIEW AND UNDERSTAND HOW THE 2019 ANNUAL VALUATION IS COMPLETED IN LIGHT OF RECENT ECONOMIC CHANGES?

Yes. However, ESOP trustees and plan fiduciaries should be aware that the economic impact of federal, state and local mandates to combat the threat COVID-19 are unlikely to impact annual valuation work for ESOPs with a 2019 calendar year end. The valuations performed for fiscal year ESOPs with a year end even earlier in 2019 are even less likely to be influenced.

Even though it is not expected to change annual valuation results, trustees and plan fiduciaries charged with monitoring trustees should consider how the recent economic changes impact the 2019 valuation requirements. The initial impact of COVID-19 is occurring right as annual valuations are being performed, and in some instances completed, for 2019 calendar year plans. This raises questions regarding how an annual valuation should take recent events into consideration.

There is little to no guidance on how subsequent events might affect an annual valuation. However, the standard adopted generally appears to look at what was “known” or “knowable” as of the date for which the valuation is being conducted (*e.g.*, December 31, 2019). It seems relatively clear that recent events do not fall into that category. As a result, most valuations are being completed for the calendar year end without factoring in this information. Even given this reality, it is likely necessary for trustees and other plan fiduciaries (*e.g.*, a board of directors) to caucus on recent developments, document the review process and ultimately come to an actionable decision, even if such



decision is to maintain the 2019 valuation process absent consideration of the changing environment. Counsel may be able to help with these steps to allow for an appropriate process to be undertaken and recorded that will allow regulatory review “in hindsight” to understand what occurred.

SHOULD PLAN FIDUCIARIES CONSIDER WHETHER AN INTERIM VALUATION DATE IS DECLARED?

Yes. Plan fiduciaries must consider whether an interim valuation date should be declared and set to bring forward the 2019 year-end valuation. While most practitioners are approaching the 2019 year-end valuation work without consideration of the impact of COVID-19, plan fiduciaries must also review the appropriateness of using such valuation work for ESOP administrative purposes.

In certain industries and events, distributions paid on the 2019 valuation may be inappropriate and, in some instances, impossible. It is incumbent on plan fiduciaries to review the financial health of the company, including current cash flow, to determine if an interim valuation is appropriate and advisable. Regardless of the answer, plan fiduciaries should specifically address this question in their processes for determining appropriate administrative requirements for 2020. Counsel can assist the plan fiduciary(ies) in crafting an action plan for this review, helping to guide the fiduciary as to the matters that may be considered in making this determination. To the extent an interim valuation is indicated by such analysis, the employer must review ESOP documentary requirements and provisions to determine if such step is authorized or, if not, could be added to the ESOP. It is important to understand the process for declaring an interim valuation—if appropriate—as actions taken absent certain documentary protections may be viewed as an impermissible change in benefits.

SHOULD PLAN FIDUCIARIES REVIEW THE CURRENT DISTRIBUTION POLICY?

Yes. Plan fiduciaries must consider whether the current distribution policy is appropriate. The strong economic and financial performance of many companies over the last few years has seen many companies adopt distribution policies permitting participants to elect a lump sum distribution in the year following a distribution event (*e.g.*, termination for any reason). Such companies have often coupled this policy with a “conversion event,” meaning that participants not receiving a distribution would have shares of company stock converted to cash.

Plan administrators should review the distribution policy to determine if it still works for the company in the



current environment. Some questions to ask might include the following:

- Does the declaration of an interim valuation make action(s) dictated by the current policy imprudent given a possible drop in stock price?
- Is the current distribution policy supportable with possibly stunted cash flows?
- Is an installment distribution policy advisable until the impact of recent events are more fully known?
- Should participants in installment distributions be given an election to forestall the current distribution?
- Is there some benefit to imposing certain legally permissible delays on distributions to be paid on certain events (*e.g.*, termination for reasons other than death, disability, or retirement)?
- Should force-out distributions (mandatory cash outs) be suspended?
- Are there other actions that might be taken to preserve the company's ability to respond to its distribution responsibilities?

SHOULD THE EMPLOYER CONSIDER PARTICIPANT COMMUNICATIONS REGARDING CERTAIN CHANGES?

Yes. To the extent an employer is making a change with respect to its 2019 distributions—be such change the imposition of an interim valuation or simply a revision to the distribution policy—the employer should communicate the change and the impact it may have on participant's rights and responsibilities early and, possibly, on multiple occasions. To the extent an employer delays the distribution process that is to occur in 2020 to provide some insight into the possible impact COVID-19 events has had on the company (*e.g.*, pushing such distribution window to third quarter, 2020) or takes other actions that differ from procedures in prior years, the employer should consider regular communications with participants to manage expectations and provide a resource for questions.

ARE THERE OTHER PROGRAMS AND IMPACTS AN ESOP-OWNED COMPANY SHOULD TAKE INTO CONSIDERATION GIVEN THE CURRENT ECONOMIC ENVIRONMENT?&NBSP;

Yes. Many ESOP owned companies also have synthetic equity programs—SARs or phantom stock—that provide payment amounts tied to company stock performance. Such programs often have stated distribution dates. The



company may be facing a situation where the value is not yet known, especially if an interim valuation is being conducted, on the required distribution date or a situation where cash flows simply do not permit payment to be made on such date.

Employers should work closely with counsel to determine if distributions may be delayed until the end of the year under the tax code or if there are certain other provisions that might require a delay of payment (*e.g.*, ongoing concern issues).

Finally, to the extent an employer taxed as an S-corporation sponsors a deferred compensation program denominated in cash or not tied to a per-share count, the value of such program is typically converted to a per-share price for purposes of testing under Section 409(p). If value drops, the number of shares reflected by such program may jump significantly, creating a very real risk of failing such testing. Plan administrators should reach out to providers to determine the impact of a falling stock price on various award programs.

SHOULD AN ESOP-OWNED COMPANY REVIEW ITS ADMINISTRATIVE AND FIDUCIARY PROCESSES?

Yes. An ESOP-owned company should review its processes for making administrative determinations/working with plan fiduciaries. ESOP-owned companies are facing significant decisions in the upcoming months. Even if plan sponsors, administrators, and fiduciaries determine that the “status quo” is appropriate, they should document the analysis undertaken to determine the appropriate path forward for the company. It is important that actions are dictated by appropriate review and consideration leading to affirmative decisions and not simply actions undertaken by habit or the lack of a review of possible alternative steps. While not every possible outcome must be known or identified, plan fiduciaries should take the time to understand the possible impact of recent economic strife on the company.

It is important to ask basic questions regarding how the plan should be administered and coordinate with plan fiduciaries, including the trustee, as to changes (if any). Employers may wish to work with counsel to determine a prudent mechanism for conducting appropriate reviews, making decisions in the short, and possibly long, term, and transmitting information to plan fiduciaries, the trustee and participants.

ARE EMPLOYERS REQUIRED TO NEGOTIATE CHANGES TO PLANS COVERING



UNION EMPLOYEES?&NBSP;

Probably. Many employer-provided benefits are considered terms and conditions of employment that cannot be changed without notifying and potentially negotiating with the union. As a result, employers should carefully discuss any planned changes with their labor counsel.

WILL REDUCTIONS IN FORCE (RIF) AND LAYOFFS CAUSE A PARTIAL WITHDRAWAL FROM MULTIEMPLOYER PENSION PLANS?&NBSP;

Maybe. Any significant reduction in the duty to contribute to a multiemployer defined benefit pension plan, including as a result of layoffs and plant closures, can trigger a partial withdrawal resulting in withdrawal liability for the employer.

EXECUTIVE COMPENSATION PLAN AND PROGRAM FAQs

CAN 2020 DEFERRAL ELECTIONS BE CANCELLED?

Maybe. As a general matter, Section 409A requires nonqualified deferral elections, once made, to be irrevocable. As a result of the COVID-19 crisis, employee requests to cancel 2020 deferral elections are increasing. However, deferral elections may be cancelled due to an unforeseeable emergency.

Note that any such deferral election must be cancelled, however, and not merely postponed or otherwise delayed, which may require a return of amounts previously deferred this year. Employers should also check the terms of any such nonqualified deferral arrangements to see if a cancellation of deferral elections is currently required or merely permitted when a 401(k) hardship distribution is taken.

CAN EMPLOYERS ALLOW UNFORESEEABLE EMERGENCY WITHDRAWALS?

Yes, but only with great care. Employers may want to consider allowing unforeseeable emergency withdrawals.



Section 409A allows for limited payment of nonqualified deferred compensation upon an unforeseeable emergency, and a plan may be amended at any time to add an unforeseeable emergency payout provision, either on a permanent or temporary basis.

The standard for an unforeseeable emergency is much stricter than is applicable to a Section 401(k) financial hardship, and must result in a severe financial hardship to the participant due to, among other causes, extraordinary and unforeseeable circumstances arising from events beyond the participant's control that cannot be met by other financial means. Only the amount reasonably necessary to satisfy the emergency need can be withdrawn. Whether there is an unforeseeable emergency and the amount that can be withdrawn is to be determined based on the facts and circumstances of the individual participant.

Also, it is important to keep in mind that adding an unforeseeable emergency withdrawal provision should not include amounts grandfathered from Section 409A, as doing so would result in immediate coverage of all amounts under Section 409A.

CAN EMPLOYERS LINK EMPLOYEE LOANS TO DEFERRED COMPENSATION?&NBSP;

No. Employers should generally avoid linking an employee loan to a nonqualified deferral arrangement. Under Section 409A, if a service provider receives a loan the repayment which is secured by or may be accomplished through an offset of or a reduction in an amount deferred under a nonqualified deferred compensation plan, the loan is treated as a substitute for the deferred compensation, and thus an impermissible acceleration.

WHAT STEPS SHOULD EMPLOYERS CONSIDER WHEN STRUCTURING PERFORMANCE-BASED COMPENSATION IN LIGHT OF COVID-19?&NBSP;

Adjustments to performance targets for short- and long-term compensation awards that have not yet been granted should be considered at this time, even if it requires delay of scheduled grants. It is reasonable to expect that failing to have performance goals reflecting current market conditions will likely result in incentive programs that create a significant distraction instead of motivating performance. Please note that there is no requirement for public companies to grant incentive compensation within the first quarter of the fiscal year.



Although there is no legal impediment to delaying setting performance metrics, delays can unsettle the workforce. For public companies, delays may cause proxy advisory firms to determine that such targets may be too easy to achieve. Whether waiting or not, however, employers should ensure that plans have sufficient flexibility to permit the administrator to adjust targets given objective, quantifiable metrics as circumstances develop. To the extent metrics are implemented in the near term, relative, rather than absolute metrics, are likely to be favored as such metrics provide a natural adjustment to the market and competitor performance. We also expect some companies to switch to shorter performance period, both for short-term and long-term incentives.

SHOULD EMPLOYERS CONSIDER ADJUSTING 2020 PERFORMANCE TARGETS?&NBSP;

Yes, but taking a wait-and-see approach before making an adjustment is likely to be the more prudent approach. For those employers that have already set 2020 performance targets, compensation committees and employers should scrutinize such targets to determine if reaching pre-determined targets has now become virtually impossible or decidedly unlikely, demotivating employees who will discount any hope of receiving 2020 performance grants. Compensation committees and employers should balance the desire to amend the targets now with waiting to see if conditions stabilize, as multiple adjustments will likely suggest confusion rather than correction.

For public companies, proxy advisors often find modification of performance targets during a performance period a problematic pay practice. It remains to be seen to what extent proxy advisors will modify their approach when evaluating modifications occurring subsequent to the onset of the COVID-19 period. Any modifications should be carefully considered in light of concerns as to whether there may be a significant disconnect between shareholder return and compensation payable. Modifications to performance goals that preserve compensation for executives above target while shareholders have lost most of their share value are likely to be heavily scrutinized and may present a target for plaintiff's counsel to assert a breach of fiduciary duty. Please note that any modifications should also take into account potential negative accounting treatment for equity awards and disclosure obligations, including whether 8-K filings will be required.

SHOULD PUBLIC COMPANY EMPLOYERS CONFIRM THAT SALES OF COMPANY STOCK COMPLY WITH INSIDER TRADING POLICIES?&NBSP;

Yes. As executives consider changes to the personal investment portfolios in light of market volatility, employers



will want to ensure any sales of company stock comply with the company's insider trading policies and no trade periods.

ARE EMPLOYERS CONSIDERING STAGGERING GRANTS AND INCENTIVE PAY?&NBSP;

Yes. Customarily, employers make grants once per year, at the same time as performance bonus metrics are established and targets provided for the coming year's target bonus program. An alternative for employers to consider is to stagger equity grants throughout the year rather than making grants in one tranche. Similarly, performance bonus components can be staggered to occur semi-annually, such that performance targets can be utilized for both pre- and post-COVID-19 recovery periods.

SHOULD EMPLOYERS CONSIDER THE IMPACT OF COVID-19 WHEN WEIGHTING FAIR MARKET VALUE ASSUMPTIONS FOR GRANTS AND AWARDS?&NBSP;

Yes. In normal times, the use of a spot price to determine fair market value on the date of the grant raises no concerns. However, the exceptional volatility of the COVID-19 era suggests that a far longer volume-weighted average should be considered when setting the size of equity awards such as performance stock units and restricted stock units. With respect to stock options, special rules set a minimum floor as to how low the exercise price may be set based on the fair market value of the company's common stock on the date of grant. However, there is no restriction on using a higher exercise price than the grant date fair market value based on a stock price average.

CAN EMPLOYERS DELAY BONUS PAYMENTS?

Maybe—it depends upon the facts and circumstances. Employers that expect to pay bonuses in 2020 representing fiscal year 2019 performance may want to hold off on payments until and unless some clarity on their own fiscal situations and the length of the economic dislocation is finalized. However, in many cases, employees, particularly senior executives, have contractual rights to receive bonuses at predetermined and pre-negotiated time periods. Further, deferring bonuses may result in a 20% addition to tax under Section 409A.



SHOULD EMPLOYERS REVIEW THEIR EQUITY PLANS AND DETERMINE IF SUFFICIENT AUTHORIZED SHARE CAPACITY EXISTS?

Yes. Grants often are made in dollar-denominated amounts, which then convert to shares based on share price. To the extent that past share grants have been denominated in dollar amounts, the recent collapse in equity prices will require a higher number of shares to deliver the dollar-denominated value to employees. At the same time, equity-based awards made in fiscal year 2020 could, if the economy rebounds, result in a large number of shares delivered when such awards vest and are settled. Accordingly, employers should review their equity plans and determine if sufficient authorized share capacity exists. If not, employers should request shareholder approval of additional capacity. Now is the time to think through the effects of such requests on issues such as dilution and determine if additional capacity is needed.

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