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## End of Year Benefits “To-Do” List

**Presentation for:**

Employee Benefits Academy  
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**Presentation by:**

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Jessica helps clients navigate the complex and evolving area of employee benefits law, including health care reform, tax-qualified retirement plans and executive compensation. She also frequently handles employee benefits issues arising in corporate transactions, employment agreements, and vendor contract negotiations.

Jessica works with clients on a broad array of employee benefits matters, advising on compliance with ERISA, the Internal Revenue Code, the Affordable Care Act, HIPAA and COBRA. She regularly advises on compensation and benefits aspects of employment agreements and severance arrangements. She also frequently works with clients on negotiating employee benefit vendor contracts and HIPAA business associate agreements for employee benefit plans.

In corporate transactions, Jessica negotiates employee benefits representations and covenants, conducts due diligence review of employee benefit plan documentation, and advises clients on executive compensation issues arising under Section 409A and Section 280G.



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Jordan focuses her practice on executive compensation and employee benefit arrangements (including their related tax and corporate governance aspects).

Jordan advises clients across various industries on ERISA, HIPAA, Internal Revenue Code, and Affordable Care Act compliance requirements governing employee benefits and compensation arrangements. She also supports clients engaged in corporate transactions with understanding and quantifying potential tax and financial exposures related to executive compensation issues under 280G and 409A and employee benefit plan compliance.

Prior to joining Hunton Andrews Kurth, she was a Manager in the human resources consulting practice of a Big Four accounting firm where she spent seven (7) years advising public and private companies on the design, implementation and operation of their executive compensation philosophies and strategies and the supporting programs, including short-term and long-term incentive programs.

# 2022 - End of Year Employee Benefits “To Do” List

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- Retirement Plans
- Health and Welfare Plans

# Qualified Retirement Plans

- Year end amendments
- Annual notices
- Administrative Considerations
  - Cybersecurity
  - ESG considerations/update
  - “Excessive fee” litigation update

- The IRS recently issued Notice 2022-33 extending the deadline for plan sponsors of qualified retirement plans and 403(b) plans to adopt SECURE Act and certain CARES Act amendments from December 31, 2022 until **December 31, 2025**.
- The IRS later issued Notice 2022-45 to add that the deadline for the CARES Act provisions not covered in Notice 2022-33, including penalty-free coronavirus-related distributions, increasing the permissible loan amount, and delaying repayment of loan amounts is also extended.

- Changes to Required Minimum Distributions under IRC 401(a)(9):
  - Delays Required Minimum Distributions for certain participants from Age 70½ to Age 72
  - Limits the maximum distribution period for post-death distributions under defined contribution plans for certain beneficiaries to ten (10) years:
    - Exception for “Eligible Designated Beneficiaries”
    - Exception captures most beneficiaries, including surviving spouses, minor children and beneficiaries who are less than 10 years younger than the participant
  - Long-time part-time employees must be eligible to make elective deferrals under 401(k) plans:
    - 500 hours in 3 consecutive years
    - Beginning in 2021 (1<sup>st</sup> year of eligibility – 2024)

# Qualified Plans – SECURE Act Changes (cont'd)

- 401(k) Safe Harbor Non-Elective Plan Changes:
  - Eliminated notification requirement for many plans
  - 401(k) plans can be amended to become Non-Elective Safe Harbor Plans:
    - At any time before 30<sup>th</sup> day before the close of the plan year (i.e., December 1 for calendar year) or
    - After the 30<sup>th</sup> day deadline but before the deadline to distribute excess contributions (i.e., December 2<sup>nd</sup> – April 15<sup>th</sup>), if the Non-Elective Contribution is at least 4% of compensation
- Provides for “qualified birth or adoption distributions” of up to \$5,000 without 10% penalty
- Pension Plans (including money-purchase pension plans) can permit in-service distributions beginning at age 59½
- Annual benefit statements must include a lifetime income disclosure describing the monthly payments the participant would receive if the participant’s total account balance was paid as a single life annuity and qualified joint and survivor annuity.



# Qualified Plans – CARES Act Optional Provisions

- Coronavirus-related plan loans - Maximum loan amount increased to \$100k/100% of account balance
  - Loans must have been taken by September 22, 2020
  - Any loan repayment due on or after March 27, 2020 to December 31, 2020 could be deferred up to one year
- Coronavirus-related distributions up to \$100k for qualified participants
  - Distribution had to have taken by December 31, 2020
  - Must have met the criteria to take distribution, which was generally anyone who (or whose family member who lives with individual) was diagnosed with COVID or experiences adverse financial consequences due to COVID
  - Plan Sponsor could rely on individual's self certification that they are eligible for a coronavirus distribution
- Participants are allowed to pay back these distributions over a 3-year period

## 457(b) SECURE Act Amendments

- The guidance extending deadlines for SECURE Act did not address 457(b) plans for tax-exempt entities.
  - As a result, the amendment deadline for 457(b) plans sponsored by tax-exempt entities to conform to the RMD provisions of the SECURE Act remains December 31, 2022 (for calendar year plans).
  - 457(b) plan sponsored by a governmental employer must be amended for the SECURE Act by the later of:
    - 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after December 31, 2023; or
    - if applicable, the first day of the first plan year beginning more than 180 days after the IRS notifies the governmental employer that the plan was administered in a manner inconsistent with the section 457 regulatory requirements.

## Safe Harbor Notice

- Safe Harbor Matching Notice must be provided 30-90 days before beginning of each plan year.
- SECURE Act eliminated notice requirement for safe harbor non-elective contributions in many cases
  - Notice is still required where the plan relies on the safe harbor rules to avoid non-discrimination testing for non-safe harbor matching contributions
- For calendar year plans, deadline is December 2<sup>nd</sup>

## Automatic Enrollment Notice

- Automatic Enrollment Notices must be provided 30-90 days before beginning of each plan year
- For calendar year plans, deadline is December 2<sup>nd</sup>

## Qualified Default Investment Alternatives Notice

- For fiduciary liability protection for qualified default investments, notice must be provided 30-90 days before beginning of each plan year
- Guidance on distribution method has changed

## Qualified Default Investment Alternatives Notice (cont.)

- The DOL published final regulations in 2020 creating a new safe harbor for the electronic delivery of retirement plan disclosures, including the QDIA
- In issuing the new 2020 DOL Safe Harbor, the DOL reversed prior DOL guidance permitting reliance on the IRS's electronic delivery rules for the delivery of QDIA notices
  - As a result, the QDIA must be provided in accordance with the DOL rules, which are generally more stringent
- The DOL indicated it would not resume the pursuit of enforcement actions until after January 27, 2022 (18 months after the regulations were published)

## Summary Annual Report

- Summary of the Plan's financial status and information on the Form 5500.
- SAR must be provided by the later of 9 months after end of plan year or two months after the Form 5500 is due (would apply if filed for an extension).

## Annual Funding Notice for Pension Plans

- Summary of the Plan's funding (including value of assets/liabilities).
- AFN must be provided no later than 120 days after the close of the plan year.
- Plans with 100 or fewer participants must give notice by earlier of the due date for the Form 5500 (including extensions) or the date the Form 5500 is filed.

## Individual Benefit Statements

- Individual Benefit Statements show the benefits earned and vested amounts
- Defined contribution plans that allow participant directed-accounts must furnish benefit statements on a quarterly basis
  - Life annuity disclosures are also required
- Defined contribution plans that do not have participant directed accounts must provide on an annual basis
- Defined benefit plans must provide every three years (or administrator can provide annual statement of availability of notice and additional information)

## Statement of Accrued and Nonforfeitable Benefits

- Must provide statement to participants who terminate

# Administrative Considerations - Cybersecurity

- Cybersecurity threats continue to pose new and increasing risk to retirement plan administrators and recent suits continue to raise questions about liability for benefit plans
- Recent cyber securities litigation:
  - Fraudulent distributions: Former executive files claim alleging that plan fiduciaries breached their legal duties by failing to prevent someone from hacking into her 401(k) account. In her case, the hacker took over her retirement account and drained it of more than \$750,000. (*Disberry v. Employee Relations Committee of the Colgate-Palmolive Co. et al.*, case number 1:22-cv-05778, S.D.N.Y. 2022)
  - DOL Cybersecurity Investigations: 7th Circuit recently considered a challenge to the DOL's authority to investigate cybersecurity breaches. DOL issued a subpoena to Alight, an administrative and recordkeeping services company, to investigate whether cybersecurity breaches cause unauthorized distributions. Alight argued that the DOL does not have authority to investigate it for nonfiduciary acts. The 7th Circuit rejected this argument and required the company to comply with the subpoena requesting the documents. (*Walsh v. Alight Solutions LLC* (7th Cir., 2022).

# Administrative Considerations - Cybersecurity

- In 2021, the DOL issued guidance for plan sponsors, fiduciaries, recordkeepers and plan participants on best practices for cybersecurity relating to 401(k) plans
  - Tips for sponsors and fiduciaries in selecting and monitoring plan service providers
  - Best practices for plan fiduciaries and recordkeepers
  - Tips for plan participants in accessing their online accounts
- While compliance is not mandated, this guidance reflects the DOL's view that fiduciaries have fiduciary responsibilities in the protection of plan participants' data, and those who have cyber security losses may find it more difficult to defend against claims of breach of fiduciary duty if this guidance is not followed



# Administrative Considerations - Cybersecurity

- Risk mitigation actions include:
  - Develop policies (similar to HIPAA privacy and security policies) to deal with and protect PII
  - Include “best practice” recommendations for participants to safeguard their plan accounts (SPD; special participant communications)
  - Vet vendors’ cybersecurity programs to ensure that best practices are being followed; require third party administrators and other service providers to periodically report on their cybersecurity practices and protocols
  - Contractually require service providers to maintain cybersecurity insurance
  - Review and, if necessary, amend service provider agreements to ensure that they deal with cybersecurity issues and provide for safeguards to protect data, and do not contain language limiting the service provider's liability for cybersecurity incidents it causes (some companies have developed a cybersecurity "addendum" to include in service provider agreements)
  - Continue to stay informed on cybersecurity issues
  - Ensure that cyber liability insurance is in place for the Company

# Administrative Considerations - Investments in ESG Funds

- In October 2020, the Trump Administration DOL issued a final rule that required plan fiduciaries to focus on "pecuniary" factors in selecting investment alternatives, including ESG funds
  - The rule did not preclude the inclusion of ESG funds, but did require plan fiduciaries to select the funds based on economic (rather than social or other) considerations; non-financial considerations could be used as a "tie-breaker" for ESG funds, so long as the pecuniary/economic factors were satisfied
- In October 2021, the Biden Administration's DOL issued proposed rules, which, among other things require fiduciaries to consider the pecuniary impacts of ESG factors in making investment decisions and voting proxies
  - These proposed rules remain under final review
  - Several state legislatures have passed or proposed bills that limit ESG investing
  - The DOL is continuing to review and address comments

# Administrative Considerations - Excessive Fee Litigation (update)

- *Hughes v. Northwestern University* (S.Ct. 2022)
  - Classic excessive fee allegations
  - District court dismissed and 7<sup>th</sup> Circuit affirmed dismissal
    - Offering a variety of investment funds was sufficient (essentially, the types of funds plaintiffs wanted were in the plan, and plaintiffs were not forced to invest in funds with higher internal costs)
    - Allegations that the plan offered too many options was not sufficient to state a viable cause of action
  - The Supreme Court vacated the 7<sup>th</sup> Circuit's decision and held that "an ERISA fiduciary that offers some prudent investment options in a retirement plan is not thereby categorically protected against a claim that other options are imprudent."
    - ERISA requires a "context-specific inquiry" and courts should ask whether a plaintiff has alleged facts that would show that a plan fiduciary failed to satisfy its duty to monitor by failing to regularly review plan investments or recordkeeping expenses and to remove imprudent investments or recordkeepers within a reasonable time frame.

# Administrative Considerations - Excessive Fee Litigation (update)

- *Smith v. Common Spirit Health* (6th Cir. 2022)
  - First published appellate decision applying the Supreme Court's recent *Hughes v. Northwestern University* case.
  - The 6th Cir. rejected the excess recordkeeping fee claims, determining that ERISA "does not give the federal courts a broad license to second-guess the investment decisions of retirement plans."
  - **Pleading standard for an excessive fee claim**: Plaintiffs must show "context" sufficient to demonstrate that "the services that [the plan]'s fee covers are equivalent to those provided by" plaintiffs' comparator plans, and that the fees are "excessive relative to the services rendered."
  - *Hughes* and *Smith* contain positive language for plan sponsors and fiduciaries that recognizes that fiduciary conduct must be judged in a context specific fashion at the time the challenged conduct occurred and with recognition of what are often competing considerations faced by fiduciaries

- Open enrollment communications and related disclosures
- Year end amendments
- Health care reporting obligations
- CARES Act/COVID-19 guidance and related issues
- The No Surprises Act
- Post-*Dobbs* Changes to Benefits

# Welfare Benefits – Annual Notice/Disclosure Requirements

- Summary of Benefits and Coverage
  - Provide with open enrollment materials
  - Must follow prescribed format
  - Significant potential penalties for failure to provide to participants
  - Notice of modification to SBC content is required 60 days before the effective date of the change
- Summary annual report
  - Must be provided the later of: Nine months after end of plan year or two months after the Form 5500 is due (i.e., if filed for an extension)
- Medicare Part D creditable coverage notice
  - States whether the plan’s prescription drug coverage is “creditable” or “non-creditable” for purposes of Medicare Part D
  - Required annually, due October 15<sup>th</sup>

# Welfare Benefits – Annual Notice/Disclosure Requirements (cont'd)

- CHIP notice
  - Description of possible premium assistance opportunities
  - Must be provided to all employees in relevant states (not just plan participants) annually
- Women's Health and Cancer Rights Act (WHCRA) Notice
  - Description of mastectomy-related benefits
  - Required upon enrollment and annually thereafter
- Newborns' and Mothers' Health Protection Act
  - Required to be included in SPD
- HIPAA Notice of special enrollment rights
  - Description of special enrollment rules
  - Must be provided to all employees eligible to enroll in a group health plan, at or before the time a participant enrolls
  - Often included in annual enrollment materials

# Welfare Benefits – Annual Notice/Disclosure Requirements (cont'd)

- **HIPAA Notice of Privacy Practices**
  - Describes how protected health information (PHI) may be used and disclosed by a group health plan and individual's rights and plan's duties with respect to PHI
  - Required at time of enrollment, and within 60 days after material revision
  - Must remind participants of the availability of the notice every 3 years
- **Notice of Patient Protections**
  - Informs participants of plan terms regarding designation of primary care physician
  - Must be provided at same time as SPD; often included in SPD
- **Notice of Grandfathered Status**
  - If applicable, states that the plan believes it is a grandfathered plan
  - Include in any plan materials describing benefits



# Welfare Benefits –Year-End Considerations

- Were any discretionary changes made that should be documented in any amendment?
- Are SPDs and/or SMMs up to date?
  - Consider changes to benefits offerings in light of CARES Act and related guidance
- Are COBRA notices up to date and accurate?
  - Most recent DOL model notices issued in May 2020
  - Consider COVID-19 related deadline extensions
- Service provider contracts – are any in need of renewal/amendment?
  - Consider whether changes are needed or appropriate in light of No Surprises Act

- Forms 1094-C and 1095-C must be reported to the IRS as in prior years
  - Per the IRS, the due date for furnishing Form 1095-C to individuals is March 2, 2023
  - Deadline to file with IRS is February 28, 2023 (paper) or March 31, 2023 (electronic)
- Several states have reporting obligations relating to state-level individual mandates:
  - Massachusetts
  - New Jersey
  - Washington, DC
  - California
  - Rhode Island

# COVID-19 and CARES Act – Implications for Welfare Benefits Plans

- IRS Notice 2020-29
  - Allowed mid-year changes to health benefits, health FSAs and/or dependent care FSAs without a change in status event
  - Allowed extension of plan year or grace period ending in 2020 through December 31, 2020
- IRS Notice 2020-33
  - Increased health FSA carryover from \$500 to \$550, and indexed to inflation going forward
- IRS Notice 2021-15
  - Issued to provide clarification on the application of Section 214 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 which provided the following temporary rules for FSAs (health and dependent care):
    - Allowed mid-year changes to health benefits, health FSAs and/or dependent care FSAs without a change in status event for plan years ending in 2021

# COVID-19 and CARES Act – Implications for Welfare Benefits Plans

- IRS Notice 2021-15 (cont.)
  - Any unused amounts as of the end of a plan year ending in 2020 or 2021 may be used to reimburse expenses incurred for the same qualified benefit up to 12 months after the end of the plan year
  - Allowed employees to carry over unused amounts from the 2020 plan year to reimburse dependent care expenses incurred during the 2021 plan year for a dependent that turned 13 during the 2020 plan year
- Plan amendments generally required by the end of the year after the year in which the changes were effective. For calendar year plans, the deadlines are as follows:
  - For changes in 2020, amendments were required by December 31, 2021
  - For changes in 2021, amendments required by **December 31, 2022**

# COVID-19 and CARES Act – Implications for Welfare Benefits Plans (cont'd)

- EBSA Disaster Relief Notice 2020-01
  - Extends deadlines to furnish certain required notices (including SPDs, SMMs) so long as there is a good faith effort to furnish as soon as administratively practicable
- DOL, EBSA, IRS and Treasury Joint Guidance
  - Tolls time limits on certain participant actions until the end of the “outbreak period”
    - Special enrollment
    - COBRA notification of a qualifying event, election, and payment
    - Claims submissions, appeals, and external review request deadlines
- The “outbreak period” remains in effect
  - The time period for the extended participant deadlines ends the earlier of (1) one year from the date first eligible for relief or (2) 60 days after the announced end of the outbreak period.

- New requirements on surprise billing and transparency made significant changes
  - Many rules regulate providers, but others apply to group health plans – particularly notice and disclosure obligations
  - Federal surprise billing and transparency requirements often overlap with state insurance laws
  - Plan sponsors will need to work with third party administrators (TPAs) and health insurance issuers to ensure compliance

# The 2020 No Surprises Act: Summary of Changes and Deadlines

Requirement	Effective Date
Requirement for plans/issuers to publish machine readable files relating to prescription drug pricing	Delayed indefinitely pending future rulemaking/additional guidance.
Requirement to publish machine-readable files of in-network rates and out-of-network allowable amounts and billed charges on a public website	Effective July 1, 2022
Requirement for a health plan or issuer to make a price comparison tool available via phone and on plan or issuer's website for plan years beginning on or after January 1, 2022	<b>Now effective for plan years beginning on or after January 1, 2023.</b>
Requirement to provide an Advanced Explanation of Benefits ("EOB")	Delayed to address concerns. RFI issued September 16th with comment period ending November 15, 2022.
Requirement to report pharmacy benefit and drug cost information, including expenditures, the 50 most frequently dispensed brand drugs, total paid claims for said drugs, and the impact of rebates on premiums and fees, by the first deadline for reporting on December 27, 2021 or the second deadline for reporting on June 1, 2022	Deferred enforcement pending further guidance or regulations, but should be prepared to report for 2020 and 2021 by December 27, 2022.
Requirement to provide NSA balance billing notice	Effective January 1, 2022
Mental Health Parity comparative analysis requirements	Effective February 10, 2021

# The 2020 No Surprises Act: Summary of Changes and Deadlines (cont.)

Requirement	Effective Date
Requirement to provide updated ID cards that include the applicable deductibles, any applicable out-of-pocket maximum limitations, and a telephone number and website address for individuals to seek consumer assistance	Effective January 1, 2022.
Requirement to establish a process for maintaining accurate provider directories, which includes a process to update and verify the accuracy of provider directory information and a protocol for responding to requests by telephone and electronic communication from a participant, beneficiary, or enrollee about a provider's network participation status	Effective January 1, 2022.
Requirement to establish continuity of care provisions that protect participants when terminations of certain contractual relationships result in changes in provider or facility network status	Effective January 1, 2022.
Prohibition against gag clauses that prevent plans and issuers from entering into an agreement with a provider, provider network, third-party administrator, or other service provider offering access to a network of providers that would directly or indirectly restrict the plan or issuer from (1) providing provider-specific cost or quality of care information; (2) electronically accessing de-identified claims data for each participant, beneficiary, or enrollee; and (3) sharing such information, consistent with applicable privacy regulations	Effective December 27, 2020.



- *Dobbs v. Jackson Women's Health Organization* (S.Ct. 2022)
  - In the wake of the Supreme Court's ruling, employers are now faced with determining how this decision will impact their workforce and their benefits offerings
    - Depending on whether an employer sponsors an insured or self-insured group health plan, the impact of *Dobbs* will be different
  - There are a number of compliance considerations when determining whether, and how, medical travel reimbursements may be offered
    - ERISA compliance
    - Mental health parity
    - Tax treatment of travel and lodging expenses
  - Employers providing coverage for pregnancy termination and/or related travel and lodging should carefully monitor developments in this area to understand their legal obligations and risks

## Executive Compensation Academy

- Title: New SEC Rules: Navigating Clawbacks and Pay vs Performance Designs
- When: December 8, 2022
- Time: 10:00 am – 11:00 am CT  
11:00 am – 12:00 pm ET