Reopening the Workplace Virtual Conference: Navigating the New Reality of COVID-19

Wage-and-Hour and Benefits Issues

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Presented By

Lake Moore, J.D., is an ERISA and employee benefits attorney who actively advises companies (large and small, public and private), administrators, accountants, tribal governments, and other lawyers on the compliance, administration, correction, and innovative design of a multitude of employee benefit plans. Lake has gained a great deal of experience handling almost all matters related to employer-sponsored retirement plans, such as 401(k), 403(b) and 457 plans, as well as health and welfare plans, such as traditional major medical plans and many ancillary plans such as adoption assistance, tuition assistance, and dependent care benefits.

Moore's ongoing passion and excitement for his practice comes from helping businesses create and maintain customized benefits tailored to the needs of employees and their families. This includes helping employers create robust and meaningful benefits that employees will actually utilize, but also in a cost-effective fashion. This area of the law is constantly evolving, and he strives to provide his clients with the advice they need to stay compliant and take advantage of new solutions to offer the best benefits in the most efficient way possible.

Through his representation of many clients before the U.S. Department of Labor and Internal Revenue Service, Lake has gained a thorough understanding of the complex and comprehensive laws, regulations, and rules that affect employer-sponsored benefit plans, such as ERISA, the Affordable Care Act, DOL and IRS regulations, and, most recently, the SECURE Act.

A portion of Lake's practice is also devoted to a broad range of business and commercial matters, such as corporate governance best practices (for example, drafting, revising, and interpreting governing documents and resolutions), mergers and acquisitions, divestitures, complex financing arrangements, business entity formation, contract negotiation and interpretation, and real estate matters (most specifically, residential leasing matters).

Lake graduated summa cum laude with a bachelor's degree in political science and philosophy in 2015 from Westminster College in Missouri, where he was actively involved on campus and in his fraternity. He went on to graduate with honors from the University of Oklahoma College of Law in 2018. While pursuing his Juris Doctor, he was a member of the American Indian Law Review and Phi Delta Phi honor society and was the recipient of several honors, including the Chesapeake Scholarship, Frank and Edna Elkouri Scholarship, Cole E. Adwon Memorial Scholarship, Aubrey M. Kerr Sr. Endowed Scholarship, and American Jurisprudence Award for Mergers and Acquisitions.

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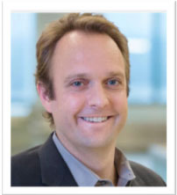

Brad Williams, J.D., litigates labor and employment disputes on behalf of employers before administrative agencies and state and federal courts.

Clients trust Williams to protect their immediate and long-term business interests through compelling advocacy and strategic negotiation. In addition to his employment-related work, Williams arbitrates labor grievances, defends unfair labor practice charges, and counsels employers on traditional labor law matters.

Prior to joining Holland & Hart, Williams completed clerkships with the Honorable Edward W. Nottingham, Chief Judge for the U.S. District Court for the District of Colorado, and the Honorable Christine M. Arguello, U.S. District Court Judge for the District of Colorado. Before law school, he was a Boettcher Foundation Scholar and attended both Colorado College and Harvard University.

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Topics to be Covered

- CARES Act Coronavirus-Related Distributions & Related Issues
- CARES Act Coronavirus-Related Loans & Related Issues
- SECURE Act and CARES Act Changes to RMDs
- Extended Deadlines for Retirement Plans and Group Health Plans

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Take a Step Back… Remember the SECURE Act?

SECURE Act

- Introduced on March 29, 2019.
- Signed by the President on December 20, 2019.
- Many provisions effective January 1, 2020.

CARES Act

- Introduced on March 19, 2020.
- Signed by the President on March 27, 2020.
- Many provisions effective immediately.

- We thought that was fast…

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Coronavirus-Related Distributions & Related Issues

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In-Service Distributions – Old Rules

- In-service distributions generally available (if allowed under Plan terms):
  - Age 59.5
  - Safe-harbor hardship events (medical expenses, prevent foreclosure, damage to principal residence, etc.)
    - Substantiation of expenses required
  - Certain loans
  - Etc.
- Early withdrawal excise tax of 10% (if under age 59.5)
- 20% mandatory withholding for eligible rollover distribution; optional withholding if not ERD

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Coronavirus-Related Distributions – Basics

- Up to $100k distribution
  - Whether to offer at all, and whether to offer full amount, is optional
  - Employers can get creative
- Made on or after January 1, 2020 and BEFORE December 31, 2020
  - Confirmed in IRS guidance
- Eligible retirement plans (e.g., 401(k) and 403(b) plans, and IRAs)
  - Does not include money purchase plans and DB plans because of certain existing in-service distribution restrictions

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Coronavirus-Related Distributions – Basics

- Qualifying individual (from the statute)
  - (I) who is diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention,
  - (II) whose spouse or dependent (as defined in section 152 of the Internal Revenue Code of 1986) is diagnosed with such virus or disease by such a test, or
  - (III) who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors as determined by the Secretary of the Treasury (or the Secretary's delegate).
- Basically someone who has, or someone whose family member has, coronavirus or has personally been financially impacted (does not include financial impact of participant's spouse, e.g. spouse has been furloughed)

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Coronavirus-Related Distributions – Basics

- Tax advantages:
  - No required income tax withholding
  - No 10% excise tax even if under age 59.5
  - Allowed to pay back to the plan within 3 years from the date distribution was received
  - Income tax spread pro rata over three years – or not (participant's choice)
    - Amended tax return for participant
    - Participant may take advantage of this even if Plan does not allow for CRD
    - If, for example, you receive a coronavirus-related distribution in 2020, you choose to include the distribution amount in income over a 3-year period (2020, 2021, and 2022), and you choose to repay the full amount to an eligible retirement plan in 2022, you may file amended federal income tax returns for 2020 and 2021 to claim a refund of the tax attributable to the amount of the distribution that you included in income for those years, and you will not be required to include any amount in income in 2022.

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Coronavirus-Related Distributions – Basics

- Self-certification
  - The Plan Administrator may rely on the participant's certification that he or she meets the requirements to receive the CRD
  - Unless the Plan Administrator has knowledge to the contrary
  - The participant is ultimately responsible for a correct tax return
- Controlled group issues
  - $100k limit applies in the aggregate across plans maintained by a controlled group

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Coronavirus-Related Distributions – Basics

- Remember to amend the plan!
  - Treated as in compliance…for now
  - On or before the last day of the first plan year beginning on or after January 1, 2022, or such later date as the Secretary of the Treasury (or the Secretary's delegate) may prescribe
    - Calendar year plans: December 31, 2022 – but don't wait that long
  - Governmental plans: two years after that

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Coronavirus-Related Distributions – Good or Bad?

- Tax burden
  - Lock in losses while the market is down
- Likely won't pay back
- Controlled group issues
  - $100k limit applies in the aggregate across plans maintained by a controlled group
  - Initially, some recordkeepers were unable to monitor the limit across plans – most can accommodate now
- If they need it, they need it – don't do mass communications?

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CARES Act Coronavirus-Related Loans & Related Issues

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Plan Loans – Old Rule

- Limit: Lesser of 50% of vested account balance or $50k
- Must be repaid within five years
- Substantially equal payments at least quarterly

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Coronavirus-Related Loans – Basics

- Qualified individuals: same as for CRD
  - Generally anyone who has coronavirus, has a family member with coronavirus, or has been financially impacted personally
- 180-day period beginning on March 27, 2020
- Limits doubled:
  - $100k or 100% of vested balance
  - Adequate security? Prohibited transaction? EBSA Disaster Notice 2020-1.
- Delayed repayments for one year
  - Applies to qualified individuals taking loans now or to qualified individuals with existing loans
  - Interest still accrues
  - Most say optional; IRS guidance from May 4 says “may” be delayed

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Coronavirus-Related Loans – Good or Bad?

- No longer have the adequate security issue
- Must be repaid
  - Good: It forces employees to repay the distribution back to the plan to have money for retirement
  - Bad:
    - May cause an additional hardship on employees in the future
    - Potentially huge principal balance
    - Interest accruing for up to one year with no payments
  - CRDs may be repaid, the distribution amount can be the same, no interest accrued

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SECURE Act and CARES Act Changes to RMDs

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SECURE Act/CARES Act RMD Changes

- SECURE Act:
  - Old rule: RMDs must begin by April 1 of the year following the year they reached age 70 ½.
  - New rule: For people who attain age 70 ½ after December 31, 2019, the age for RMDs increases to 72. Individuals who attain 70 ½ on or before December 31, 2019 are not affected.
- CARES Act:
  - Suspends RMDs for 2020.
  - What if a participant already took an RMD? Possible to return RMDs already distributed in 2020.
    - Generally, can only return within 60 days after distribution (one rollover per year).
    - Treat as eligible rollover distribution and rollover into IRA.
  - Why? RMD amount based on account balance as of December 31, 2019.

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Extended Deadlines for Retirement Plans and Group Health Plans

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Sources for Extended Deadlines:

- EBSA Disaster Relief Notice 2020-1
- DOL FAQs
- Treasury Regulations

- Many deadlines extended other than those mentioned here. Check if you're worried about something specific.

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EBSA Disaster Relief Notice 2020-1 – Extended Deadlines

- Extends certain ERISA deadlines falling from March 1, 2020 (the beginning of the national emergency declared by the President) until 60 days after the announcement of the end of the national emergency or such other date as announced by the DOL.
- Extension of deadlines for furnishing certain notices, disclosures, or documents that must be furnished during the emergency period.
  - Act in good faith: use electronic means of communication, e.g., email, texts, websites.
  - Furnish as soon as administratively practicable under the circumstances.
  - Ex. SPD, SMM, SAR, plan fee disclosures, QDIA, etc.

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EBSA Disaster Relief Notice 2020-1 – Extended Deadlines

- Plan Loans and Distributions – Verification Procedures (does not include spousal consent)
  - If procedural requirements are not met, the DOL will not treat it as a failure if:
    - that failure is solely attributable to the COVID-19 outbreak (!?);
    - the plan administrator makes a good-faith diligent effort under the circumstances to comply with those requirements; and
    - the plan administrator makes a reasonable attempt to correct any procedural deficiencies such as assembling any missing documentation, as soon as administratively practicable.

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EBSA Disaster Relief Notice 2020-1 – Extended Deadlines

- Delay Transmitting Participant Contributions
  - Ex. The only person in the office who knows how to send the contribution file is out sick
  - Contributions become plan assets on the earliest date on which amounts can be reasonably segregated from the employer's general assets
  - No enforcement action during the emergency period if delay is solely attributable to coronavirus outbreak (!?)
  - Must comply as soon as administratively practicable under the circumstances

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EBSA Disaster Relief Notice 2020-1 – Have an Investment Committee Meeting

- **General ERISA Fiduciary Compliance Guidance**
- The Department recognizes that affected plan participants and beneficiaries may encounter problems due to the COVID-19 outbreak. The guiding principle for plans must be to act reasonably, prudently, and in the interest of the covered workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic wellbeing. Plan fiduciaries should make reasonable accommodations to prevent the loss of benefits or undue delay in benefits payments in such cases and should attempt to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established timeframes.

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Treasury Regulations – Extended Deadlines

- COBRA Continuation Coverage
  - Generally applies to employers with 20 or more employees.
  - General rule:
    - COBRA election notice must be sent to employee with qualifying event within 45 days.
    - Generally 60 days to elect coverage, and 45 days after elective coverage to make the first payment. Premiums are generally due within 30 days after the first day of the period of coverage.
    - Coverage is retroactive to the date employee lost coverage.
    - COBRA coverage typically lasts 18 months.
  - Period starting on March 1 until 60 days after the end of the national emergency must be disregarded for this deadline.

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Treasury Regulations – Extended Deadlines

- Electing COBRA Example:
  - Assuming April 30 end to the national emergency, so 60 days later, June 29, end to the Outbreak Period
  - Amy works for Apple and participates in the group health plan. Due to the National Emergency, Amy experiences a qualifying event for COBRA purposes as a result of a reduction of hours below the hours necessary to meet the group health plan's eligibility requirements and has no other coverage. Amy is provided a COBRA election notice on April 1, 2020. What is the deadline for Amy to elect COBRA?
  - Amy is eligible to elect COBRA coverage under the plan. The Outbreak Period is disregarded for purposes of determining Amy's COBRA election period. The last day of Amy's COBRA election period is 60 days after June 29, 2020, which is August 28, 2020

Treasury Regulations – Extended Deadlines

- HIPAA Special Enrollment
  - General rule: Must allow certain individuals to who lose eligibility under another plan to enroll within 30 or 60 days of the event.
  - Period starting on March 1 until 60 days after the end of the national emergency must be disregarded for this deadline.

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Treasury Regulations – Extended Deadlines

- HIPAA Special Enrollment Example:
  - Assuming April 30 end to the national emergency, so 60 days later, June 29, end to the Outbreak Period
  - Betty is eligible for, but previously declined participation in, her employer-sponsored group health plan. On March 31, 2020 (within the Outbreak Period), Betty gave birth and would like to enroll herself and the child into her employer's plan; however, open enrollment does not begin until the fall. When may Betty exercise her special enrollment rights?
  - The Outbreak Period is disregarded for purposes of determining Betty's special enrollment period. Betty and her child qualify for special enrollment into her employer's plan as early as the date of the child's birth. Betty may exercise her special enrollment rights for herself and her child into her employer's plan until 30 days after June 29, 2020, which is July 29, 2020, provided that she pays the premiums for any period of coverage.

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Treasury Regulations – Extended Deadlines

- Claims procedures
  - General rule: Participants in group health plans have 180 days (60 days for pension plans) following adverse benefit determination to appeal.
  - Period starting on March 1 until 60 days after the end of the national emergency must be disregarded for this deadline.

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Treasury Regulations – Extended Deadlines

- List of deadlines extended:
  - (1) The 30-day period (or 60-day period, if applicable) to request special enrollment under ERISA section 701(f) and Code section 9801(f),Start Printed Page 26354
  - (2) The 60-day election period for COBRA continuation coverage under ERISA section 605 and Code section 4980B(f)(5),[9]
  - (3) The date for making COBRA premium payments pursuant to ERISA section 602(2)(C) and (3) and Code section 4980B(f)(2)(B)(iii) and (C),[10]
  - (4) The date for individuals to notify the plan of a qualifying event or determination of disability under ERISA section 606(a)(3) and Code section 4980B(f)(6)(C),
  - (5) The date within which individuals may file a benefit claim under the plan's claims procedure pursuant to 29 CFR 2560.503-1,
  - (6) The date within which claimants may file an appeal of an adverse benefit determination under the plan's claims procedure pursuant to 29 CFR 2560.503-1(h),
  - (7) The date within which claimants may file a request for an external review after receipt of an adverse benefit determination or final internal adverse benefit determination pursuant to 29 CFR 2590.715-2719(d)(2)(i) and 26 CFR 54.9815-2719(d)(2)(i), and
  - (8) The date within which a claimant may file information to perfect a request for external review upon a finding that the request was not complete pursuant to 29 CFR 2590.715-2719(d)(2)(ii) and 26 CFR 54.9815-2719(d)(2)(ii).
  - (9) Deadline to provide COBRA election notice.

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DOL FAQs – Audit/Investigation Warning!

- **Q2: My employer's place of business is temporarily closed because of the COVID-19 outbreak. I cannot contact my plan administrator, or the claims administrator. Who do I contact to file a claim for benefits, or to obtain replacement identification documents?**
- Many employers affected by the COVID-19 outbreak may provide special ways for employees to contact them during the outbreak. Your employer should be able to give you the name of the person to contact to obtain claim forms or other documents. If you cannot locate a contact person for your employer, you may contact one of our benefits advisors for help at www.askebsa.dol.gov or 1-866-444-3272.

Audit/investigation risk! Answer participant questions!

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Wage & Hour Basics

Fair Labor Standards Act (FLSA)

- *Not* suspended or amended during pandemic
- Supplemented by state, local wage & hour laws
- Does not mandate paid leave

Now is the time to plan for wage & hour issues affected by COVID-19

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Sending Employees Home

Exempt v. Nonexempt Employees

- Nonexempt = generally hourly and entitled to overtime
- Exempt = generally salaried (at least $684 per week) and *exempt* from overtime requirements

Paying Exempt v. Nonexempt Employees for Reduced Work

- Nonexempt = not required to be paid for time not working
- Exempt = generally entitled to full weekly salary unless *completely* relieved of duties for the workweek

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Work at Home

Nonexempt Employees

- When nonexempt employees perform work at home, they must be paid for all hours worked
  - That's true, even if employees work more hours than instructed
    - In that case, employees must be still paid for all hour worked, *but* they may also be disciplined
  - Note: On-call time constitutes hours worked
- Employers can also require nonexempt employees to pay for equipment so long as they still receive the minimum wage and any required overtime

Exempt Employees

- When exempt employees perform *any* work from home during a workweek, they must be paid for the entire workweek

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Absences Due to COVID-19

Nonexempt employee example:

- Normal schedule is 8 hours a day, 5 days a week
- Employee works only 4 hours, then goes home sick
- FLSA requires employer to pay only for the 4 hours

Exempt employee example:

- Normal schedule is 8 hours a day, 5 days a week
- Employee works only 4 hours, then goes home sick
- FLSA requires employer to pay entire weekly salary
- *Unless* full-day deductions made in accordance with a bona fide sick leave plan or policy

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Reducing Hours to Cut Costs

Reductions in hours or schedules should be carefully considered

For nonexempt employees, employers:

- May reduce hours, and only pay for time worked
  - *But* should be vigilant tracking time worked

For exempt employees, employers:

- Risk exemptions by reducing pay
- Must still pay full salaries for each workweek
- Should consider alternatives, like weeklong furloughs, or prospective salary reductions

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Reduced Hours and PTO

Scenario: Employer reduces hours for all nonexempt employees from 40 to 30 hours. Employee asks to take a week of PTO. Do you pay the employee for 40 hours or 30 hours?

Answer: It depends . . . on whether your PTO policy grants leave in blocks of hours, days, or weeks.

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Salary Reductions

Nonexempt employees

- Reduction in pay is permissible so long as employee is paid minimum wage, and all overtime due
- Employment contracts, enforceable promises, CBAs can be exceptions

Exempt employees

- Reduction in pay is permissible so long as reduction isn't used to evade the salary basis requirements for exemptions; employees must still receive at least $684 per week on salary basis
- Day-to-day or week-to-week fluctuations in deductions are generally impermissible and can result in the loss of exemptions
- Permissible salary reductions should address "long-term business needs" and be used *only* when employer anticipates prolonged economic downturn

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Payroll Suspension

- Asking employees to work through a payroll suspension may be tempting, but *it's not permissible*
- Employers can neither require nor allow employees to work without pay
- FLSA requires employees be paid *at least* minimum wage and all overtime due
- Not doing so can lead to serious liability, criminal penalties

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Employee Furloughs

Furlough vs layoff:

- Furloughs offer potential for continuing benefits coverage (if permitted under plan)
- Otherwise, both are a separation from employment

Considerations for furlough:

- State law and/or company policy may trigger payout of accrued vacation, PTO
- Exempt employees risk exemptions if *any* work is done while on furlough

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FFCRA/EPSL and the FLSA

- FLSA *has not* been suspended because of pandemic
- FFCRA's emergency paid sick leave is enforced via FLSA

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Employee Loans and Pay Advances

Employees experiencing financial hardship may come to employer for help

- Laws governing loans can make loans an administrative burden
- Pay advances also have risk

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Thank you. Questions?

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