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Employee Benefit Plan Review

Ask the Experts

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COBRA and Employee Assistance Programs

Q My company sponsors an Employee Assistance Program ("EAP"), and I am wondering whether the EAP is subject to the Consolidated Omnibus Budget Reconciliation Act ("COBRA") continuation coverage law.

A It depends on whether your company's EAP meets the definition of a "group health plan" under COBRA. An EAP can include any of a variety of employer-sponsored programs, and the types of services provided from one EAP to another may vary considerably, though they generally are intended to promote employee well-being, strengthen workplace mental health, and prevent or address personal issues that may affect an employee's workplace performance. An EAP is a "group health plan" under COBRA if it provides "medical care," as defined in Internal Revenue Code ("Code") Section 213(d). Under Code Section 213(d), medical care means amounts paid for:

- The diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body;
- Transportation primarily for and essential to medical care;
- Qualified long term care services; and
- Insurance, including amounts paid as premiums under Medicare Part B.

"Medical care" does not include anything that is merely helpful to an individual's health. Different EAPs provide different types of benefits, and there are some EAPs that do not provide medical services, and therefore are not "group health plans" (e.g., an EAP that only provides referral services). However, if an EAP provides some type of medical care (e.g., psychological counseling services), the EAP will be a "group health plan" that is subject to COBRA.

Dependent Care FSA Documents

Q Our company provides employees with a dependent care flexible spending arrangement ("dependent care FSAs"). Do we need to provide employees with both a plan document and a summary plan description for this arrangement?

A Dependent care flexible spending arrangements are primarily governed by Section 129 of the Internal Revenue Code ("Code"). Dependent care FSAs generally allow employees to "put aside" funds (not to exceed $5,000 per year) on a pre-tax and unfunded basis that they can then use to reimburse themselves for qualifying dependent care expenses incurred during that year. In this way, dependent care FSAs operate much like health-care flexible spending arrangements ("health FSAs"). Dependent care FSAs, like health FSAs, are operated through cafeteria plans under Section 125 of the Code. Section 125 of the Code allows employees to make tax-free elections between receiving cash and qualifying benefits, including dependent care benefits. Under both Sections 125 and 129 of the Code, a written plan is required to qualify the dependent care FSA for this special tax treatment. So, yes, you should have a "plan document" for your dependent care FSA.

You also ask whether the dependent care FSA needs a summary plan description. "Summary plan description" is a term of art under the Employee Retirement Income Security Act ("ERISA"). Under ERISA, all pension and welfare plans that are subject to ERISA must be in writing

and must be governed by a plan document. Plan sponsors must also maintain a summary plan description for each plan, which should be given to plan participants. The "plan document" and the "summary plan description" can be the same document, as long as the document satisfies ERISA's requirements for summary plan descriptions. Depending on the complexity of the plan, doing so may not be practicable.

However, this requirement to have a summary plan description does not apply to a plan that is not subject to ERISA. Generally speaking, dependent care FSAs, unlike health FSAs, are not subject to ERISA. They are not pension benefits and, short of the employer providing employees with access to a day-care center, they are not welfare benefits. As such, it is unlikely that you would also need to create and provide your employees with a separate summary plan description for the dependent care FSA.

Long Term Part-Time Employees

Q My company sponsors a 401(k) plan for full-time employees. I read that, starting next year, 401(k) plans are required to cover part-time employees. Is my company's plan required to cover all part-time employees or just employees who work a certain number of hours? When are the part-time employees eligible to join the plan and will they be eligible for matching contributions?

A Effective in 2021, plans will be required to permit certain long term, part-time employees to make elective deferrals to 401(k) plans, but only if certain service and other requirements are met. The requirement does not extend to matching or other employer contributions such as profit-sharing contributions. The new requirement does not extend to collectively bargained employees.

This requirement was enacted by the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act") and is effective for plan years beginning after December 31, 2020. However, as noted below, service earned during 12-month periods beginning before January 1, 2021 is not required to be taken into account in determining the new eligibility requirements (but it is required to be taken into account for vesting purposes).

Code Section 401(k)(2)(D) generally limits the period of service with the employer(s) maintaining a plan that includes a cash or deferred arrangement ("CODA") (or 401(k) plan) that the plan may require employees to complete to participate in the CODA. Under current law, Code Section 410(a)(1) provides that plans may exclude employees who have not attained age 21 or completed at least 1,000 hours of service in a 12-month period (age 21/1,000 hours in 12 months requirement).[1]

The SECURE Act amended Code Section 401(k)(2)(D) to provide that a CODA may not require an employee to complete a period of service that extends beyond the close of the earlier of: (i) current age 21/1,000 hours in 12 months requirement, or (ii) subject to certain requirements, the first period of three consecutive 12-month periods during each of which the employee has completed at least 500 hours of service (three year/500 hours requirement). Employees who meet the three year/500 hours requirement are sometimes referred to as "long term, part-time employees."

For purposes of whether an employee has met the three year/500 hours requirement, 12-month periods beginning before January 1, 2021, are not taken into account. In addition, the new SECURE Act requirement will not apply to an employee unless the employee has attained age 21 by the close of the three consecutive 12-month periods.

The SECURE Act requirement also provides special vesting rules for long term, part-time employees. Under new Code Section 401(k)(15)(B)(iii), a long term, part-time employee must be credited with a year of service for purposes of determining whether the employee has a vested right to any employer contributions (other than elective deferrals) for each 12-month period during which the employee completes at least 500 hours of service. The SECURE Act's exclusion of 12-month periods beginning before January 1, 2021 that applies to determine whether an employee is eligible to make 401(k) contributions does not apply for purposes of determining whether an employee is vested in 401(k) contributions.

The SECURE Act also sets forth exceptions from the non-discrimination and top-heavy testing requirements and special break in service rules for crediting vesting of long term, part-time employees.

Note

1. Code Section 410(a)(1)(B)(i) provides that a plan may require employees to complete two years of service (rather than one) if accrued benefits under the plan are 100 percent vested after two years of service.

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