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Insider

Potential impact of Supreme Court changes on the ACA

By Anu Gogna and Ben Lupin

Author's note: Since this article was originally published on October 13, 2020, the Senate voted 52 to 48 to confirm Amy Coney Barrett to the Supreme Court.

On November 10, 2020, the U.S. Supreme Court is scheduled to hear oral arguments challenging the constitutionality of the Affordable Care Act (ACA) in the case of *California v. Texas*.[1] Many questions surround this case and the future of the ACA in light of the timing to fill the Supreme Court seat vacated by the death of Justice Ruth Bader Ginsburg.

Background

In 2017, Congress enacted tax reforms that cut the ACA's individual mandate penalty to $0 starting in 2019. Texas and other Republican-led states, along with two private citizens, sued, arguing that the individual mandate is unconstitutional if it no longer imposes any tax. Further, because the ACA lacks a severability clause, and the individual mandate is integral to the ACA, they argued that if that provision is unconstitutional, then the entire law must fall. The Fifth Circuit Court of Appeals ruled that the individual mandate was unconstitutional but sent the case back to the federal District Court to rule on the severability issue. That Fifth Circuit decision was appealed to the Supreme Court.[2]

Q&A

Q. When is the Supreme Court scheduled to hear the case, and when is a decision expected?

The Supreme Court is scheduled to hear oral arguments on November 10, 2020 (one week after the presidential election). A decision on the case is expected by spring/summer of 2021.

Q. How might the Supreme Court rule on the case?

According to some Supreme Court analysts, the court generally has the following options when it decides the case:

1. To *dismiss* the case on technical grounds, leaving the ACA in place (for example, holding that Texas and the individual plaintiffs lacked standing to bring the lawsuit)
2. To *uphold* the individual mandate and therefore the entire ACA
3. To uphold the ACA while finding the individual mandate is unconstitutional without its penalty, essentially *maintaining the status quo*
4. To uphold the ACA generally but *hold the individual mandate and other provisions closely linked to the mandate as unconstitutional*
5. To *strike down* the entire ACA as unconstitutional

Q. How would the nomination of Judge Amy Coney Barrett to the Supreme Court affect the decision?

Only those justices sitting on the Supreme Court when the case is heard will vote, and it is not yet known if President Trump's nominee will be confirmed prior to when the case

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[1] See "**Supreme Court to hear latest challenge to the ACA**," *Insider*, March 2020.

[2] Note that the Supreme Court previously upheld the constitutionality of the ACA's individual mandate in 2012 in *National Federation of Independent Business v. Sebelius*, based on Congress' power to tax.

is argued. A vacancy on the court was created by the death of Justice Ruth Bader Ginsburg on September 18, 2020.

If the case is heard *before* a new justice is confirmed, and the vote splits 4 – 4, the justices could reschedule oral arguments or delay issuing any ruling until the case can be reheard by a full Supreme Court, possibly later in the spring of 2021 depending on the timing of confirmation. Alternatively, the court could issue a 4 – 4 ruling, which would maintain the status quo and leave the Fifth Circuit's ruling intact; the case would then be remanded back to the District Court. In this scenario, the ACA would remain in effect while the District Court analyzed the severability issue provision by provision. The litigation could continue for years, awaiting a new District Court decision, another appeal to the Fifth Circuit and most likely a return to the Supreme Court.

It's possible that the Senate could confirm President Trump's nominee before the scheduled date for oral arguments, and therefore the case could be heard with a full court. Judge Barrett has not issued any rulings on the ACA but has criticized the Supreme Court's prior ruling to uphold it. Her position on the ACA and the Supreme Court's prior rulings on the topic will likely be a key issue during her confirmation hearings, which are expected to occur in mid-October.

Q. What are the implications of the Supreme Court ruling for employers and plan sponsors?

A more complete understanding of the employer implications will depend on the scope of the Supreme Court's ruling (i.e., what provisions, if any, are overturned, and the related timing). For example, if only the individual mandate is overturned, then there would be little to no impact on employer-sponsored health plans. If the individual mandate and provisions that are tied to it, such as guaranteed issue and the prohibition on preexisting condition exclusions, are overturned, then the impact would likely be minimal on many of the ACA employer requirements, such as the employer mandate (including the corresponding information reporting) and Patient-Centered Outcomes Research Institute fee.

Based on the election results in November, particularly if the Democrats take control of the Senate and the presidency and retain the House, potential legislative fixes may be available.

However, if the ACA is overturned in its entirety, then plan sponsors would need to determine whether to continue to comply with some or all of the former requirements, including covering dependents to age 26, dollar limits on essential health benefits, the employer mandate, ACA information reporting and waiting periods.

Q. Could the election results affect the future of the ACA?

Based on the election results in November, particularly if the Democrats take control of the Senate and the presidency and retain the House, potential legislative fixes may be available (e.g., raising the individual mandate penalty from $0 to some minimal amount), which would resolve the issue raised in *California v. Texas.* If the fixes are adopted before a Supreme Court decision, they could make the need for a decision moot (and the ACA would remain in place).

For comments or questions, contact
Anu Gogna at +1 973 290 2599,
anu.gogna@willistowerswatson.com; or
Ben Lupin at +1 215 316 8311,
benjamin.lupin@willistowerswatson.com.

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***Insider* authors**

Precious Abraham	Anu Gogna	Mike Pollack
Ann Marie Breheny	Russ Hall	Laura Rickey
Cindy Brockhausen	William Kalten	Kathleen Rosenow
Gary Chase	Andrew Kusner	Maria Sarli
Stephen Douglas	Benjamin Lupin	Steven Seelig
Maureen Gammon	Brendan McFarland	Adam Wentz
Rich Gisonny	Steve Nyce	Lindsay Wiggins

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For permissions and reprint information, please email Joseph Cannizzo at **joseph.cannizzo@willistowerswatson.com**.

More information can be found on the website: **www.willistowerswatson.com**.

Publication company
Willis Towers Watson
Research and Innovation Center
800 N. Glebe Road
Arlington, VA 22203
T +1 703 258 7635

DOL issues guidance on tracking and paying for telework

By Stephen Douglas, Rich Gisonny, Laura Rickey and Lindsay Wiggins

The U.S. Department of Labor's Wage and Hour Division (WHD) recently issued **Field Assistance Bulletin (FAB) 2020-5** clarifying an employer's obligation to track the number of compensable hours worked by nonexempt employees who are teleworking or otherwise working remotely. According to the FAB, an employer that knows or has reason to believe that work is being performed must pay an individual for any such hours worked. While the guidance is a direct response to the significant increase in remote working arrangements since the start of the COVID-19 pandemic, it also applies to all telework or remote work arrangements. The guidance is effective immediately.

Background and discussion

The Fair Labor Standards Act (FLSA) generally requires employers to compensate their nonexempt employees for all hours worked, including overtime hours. This principle applies equally to work performed away from the employer's worksite or premises, such as telework. Employers are further required to ensure that work is not performed that they do not wish to be performed.

FAB 2020-5 reaffirms that an employer must pay its employees for all hours worked, including work not requested but allowed, and work performed remotely. If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked. Even if an employer does not have actual knowledge of unscheduled hours, an employer may have *constructive knowledge,* and thus must pay the employee for those hours.

According to the FAB (and earlier court decisions), employers must use reasonable diligence in tracking nonexempt telecommuters' work hours. One such way is by providing a reasonable reporting procedure for non-scheduled time and then compensating employees for all reported work hours, even hours not requested by the employer; however, failure to compensate an employee for unreported hours that the employer did not know about, *nor had reason to believe were being performed,* does not violate the FLSA.

When an employee fails to report hours worked through an employer's reporting procedure, employers are generally not required to investigate further to uncover unreported hours. In other words, employers *generally* do not have to sift through information-technology records to investigate whether employees are actually working.

FAB 2020-5 reaffirms that an employer must pay its employees for all hours worked, including work not requested but allowed, and work performed remotely.

If, however, an employer is aware that an employee is performing work that is allowed but has not been requested, then the employee must be paid for those hours. For example, if an employee is using company-provided email after hours, the employer should confirm that the employee is submitting time sheets for the additional hours worked. This is an instance where consulting records outside the employer's timekeeping procedure would be relevant; such records would constitute constructive (as opposed to actual) knowledge of hours worked.

Going forward

Employers should review their remote working arrangements to ensure they have reasonable procedures in place to track and compensate employees for hours worked, including time the employer actually knew was being worked along with hours that the employer should have known about by exercising reasonable diligence. Employers may wish to consult with legal counsel and other professional advisors to help determine what constitutes reasonable diligence in specific circumstances.

For comments or questions, contact
Stephen Douglas at +1 203 326 6315,
stephen.douglas@willistowerswatson.com;
Rich Gisonny at +1 203 351 5122,
rich.gisonny@willistowerswatson.com;
Laura Rickey at +1 214 530 4215,
laura.rickey@willistowerswatson.com; or
Lindsay Wiggins at +1 213 337 5844,
lindsay.wiggins@willistowerswatson.com.

IRS delays due date for 2020 ACA reporting

By Maureen Gammon and Kathleen Rosenow

In **Notice 2020-76,** the IRS has extended the due date for certain 2020 Affordable Care Act (ACA) information reporting filings from February 1, 2021,[1] to March 2, 2021. Specifically, the delayed due date applies to furnishing 2020 Form 1095-B, *Health Coverage,* and Form 1095-C, *Employer-Provided Health Insurance Offer and Coverage,* to *individuals.* While the IRS is otherwise allowed to grant extensions of up to 30 days to furnish these forms to individuals, the notice states that the IRS will not extend the due date beyond March 2, 2021.

Notwithstanding the extension provided in the notice, the IRS encourages employers and other coverage providers to furnish 2020 statements as soon as they are able.

The notice *does not* extend the due date for filing the 2020 ACA information reporting forms *with the IRS,* including Form 1094-B, *Transmittal of Health Coverage Information Returns;* Form 1095-B, *Health Coverage;* Form 1094-C, *Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns;* and Form 1095-C, *Employer-Provided Health Insurance Offer and Coverage.* That deadline is March 31, 2021 (if filing electronically), and March 1, 2021[2] (if not filing electronically).

The notice also provides relief from the reporting penalty for failure to provide a Form 1095-B to individuals enrolled in a fully insured plan, and failure to provide a Form 1095-C to individuals who were enrolled in a self-insured plan *but were not an ACA full-time employee for any month in 2020,* subject to the following two conditions:

1. The employer must post a notice on its website stating that individuals can receive a copy of their 2020 Form 1095-B or 1095-C (as applicable) upon request. The notice must be accompanied by an email address and a physical address, as well as a telephone number, of the reporting entity/applicable large employer that the individual can contact with questions.
2. The reporting entity/applicable large employer must furnish a 2020 Form 1095-B or 1095-C (as applicable) to an individual within 30 days of the date the request is received.

The IRS has extended the due date for certain 2020 Affordable Care Act information reporting filings from February 1, 2021, to March 2, 2021.

Finally, the notice provides for *transitional good-faith relief* from the penalties imposed by Internal Revenue Code sections 6721 and 6722 relating to the 2020 ACA information reporting requirements. The good-faith transition relief applies to incorrect or incomplete information, such as missing and inaccurate taxpayer identification numbers and dates of birth, as well as other information required on the return or statement. To be eligible for the relief, reporting entities must make a good-faith effort to comply and file a return or furnish a statement by the extended due dates provided in the notice. The notice also indicates that this is the last year that the IRS intends to provide this relief.

For comments or questions, contact Maureen Gammon at +1 610 254 7476, maureen.gammon@willistowerswatson.com; or Kathleen Rosenow at +1 507 358 0688, kathleen.rosenow@willistowerswatson.com.

[1] Because the regular due date, January 31, 2021, falls on a Sunday, the due date became February 1, 2021.

[2] Because the regular due date, February 28, 2021, falls on a Sunday, the due date became March 1, 2021.

Paid sick leave law landscape continues to evolve

By Cindy Brockhausen and Bill Kalten

The paid sick leave (PSL) law landscape continues to evolve as efforts to enact, expand, clarify and even overturn paid sick leave laws is constant across our nation. Since our last update,[1] Colorado and New York enacted new PSL laws, New Jersey and New York City amended their existing PSL laws, Maine issued guidance to assist in the implementation of its earned paid time off (EPTO) law, and court actions — or lack thereof — have affected the implementation of PSL ordinances in Texas. PSL laws generally require covered employers to provide specified amounts of paid leave that can be used for certain reasons, such as when they or their family members are ill or are victims of domestic violence, or for work, school or daycare closings related to such issues as a public health emergency, while EPTO laws, which are similarly structured to the PSL laws, allow employees to use leave *for any reason.* Currently, the only jurisdictions with EPTO laws are Nevada; Maine; and Bernalillo County, New Mexico.

PSL laws generally require covered employers to provide specified amounts of paid leave that can be used for certain reasons...while EPTO laws allow employees to use leave for any reason.

New paid sick leave laws

Colorado's new PSL law creates both temporary and permanent PSL mandates for employers. The permanent PSL law requires employers to provide one hour of PSL for every 30 hours worked, up to a maximum of 48 hours per year. The law also requires employers to provide additional paid leave for reasons related to a public health emergency. The law is effective January 1, 2021, for employers with 16 or more employees, and January 1, 2022, for employers with less than 16 employees. The law's temporary provisions — effective July 15, 2020, through December 31, 2020 — expand the applicability of the emergency paid leave requirements of the federal Families First Coronavirus Response Act (FFCRA) and limits the exemptions available to employers under that law.

New York's PSL law requires employers to provide both paid and unpaid sick leave, depending on the number of employees and the company's net income. Employers with four or fewer employees must provide up to 40 hours of unpaid leave in a calendar year, unless the employer has a net income of greater than $1 million in the previous year — in which case the sick leave must be paid. In a calendar year, employers with between five and 99 employees must provide up to 40 hours of PSL, and employers with 100 employees or more must provide up to 56 hours of PSL. The statewide law does not preempt the municipal laws already in effect (i.e., in New York City and Westchester County) and provides that other jurisdictions with one million or more residents can enact PSLs that meet or exceed the state's PSL requirements. The law went into effect on September 30, 2020; however, employees cannot use any accrued leave until January 1, 2021. The state has posted some information on its newly created Paid Sick Leave website, but like the law itself, the information is silent on several important issues, such as how to calculate employer size and whether employers need to comply with any employee notice requirements.

Amendments and updates to existing paid sick leave and earned paid time off laws

Maine's EPTO law, effective January 1, 2021, requires employers with more than 10 employees in Maine to provide one hour of paid leave for every 40 hours worked, up to a maximum of 40 hours of paid leave per year. To assist in the law's implementation, the Maine Department of Labor has issued final regulations and FAQs clarifying such issues as frontloading, carryover and separation from employment.

New Jersey's PSL law was expanded, effective March 25, 2020, to provide leave coverage to employees during a state of emergency declared by the governor, or upon the recommendation, direction or order of a health care provider or authorized public official, when the employee undergoes isolation or quarantine, or cares for a family member in quarantine, as a result of suspected exposure to a communicable disease and a finding by the provider or authority that the employee's or family member's presence in the community would jeopardize the health of others. The law also clarifies that employees may use accrued leave time when their workplace — or their child's school or care provider — has been closed because of a state of emergency declared by the governor due to an epidemic or other public health emergency. Note that New Jersey Governor Phil Murphy declared a public health emergency related to COVID-19 on March 9, 2020.

[1] See "**Paid sick and safe leave laws continue to spread, and 'any reason' laws starting to emerge**," *Insider*, August 2019.

New York City amended its existing PSL law to better align with New York state's new PSL law. Amendments include new obligations for New York City employers, such as pay statement reporting requirements (effective September 30, 2020) and expanding the annual amount of PSL for employers with 100 or more employees from 40 hours to 56 hours (effective January 1, 2021). New York City employers have until October 30, 2020, to notify employees of the changes.

Texas' battle over PSL is still on as the state's highest court declined to review a case that could have decided whether municipal PSL ordinances in the state were lawful. On June 5, 2020, the Texas Supreme Court let stand the state's 3rd Court of Appeal's ruling that blocked Austin's PSL ordinance from taking effect. The court did not offer a reason for its refusal to review the case. Prior to this development, on March 30, 2020, a state district court issued a preliminary injunction blocking Dallas' PSL ordinance. The city has not stated if it will appeal the decision. San Antonio's PSL ordinance is also on hold while awaiting a decision from the state's 4th Court of Appeals. If the appeals court reverses the lower court's decision, thereby creating a split of authority among the appellate courts, the Texas Supreme Court most likely will grant a petition for review.

For a current listing of all the states and localities with PSL and EPTO laws, see the map on the following page.[2] Absent a federal mandate, these laws and regulatory developments are expected to continue.

COVID-19 and paid sick leave

Although leave accrued under the PSL laws are most likely available for a COVID-19-related reason, employers should verify if any COVID-19-specific guidance and employer resources were issued in each jurisdiction where they have operations.

At this time, we are aware of at least 16 jurisdictions that have enacted temporary mandates in direct response to the COVID-19 pandemic. The majority of these measures are set to expire on December 31, 2020, unless extended:

- The state of California and 12 of its localities — the city of Los Angeles, Los Angeles County, the city of Long Beach, Oakland, the city of Sacramento, Sacramento County, San Diego, San Francisco, San Jose, San Mateo County, Santa Rosa and Sonoma County — have recently enacted similar temporary supplemental PSL laws related to COVID-19. In the state of California, the city of Los Angeles, Oakland, San Diego and San Francisco, these temporary measures are in addition to existing PSL laws. These measures generally extend the emergency PSL protections afforded by the federal FFCRA to employers to which the federal FFCRA does not apply.
- Washington, D.C., enacted a measure expanding the district's existing PSL law to provide leave during the COVID-19 emergency. The temporary measure applies to employers with between 50 and 499 employees, but not health care providers, for the same reasons covered under the federal FFCRA.
- New York recently enacted a law mandating PSL for most employees in certain circumstances when they are under quarantine or isolation orders due to COVID-19. The law is separate from the recently enacted PSL law discussed above.
- The city of Philadelphia amended its existing paid sick leave law to require employers with 500 or more employees to provide up to 112 hours of paid sick leave for employees to use under certain circumstances during the COVID-19 pandemic.

For a current listing of all the states and localities with PSL and EPTO laws, see the map on the following page.

Going forward

Covered employers in states and localities with PSL and EPTO laws should review their existing leave policies and procedures to ensure they comply with the laws in their operational jurisdictions. Federal contractors must also comply with **Executive Order 13706** and its related regulations.

As the number of these laws continues to grow, multistate employers may wish to consider crafting a uniform policy that meets requirements in all their jurisdictions, although doing so could prove challenging, as the laws in some jurisdictions could conflict with laws in others.

For comments or questions, contact
Cindy Brockhausen at +1 203 326 5468,
cindy.brockhausen@willistowerswatson.com; or
Bill Kalten at +1 203 326 4625,
william.kalten@willistowerswatson.com.

[2] This map does not include the jurisdictions that have enacted temporary mandates in direct response to the COVID-19 pandemic.

States/localities mandating paid sick leave:

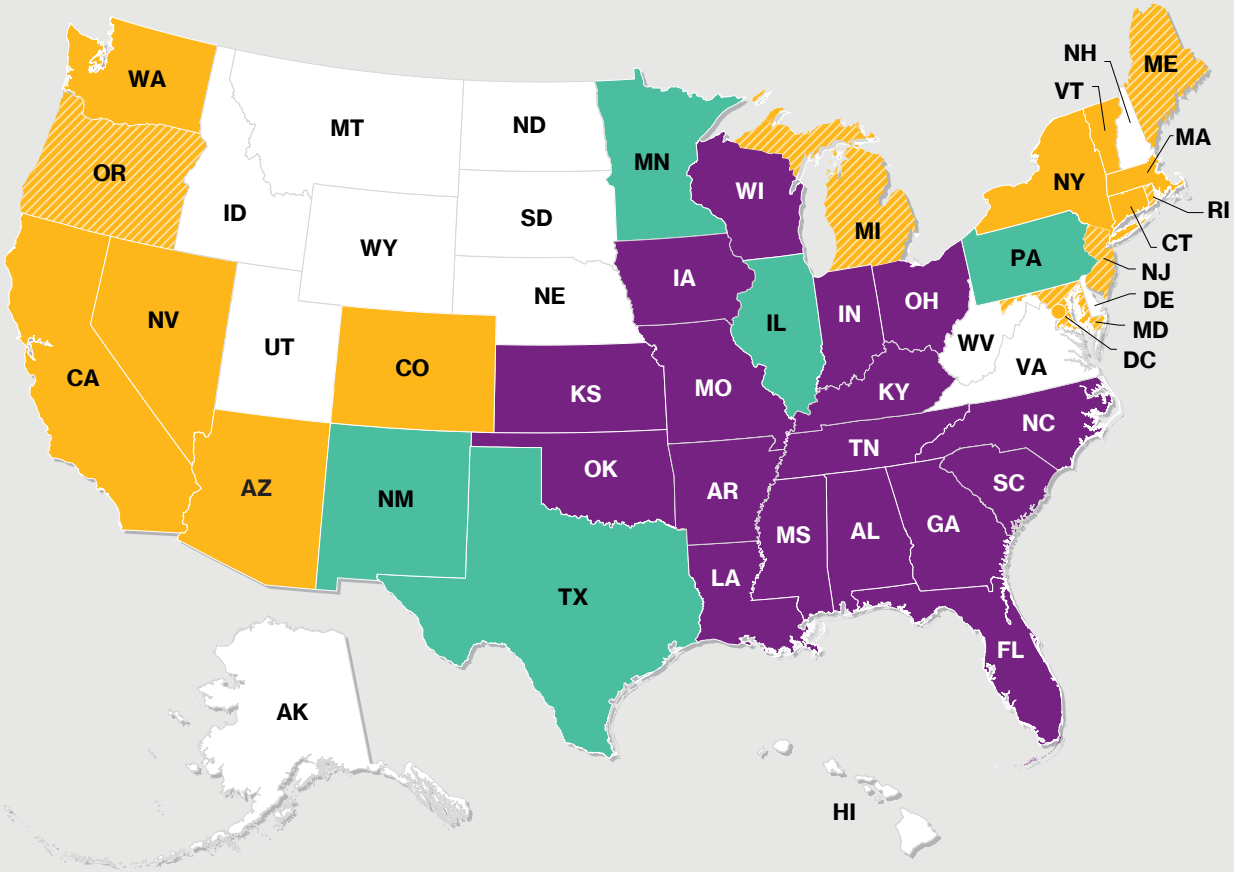
Arizona
California
Colorado[1]
Connecticut
Maine[2]
Maryland
Massachusetts
Michigan
Nevada[3]
New Jersey
New York[4]
Oregon
Rhode Island
Vermont
Washington
Washington, DC

California: *Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco, Santa Monica*
Illinois: *Chicago, Cook County*[5]
Maryland: *Montgomery County*
Minnesota: *Duluth, Minneapolis, St. Paul*
New Mexico: *Bernalillo County*[6]
New York: *New York City, Westchester County*
Pennsylvania: *Philadelphia, Pittsburgh*
Texas: *Austin,*[7] *Dallas,*[8] *San Antonio*[9]
Washington: *Seattle, Tacoma*

States with bans against local paid sick leave laws:

Alabama
Arkansas
Florida
Georgia
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Michigan
Mississippi
Missouri
New Jersey
North Carolina
Ohio
Oklahoma
Oregon
Rhode Island
South Carolina
Tennessee
Wisconsin

[1] Effective January 1, 2021 (January 1, 2022, for small employers).
[2] Leave can be taken for any reason; effective January 1, 2021.
[3] Leave can be taken for any reason.
[4] Does not prevent a city with a population of 1 million or more from enacting or enforcing local laws that meet or exceed the law's minimum requirements.
[5] Numerous municipalities have opted out.
[6] Leave can be taken for any reason.
[7] Implementation blocked due to court ruling.
[8] Implementation temporarily postponed due to court ruling.
[9] Implementation temporarily postponed due to court ruling.



States mandating paid sick leave (and the District of Columbia)
States mandating paid sick leave and prohibiting local jurisdictions from legislating paid sick leave
States with one or more localities (but not the state itself) that mandate paid sick leave
States prohibiting local jurisdictions from legislating paid sick leave

This map does not include the jurisdictions that have enacted temporary mandates in direct response to the COVID-19 pandemic.

DOL issues interim final rule on lifetime income illustrations

By Gary Chase and Bill Kalten

The Department of Labor (DOL) has issued an **interim final rule** (IFR) that will require plan administrators of ERISA-covered defined contribution (DC) plans to include lifetime income illustrations on participant benefit statements at least once annually. A related fact sheet is available **here**. The rule implements section 203 of the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019.[1]

The lifetime income illustrations are intended to encourage participants to save more for retirement by showing the estimated monthly lifetime income that could be paid from their account balance. The IFR also includes model language that plan fiduciaries may use to explain the lifetime income illustrations and the assumptions used to calculate them. Plan fiduciaries that use the model language will receive liability protection in the event a participant's account balance at retirement does not generate the income stream described in the disclosure.

The interim final rule will take effect on September 18, 2021, and includes a 60-day comment period; however, the DOL stated in a **news release** that it will "use comments to improve the rule before its effective date," so the rule might change before it is final.

Background

In 2013, the DOL released an Announced Notice of Proposed Rulemaking that would require that pension benefit statements provided to DC plan participants include lifetime income illustrations; however, developing a rule for providing realistic illustrations that are administratively feasible and incentivize participants to save more for retirement — but that also do not cause confusion or make participants feel that saving enough for retirement is impossible — proved to be a challenge, so the rule was never finalized.

In late 2019, the SECURE Act amended ERISA to require DC plan administrators to show a participant's accrued benefit on his or her pension benefit statement as both a current account balance and an estimated lifetime stream of payments. Using DOL assumptions, plan administrators must show participants equivalents of their retirement savings as monthly income under two potential scenarios: 1) as a single life income stream, and 2) as an income stream that factors in a survivor benefit. Plan administrators using assumptions and rules provided by the DOL receive liability protection. To accelerate the issuance of guidance regarding the lifetime income disclosure, the SECURE Act required the DOL to issue a model disclosure within one year of enactment.

The lifetime income illustrations are intended to encourage participants to save more for retirement by showing the estimated monthly lifetime income that could be paid from their account balance.

Interim final rule

Annuitization assumption requirements

Under the IFR, a benefit statement must include the account balance as of the last day of the statement period, and at least annually the statement must include the lifetime income illustrations showing the account balance as both a single life annuity (SLA) and a 100% qualified joint and survivor annuity (QJSA). The IFR includes the following model chart:

Account balance as of [DATE]	Monthly payment at 67 (single life annuity)	Monthly payment at 67 (qualified joint and 100% survivor annuity)
$125,000	**$645/**month for life of participant	**$533/**month for life of participant **$533/**month for life of participant's surviving spouse

Except for certain in-plan annuities (which are subject to special rules, discussed below), the lifetime income illustrations must be based on the following methodology:

- **Account balance assumptions.** The lifetime income illustrations must be based on the value of a participant's account balance as of the last day of the statement period. The participant is assumed to be 100% vested in his or her account. The account balance also must include the outstanding balance of any participant loan, unless the loan is in default.

[1] For more information on the SECURE Act, see "**SECURE Act crosses finish line**," *Insider*, December 2019.

- **Assumed commencement date.** The annuity commencement date is assumed to be the last day of the statement period.
- **Assumed age at commencement.** The participant is assumed to be age 67 (or actual age, if older) as of the last day of the statement period. In the preamble, the DOL explains that age 67 was chosen to align the lifetime income illustrations with the Social Security normal retirement age. This would ensure that the disclosures are more consistent than if the plan's normal retirement age (which varies by plan) was used.
- **Marital status.** For purposes of calculating the value of the QJSA, the participant is assumed to be married with a spouse who is the same age as the participant.
- **Interest rate.** The interest rate used to calculate the lifetime income illustrations is the 10-year constant maturity Treasury securities yield rate for the first business day of the last month of the statement period. This rate was chosen because it reflects the interest rate that would be used to price a commercial annuity.
- **Mortality table.** The mortality table used to calculate the lifetime income illustrations is the 417(e) mortality table in effect for the last month of the period covered by the benefit statement. The DOL selected a unisex mortality table to simplify administration and reflect what would be used to calculate an annuity under an ERISA plan; however, it acknowledged that the insurance industry would use a gender-specific mortality table. As a result, using the 417(e) mortality table would overstate a woman's monthly benefit and understate a man's monthly benefit when compared with an annuity that could be purchased outside of an ERISA plan.

The DOL also explained its decision to exclude the following factors from the calculation of lifetime income illustrations:

- **No insurance load.** An insurance load is the amount used in annuity pricing to reflect an insurance company's administrative expenses and profit margin. The DOL decided not to include an insurance load because of the difficulty in selecting one that could uniformly apply to all annuity products. In addition, due to the use of conservative interest rate and mortality assumptions, a load is effectively factored into the calculation of the lifetime income illustrations.
- **No inflation adjustment.** An adjustment to the lifetime income illustrations to reflect the impact of inflation is not included when calculating the lifetime income illustrations. Rather, the payments are assumed to be level over the lives of the participant and beneficiary. The DOL was concerned that adding an inflation adjustment would complicate the lifetime income illustration and potentially confuse participants, and that a lower inflation-adjusted starting payment could discourage participants from saving. As a result, the DOL elected to include a disclosure about declining purchasing power rather than include an inflation adjustment in the illustration.

The DOL decided to use an immediate annuity approach instead of a deferred annuity approach (which would have considered future contributions and earnings).

- **No term certain or other features.** The IFR does not address the treatment of lifetime income streams of payment that include a term certain or other features (such as guaranteed lifetime withdrawal benefits).
- **No projection of future earnings or future contributions.** The DOL decided to use an immediate annuity approach instead of a deferred annuity approach (which would have considered future contributions and earnings). Using a current annuity for the lifetime income illustrations — which would show lower payment amounts — could discourage participants by making it appear as if it is not feasible to save sufficiently for retirement.

Required explanations and optional model language

Under the IFR, plans are required to include, with the lifetime income illustrations, explanations of the following 11 items:

1. Benefit commencement date and age assumption
2. The single life annuity
3. The qualified joint and 100% survivor annuity, the availability of other survivor percentages and the impact of selecting a lower survivor percentage
4. Assumption regarding marital status
5. Interest rate assumption
6. Mortality assumption
7. That the lifetime income illustrations are not guaranteed
8. A variety of factors that could cause a participant's actual monthly income to differ from the illustrations, including that the "actual account balance (reflecting future investment gains and losses, contributions, distributions, and fees)" may be different at retirement
9. That the lifetime income monthly payment amounts will not be adjusted for inflation in future years

10. That the monthly income illustrations assume that the participant is 100% vested in his or her current account balance
11. That the monthly income illustrations assume that any outstanding plan loans that have not been defaulted are repaid by the time the participant retires

The IFR provides optional model language in two formats: 1) separate paragraphs for each of the 11 points, which are incorporated into an existing benefit statement; and 2) a consolidated model benefit statement, which includes all of the required disclosures and is attached as a supplement to a benefit statement.

Special disclosure rules: In-plan and deferred annuities

The IFR includes special rules that apply to plans that offer in-plan distribution annuities[2] and deferred income annuities (DIAs).[3]

In-plan distribution annuities

For plans that offer an in-plan distribution annuity provided through a contract with an insurance company, the lifetime income illustrations may be based on the terms of the insurance contract. The IFR includes separate disclosure requirements and optional model language that apply in this case. The lifetime income illustrations would still be required to include illustrations based on an SLA and a QJSA; however, the survivor percentage for the QJSA may reflect the survivor percentage under the contract instead of 100%. The lifetime income illustrations must still assume that payment commences on the last day of the statement period and that the participant or beneficiary is 67 (or actual age if older) on the date of commencement. For purposes of the QJSA, it must assume that a spouse is the same age as the participant or beneficiary.

Deferred income annuities

For plans that offer DIAs, the illustration and disclosure rules above do not apply. Instead, if any portion of a participant's accrued benefit is used to purchase the DIA, the lifetime income illustrations must disclose the amount payable under the DIA in addition to the following:

- The date payments are scheduled to commence and the participant's age on such date
- The frequency and amount of deferred income stream payments under the contract as of the commencement date, in current dollars

The IFR includes special rules that apply to plans that offer in-plan distribution annuities and deferred income annuities.

- A description of the survivor benefit, period certain commitment or similar feature
- Whether the deferred income stream of payments is fixed or will adjust with inflation or on some other basis

The IFR does not include model language for a DIA. Since the DIA disclosure requires the use of actual payment amounts, model language is not needed. Note that the portion of a participant's account balance that is not invested in the DIA remains subject to the IFR's disclosure requirements.

Limitation on liability

Under the IFR, a plan fiduciary or sponsor, or other person, will not be liable under ERISA for providing the lifetime income stream disclosures if:

1. The assumptions required under the IFR are used in preparing the lifetime income illustrations
2. An explanation accompanies the lifetime income illustrations that is "substantially similar in all material respects" to the model language provided in the IFR

Following are examples of permitted changes to the model disclosure:

- Replacing references to "this statement" with "your statement"
- Adding references to the plan name
- Adding the name of the employer or plan administrator instead of using "we"
- Changing "if your spouse dies first" to "if your spouse predeceases you"
- Describing an SLA as a "payment form" instead of an "arrangement"

The IFR allows for additional lifetime income illustrations beyond those that are required (for example, to reflect the time value of money), provided they are clearly explained, presented in a manner that is designed to avoid confusing

[2] An in-plan distribution annuity is the option to have all or a portion of the account balance paid through an in-plan annuity that is purchased at retirement.

[3] A deferred income annuity is an investment option under the plan in which contributions are directed, and at a specified age, some or all of the funds in this investment option may be paid out as an annuity.

or misleading participants, and are based on reasonable assumptions; however, the limitation of liability would not apply to these additional illustrations.

The liability limitation also does not apply to lifetime income illustrations for DIAs, since the disclosure would reflect the actual payment amount and not a hypothetical amount based on assumed factors.

Going forward

Plan sponsors should work with their plan administrators to discuss a plan for compliance. Issues that should be considered include:

1. The required lifetime income illustrations in the IFR do not take into account future earnings or contributions, which will result in an unrealistically small lifetime income number for younger participants. This could discourage additional retirement savings and conflict with most of the disclosures and online tools currently in use. Sponsors should consider whether to provide additional lifetime income illustrations, understanding that the liability shield would not extend to such disclosures.
2. Plans that offer or are considering offering a lifetime income solution will need to consider how to align disclosure of the plan's lifetime income solution with the lifetime income illustrations required by the IFR, and whether supplemental communications will be necessary to avoid confusion.

However, the ability to implement the lifetime income illustrations is somewhat limited, as the DOL may modify the rules to reflect comments prior to the effective date.

For comments or questions, contact
Gary Chase at +1 212 309 3802,
gary.chase@willistowerswatson.com; or
Bill Kalten at +1 203 326 4625,
william.kalten@willistowerswatson.com.

News in Brief

PBGC changes position on deferred contributions under CARES Act

By Mike Pollack, Maria Sarli and Adam Wentz

In late September, the Pension Benefit Guaranty Corporation (PBGC) announced that it will allow revised premium filings that reflect pension contributions delayed under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. **Technical Update 20-2, Extended Due Date for Inclusion of Prior Year Contributions** provides further information on the timing of contribution receipts includable in the asset value used to determine variable-rate premiums due for 2020.

The CARES Act extended the due date for certain pension contributions that would otherwise be due in 2020 to January 1, 2021. PBGC premium filings for calendar-year plans are due by October 15, 2020. The PBGC guidance allows an amended filing to include additional prior plan-year contributions made after the premium filing due date for filings with due dates from March 1, 2020, through January 1, 2021.

Plan administrators will still need to file and pay premiums by their normal due dates; however, they will now be able to make an amended filing and request a refund or a credit toward future premiums once additional contributions have been made. Only those contributions made by January 1, 2021, and included as prior-year contributions may be included in the amended filing, and the contributions should be discounted in the same manner as for funding calculations.

Plan administrators who want to take advantage of this relief must amend their premium filing by February 1, 2021.

SEC issues guidance on COVID-19-related expenses for executive officers

By Bill Kalten and Steve Seelig

The Securities and Exchange Commission (SEC) recently published **Regulation S-K Compliance & Disclosure Interpretation (C&DI) 219.05** that provides guidance on whether benefits provided to executive officers because of the COVID-19 pandemic constitute perquisites or personal benefits. The guidance provides that certain COVID-19-related expenses paid by employers to enable named executive officers (NEOs) to work from home are not considered perquisites to be listed in the All Other Compensation column of the proxy statement's Summary Compensation Table.

Note, the perquisite rule differs from income tax rules; therefore, employers should consult with SEC counsel and tax advisors to analyze the disclosure and tax regimes, separately and respectively.

C&DI 219.05

In the guidance, the SEC uses the same two-pronged test it provided previously in Release 33-8732A for determining whether an item is a perquisite or a personal benefit:

1. An item is not a perquisite or personal benefit if it is integrally and directly related to the performance of the executive's duties.
2. Otherwise, an item that confers a direct or indirect benefit and that has a personal aspect, without regard to whether it may be provided for some business reason or for the convenience of the company, is a perquisite or personal benefit unless it is generally available on a nondiscriminatory basis to all employees.

The guidance notes that this remains a facts and circumstances test, and provides the following examples:

- **Generally considered not a perk:** Enhanced technology needed to make the NEO's home his or her primary workplace upon imposition of local stay-at-home orders because it is integrally and directly related to the performance of the executive's duties under prong 1 of the test
- **Considered perhaps a perk:** Items such as new health-related or personal transportation benefits provided during and because of COVID-19, unless they are generally available to all employees

[C]ertain COVID-19-related expenses paid by employers to enable NEOs to work from home are not considered perquisites.

The guidance does not address non-technology-related expenses for which NEOs have been reimbursed in creating a functional home office environment, such as chairs, desks, room reconstruction and decorating for shareholder-attended Zoom calls. Nor does it address additional expenses that are covered by the employer when a NEO continues to work from home after local stay-at-home orders have been lifted.

Tax rules

Under tax law, any item of value conferred to an employee by an employer is compensation income unless the Internal Revenue Code provides an exception. Companies should consult with a tax advisor when it comes to COVID-19-related expenses that are paid by an employer. At least two possible rules might provide an exclusion for those employer-paid expenses, both of which may be applied differently from the perk rule. The following are our impressions. Companies must work with their tax advisors to establish the rationale for a potential exclusion.

Working condition fringe benefits

Code section 132(a)(3) excludes from income a working condition fringe, which is any property or service paid for by an employer that would be deductible if the employee had purchased it himself or herself. Traditionally, those items include company-provided cell phones; however, with many employees now working from home, ramp-up technology costs borne by employers may also qualify under this rule. Because no nondiscrimination rules apply in this area, these expenses can be covered for selected employees.

To address this area's complexities, employers must first determine if an item would be deductible for the individual and then understand how those expenses must be substantiated to the IRS to sustain the exclusion. Generally, companies may find costs for broadband and phone connectivity, computer and video equipment (and peripherals such as monitors and printers), IT security enhancements and office supplies, if

employer-paid, as meeting the working condition fringe rule. As the items move to the physical environment itself, such as furniture, office build-out and separate facilities away from the office, the questions about income exclusion become more complicated to resolve.

Qualified disaster relief payments

Code section 139 would exclude from an employee's income any employer qualified disaster relief payments (COVID-19 has been declared a federal disaster). Not only is the employee not subject to income tax, but both the employer and the employee are not subject to payroll taxes. There are no rules regarding nondiscrimination for these payments; therefore, the company may choose to make such payments only to executives.

The exclusion applies only to payments as a result of the disaster to reimburse or pay "reasonable and necessary" personal, family, living or funeral expenses, or for repair or rehabilitation of a personal residence or repair or replacement of its contents. The exclusion does not apply to income replacement payments, including payments for lost wages or unemployment. This means that wages the employer voluntarily continues to pay to employees while the business is closed due to COVID-19 would *not* qualify.

Rev. Rul. 2003-12 specifies that only reasonable and necessary medical, temporary housing or transportation expenses not reimbursed (e.g., by insurance or the government) are excluded from gross income under code section 139.

- **Items excludible** under the statute include payments to reimburse an individual for COVID-19-related medical expenses, temporary housing and funeral costs.
- **Items that may be excludible** include childcare costs during school closures for employees who must report to work (may not apply when employees work from home), grocery/meal delivery expenses, some cab or car-sharing commuting costs where public transportation isn't safe or available, expenses to care for family members who don't live in the same home and expenses for remote learning needs of children.

The costs of physically establishing and maintaining a home office may be treated similarly to the perk disclosure and working condition fringe test discussed above, where equipment (e.g., computers, printers), broadband and phone costs are excludible but items related to the physical environment might not be. Companies seeking to use this exclusion should consider how they would administer the plan, so they can document to the IRS the expenses either paid for or reimbursed in the event of an audit.

For comments or questions, contact Bill Kalten at +1 203 326 4625, william.kalten@willistowerswatson.com; or Steve Seelig at +1 703 258 7623, steven.seelig@willistowerswatson.com.

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