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Employee Benefit "Gifts" Included in End of Year Legislation

The massive appropriations bill enacted by Congress on December 21 and signed into law on December 27 contained helpful provisions for employers sponsoring retirement, welfare and fringe benefit plans. This alert highlights the key employee benefit plan provisions contained in the Tax Certainty and Disaster Relief Act (Act) division of the appropriations bill.

Key Provisions

- **Temporary Relief for Health Care and Dependent Care Flexible Spending Accounts**

Health Care Flexible Spending Accounts (Health FSAs) and Dependent Care Flexible Spending Accounts (Dependent FSAs) are subject to the "use it or lose it" rule which can result in employees forfeiting amounts they do not use by the end of a plan year. Employees impacted by COVID -19 had hoped to be able to withdraw unused funds in their 2020 FSAs. Although the relief provided by the Act does not permit return of unused funds, it does allow employers to amend FSAs to provide continued access to funds already contributed.

- Health FSAs and Dependent FSAs may permit all unused amounts remaining at the end of the 2020 and 2021 plan years, respectively, to be carried over to the next plan year.
- Alternatively, Health FSAs and Dependent FSAs may extend the grace period for unused benefits or contributions remaining at the end of the 2020 and 2021 plan years to 12 months after the end of each such plan year. (Health FSAs and Dependent FSAs can permit carry-overs or grace periods, but not both).
- During the 2021 plan year, employees may prospectively change their contribution election for any reason.
- Employees who terminate employment during calendar year 2020 or 2021 may continue to receive reimbursements from their Health FSA through to the end of the plan year in which they terminate employment, including any grace periods. Currently, most terminated employees cannot be reimbursed for expenses incurred after termination, unless they are eligible for and elect COBRA continuation coverage.
- During the 2020 plan year, dependent FSAs may reimburse expenses for dependent children up to age 14 instead of age 13. The age 14 relief only applies for expenses incurred in 2020, or in 2021 to the extent the eligible employee has unused amounts in his or her Dependent FSA carried over from the 2020 plan year.

Adoption of any of the temporary relief provisions is optional. Amendments reflecting the optional relief selected will need to be adopted by a delayed amendment deadline and the plan will need to be operated in accordance with the amendment.

- **Special Disaster-Related Rules for Use of Retirement Funds**

The Act allows employers to amend their retirement plans to provide access to retirement funds for participants residing in federally declared disaster areas (excluding disasters solely related to COVID-19) during the period beginning January 1, 2020, and ending 60 days after enactment of the Act. Specifically:

- Qualified disaster distributions (QDDs) of up to $100,000 are permitted. QDDs are not subject to the 10 percent tax on early distributions from retirement plans, may be taxed ratably over a three-year period and may be recontributed to an eligible retirement plan during the three-year period. QDDs must be taken within the period beginning on the day of the incident causing the disaster and ending no later than 180 days of the Act's enactment (e.g., before June 19, 2021) to a person whose principal residence is located in the area affected by the disaster and who has sustained an economic loss by reason of the disaster.
- Individuals who took hardship withdrawals during the period beginning 180 days before the disaster and ending 30 days after the disaster period for purposes of purchasing or constructing a principal residence located in the qualified disaster area may recontribute such withdrawal if the recontribution occurs within the period beginning on the day the disaster occurs and ending 180 days after the Act's enactment.
- Individuals with a principal residence in a disaster area and who have sustained an economic loss by reason of such qualified disaster may take plan loans within 180 days of the Act's enactment up to the lesser of $100,000 or the greater of $10,000 or 100 percent of the employee's current nonforfeitable benefit. Additionally, such individuals may extend all repayments due on their outstanding loans during the incident period, provided the subsequent repayments are adjusted to include interest accrued during the delay.

Employers who decide to implement the disaster-related relief must amend their plans by the delayed amendment deadline, i.e., on or before the last day of the first plan year beginning on or after January 1, 2022 (January 1, 2024, for governmental plans) or such later date as the secretary of the Treasury may prescribe.

- **Partial Termination Relief**

A retirement plan—e.g., 401(k) plan—is not treated as having a partial termination (which would require immediate vesting for affected participants) during any plan year which includes the period beginning on March 13, 2020, and ending on March 31, 2021, if the number of active participants covered by the plan on March 31, 2021, is at least 80 percent of the number of the active participants covered by the plan on March 13, 2020. Thus, if sufficient numbers of plan participants are rehired before March 31, 2021, a partial termination is avoided.

- **Student Loan Repayment Relief**

The definition of educational assistance under an educational assistance program is expanded to include employer payments made through December 31, 2025, of principal or interest on a qualified education loan incurred by an employee. Prior to the Act, employer payments had to be made by December 31, 2020, to constitute educational assistance.

What Should Employers Do?

Employers should determine if they wish to adopt any or all of the changes permitted to be made to their Health FSAs, Dependent FSAs and retirement plans. Additionally, they should coordinate with their plan administrators to implement these changes as well as any changes necessitated by the partial termination relief and the student loan repayment relief. Any changes will need to be communicated to plan participants. Employers will also need to be sure amendments implementing any relief provisions are timely adopted.

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If you have any questions regarding the above or need assistance preparing plan amendments or employee communications, please reach out to any of the attorneys in Day Pitney's ERISA and Executive Compensation group.

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