LEGISLATIVE AND REGULATORY DEVELOPMENTS IN 2020 OF INTEREST TO CHURCH-SPONSORED EMPLOYEE BENEFIT PLANS AND PROGRAMS

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I. LEGISLATION AND LEGISLATIVE INITIATIVES

A. 2020 Spending Bill

On December 20, 2019, President Trump signed into law the Further Consolidated Appropriations Act, 2020 (the "2020 Spending Bill").[1] The 2020 Spending Bill includes several provisions impacting retirement plans, health plans, and tax-exempt employers.

The 2020 Spending Bill incorporates provisions of the Setting Every Community Up for Retirement Enhancement Act (the "SECURE Act"), the Bipartisan American Miners Act of 2019, and the Taxpayer Certainty and Disaster Tax Relief Act of 2019, which include changes to the Internal Revenue Code (the "Code") and the Employee Retirement Income Security Act ("ERISA") that impact retirement plans. These provisions are further discussed in Appendix A of this report.

The 2020 Spending Bill also makes the following changes:

- Cadillac Tax: The 2020 Spending Bill repeals the excise tax on high-cost employer health plans (i.e., the Cadillac tax). The repeal of this provision is further discussed in Section III.C. of this report.

- PCORI Fee: The 2020 Spending Bill extends the recently expired Patient Centered Outcome Research Institute or "PCORI" fee for 10 years so that it will continue to be imposed through plan years ending before October 1, 2029. The extension of this fee is further discussed in Section III. D. of this report.

- UBIT on Qualified Transportation and Parking: In 2017, the Tax Cuts and Jobs Act added section 512(a)(7) to the Code, which required tax-exempt employers to pay unrelated business income tax ("UBIT") on qualified transportation fringe benefits or parking provided to employees. The 2020 Spending Bill also repeals this provision.[2]

B. COVID-19

1. Enacted Legislation

In March 2020, Congress enacted two pieces of legislation in response to the coronavirus pandemic - the Families First Coronavirus Response Act ("Families First Act")[3] and the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act").[4] See

[1] Public Law No. 116-94 (2019).

[2] The IRS released instructions on how to claim a refund or credit of the UBIT reported under Code section 512(a)(7). *See* https://www.irs.gov/forms-pubs/how-to-claim-a-refund-or-credit-of-unrelated-business-income-tax-ubit-or-adjust-form-990-t-for-qualified-transportation-fringe-amounts.

[3] Public Law No. 116-127 (2020).

[4] Public Law No. 116-136 (2020).

Section II of this report for a summary of the provisions of the Families First Act and CARES Act impacting welfare and retirement plans.

2. Proposed Legislation

Since the enactment of the Families First Act and CARES Act, additional legislation has been introduced in Congress that would provide further relief because of the COVID-19 pandemic. The Health and Economic Recovery Omnibus Emergency Solutions ("HEROES") Act (H.R. 6800) is a stimulus bill introduced by House Democrats while the Health, Economic Assistance, Liability Protection and Schools ("HEALS") Act is a stimulus bill introduced by Senate Republicans.[5] Both bills include provisions that would impact employee benefit plans.

The HEROES Act was originally passed by the House on May 15, 2020, and an updated version was passed on October 1, 2020. Among other provisions, the updated HEROES Act includes provisions requiring:

- coverage for items and services related to the testing and treatment of COVID-19 without the imposition of any cost-sharing requirements during the public health emergency;
- group health plans to notify each participant and beneficiary whether the plan will waive time restrictions on refills;
- expanded notification to qualified beneficiaries about the availability of Exchange coverage; and
- free coverage of COVID-19 testing retroactive to the beginning of the public health emergency.

The HEALS Act was introduced in the Senate on July 27, 2020. In addition to other provisions, the HEALS Act includes provisions:

- permitting carryovers of health and dependent care flexible spending account ("FSA") balances from 2020 to 2021;
- permitting telehealth to temporarily be provided as an excepted benefit for employees who are not eligible for employer health coverage; and
- providing that access to full service onsite clinics would not prevent Health Savings Account ("HSA") contributions through 2021.

[5] Two bills were also introduced in the Senate that include COBRA premium assistance provisions – the Continuous Health Coverage for Workers Act (S. 4329) and the Worker Health Coverage Protection Act (S. 4714). The Continuous Health Coverage for Workers Act also includes premium assistance provisions for church plans that are exempt from COBRA.

It is unlikely that either of these bills will pass before the end of the current Congress.

C. Church Alliance Legislative Initiatives

1. Commodity Pool Operator Fix

The Dodd-Frank Act amended the Commodity Exchange Act's definition of "commodity pool operator" ("CPO"), expanding the universe of entities that must register as such. Under the applicable regulations, church plans are generally excluded from the "pool" definition in 17 CFR §4.10(d)(1). However, there is some concern that if an entity (e.g., a church benefits board), commingles plan assets with non-plan assets for investment purposes, then it could qualify as a "pool" if it trades in qualifying commodity interests and, therefore, would be required to register as a commodity pool operator. Trading in qualifying commodity interests includes investing or retaining investment managers that invest in such interests.

Previously, the Church Alliance worked with the offices of Senators Amy Klobuchar (D-MN) and David Perdue (R-GA) to clarify the Dodd-Frank CPO legislation. This resulted in the introduction of Senate bill 552 (S. 552) on February 26, 2019. Representative Amy Craig (D-MN) introduced identical companion legislation (H.R. 4250) in the House on September 9, 2019. H.R. 4250 was referred to the House Agriculture Subcommittee on Commodity Exchanges, Energy and Credit on September 18, 2019. The CPO clarification language was also included in the House Agriculture Committee's CFTC Reauthorization Act of 2019 (H.R. 4895). Since it is unlikely that the legislation will pass before the end of the current Congress, the Church Alliance will work to have the legislation reintroduced and advanced in the next Congress.

D. Proposed Legislation

1. Securing a Strong Retirement Act of 2020

On October 27, 2020, House Ways & Means Committee Chairman Richard Neal (D-MA) and Ranking Member Kevin Brady (R-TX) introduced the Securing a Strong Retirement Act of 2020 (H.R. 8696) ("Neal-Brady bill"), which is bipartisan legislation that would build on certain provisions included in the SECURE Act.[6] Among other things, the Neal-Brady bill would:

- Expand automatic enrollment in retirement plans;
- Expand the ability of 403(b) custodial accounts to invest in collective investment trusts;

[6] The Neal-Brady bill includes several provisions that are similar to provisions that were included in the Portman-Cardin legislation that was introduced in 2019. The following two provisions from the Portman-Cardin bill are not included in the Neal-Brady bill: (1) the provision that would permit non-spousal beneficiaries to roll assets into qualified trusts; and (2) the provision that would allow spousal beneficiaries to treat accounts as their own.

- Increase the age of the required beginning date for mandatory distributions to age 75 with respect to individuals who attain age 72 after December 31, 2020;

- Permit 403(b) open MEPs;[7]

- Treat student loan payments as elective deferrals for purposes of matching contributions;

- Allow employers to offer *de minimus* financial incentives to employees who contribute to 401(k) and 403(b) plans;

- Allow exemption from required minimum distribution rules for individuals with certain account balances;

- Expand the Employee Plans Compliance Resolution System ("EPCRS") to allow more types of errors to be corrected;

- Allow distributions from certain qualified plans (including certain section 403 annuity plans) for charitable purposes; and

- Allow a higher catch-up contribution to apply at age 60.

While there may be some action taken on the Neal-Brady bill during the lame duck session (such as a hearing), we expect efforts on the bill to continue during the next Congress.

II. COVID-19 GUIDANCE

In March 2020, Congress enacted two pieces of legislation in response to the coronavirus pandemic - the Families First Act and the CARES Act. Since the enactment of this legislation, various governmental agencies have issued regulations and other guidance relating to the provisions included in the Families First Act and the CARES Act. This report focuses on the provisions of the legislation and subsequent guidance that impacts welfare and retirement plans.

A. Welfare Plans

1. Families First Act and CARES Act

The Families First Act and CARES Act include several provisions impacting health and welfare plans. On April 11, 2020 and June 23, 2020, the Internal Revenue Service ("IRS"), Department of Labor ("DOL") and the Department of Health and Human Services ("HHS") (collectively, the "Agencies") issued FAQs that provide further guidance on some

[7] After discussions among Church Alliance and House Ways & Means Committee representatives, the provision as drafted excludes church 403(b) plans from the open MEP expansion. The Church Alliance requested that the Neal-Brady bill not include church plans in the open MEP expansion and House Ways & Means Committee representatives agreed.

of the provisions included in the Families First Act and CARES Act. The Agencies have also issued interim final regulations providing additional guidance on certain provisions. This section discusses the Families First Act and CARES Act provisions impacting health and welfare plans, along with some of the changes made by the FAQ guidance and interim final regulations.

COVID-19 Diagnostic Testing

The Families First Act requires group health plans and health insurers to provide coverage for COVID-19 diagnostic testing that has been approved by the U.S. Food and Drug Administration, along with items and services furnished during an office, telehealth, urgent care center, or emergency room visit to the extent those items and services relate to the furnishing of the test or the evaluation of the individual's need for the test. Coverage must be provided without cost-sharing (such as deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements.

The CARES Act extends this coverage requirement to additional categories of COVID-19 diagnostic testing, including testing: (i) for which the developer has requested or intends to request emergency authorization; (ii) developed in and authorized by a State; or (iii) otherwise identified in subsequent guidance.

Regulation of Pricing

A group health plan or health insurer providing coverage for required COVID-19 diagnostic testing must reimburse the provider of the testing at the rate that the plan or insurer had negotiated before the public health emergency began, if such a rate exists. If there is no negotiated rate, the plan or insurer must reimburse the provider at the cash price for such service as listed by the provider on a public website, or the plan or insurer may negotiate with the provider to pay less than that cash price. Providers are required to make public the cash price for COVID-19 diagnostic testing on a public website or potentially be subject to penalties. The June 23, 2020 FAQs clarify that the requirement applies to testing but not to other items and services.

The Agencies also issued interim final regulations[8] providing additional guidance on COVID-19 testing. The regulations provide additional guidance about the requirement that providers make public the cash price for COVID-19 diagnostic testing on a public website. The regulations also provide additional guidance about posting this information and how the requirement will be enforced.

[8] 85 Fed. Reg. 71,142 (Nov. 6, 2020).

FAQ Guidance Related to Testing

The April 11, 2020 FAQs clarify that the COVID-19 coverage requirements:

- Apply to insured and self-insured group health plans, including church plans and grandfathered health plans;

- Do not apply to excepted benefits, short-term, limited duration insurance, or group health plans that do not cover at least two current employees (e.g., retiree-only plans).

The COVID-19 coverage requirements apply as of March 18, 2020 and throughout the public health emergency related to COVID-19.

The April 11, 2020 and June 23, 2020 FAQs also provide the following guidance on testing:

- A visit includes both traditional and non-traditional care settings, including COVID-19 drive-through screening and testing sites with licensed healthcare providers.

- Plans may not impose cost-sharing requirements, prior authorization requirements, or medical management requirements for mandated benefits.

- Coverage must be provided when medically appropriate, as determined by the attending provider in accordance with accepted standards of current medical practice.

- The requirements apply to items and services furnished by out-of-network providers.

- If other tests are performed during a visit, and the visit results in COVID-19 testing, the plan must provide coverage for the related tests (without cost-sharing, prior authorization or other medical management requirements). Examples of other tests are influenza tests and blood tests.

- A health care provider does not have to be "directly" responsible for providing care to a patient to be considered an attending provider, if the provider makes an individualized clinical assessment of the individual.

- At-home testing must be covered if other requirements are satisfied.

- Coverage is not required for testing conducted to screen for general workplace health and safety (such as employee "return to work" programs), for public health surveillance, or for any other purpose not primarily intended for individualized diagnosis or treatment.

- Multiple tests must be covered if other requirements are satisfied.

- Facility fees must be covered without cost-sharing if related to the furnishing of the test or the evaluation of the need for the test.

Telehealth

A plan will not fail to be a high deductible health plan ("HDHP") due to coverage of telehealth and other remote services without applying a deductible. This will permit HDHPs to provide pre-deductible coverage of telehealth without jeopardizing a participant's ability to make HSA contributions. This change is effective March 27, 2020 and applies for plan years beginning on or before December 31, 2021.

The June 23 FAQ guidance also permits large employers to offer telehealth benefits to employees that are not eligible for coverage under another plan, without application of the Affordable Care Act ("ACA") group market reforms. This change is applicable for the duration of any plan year beginning before the end of the public health emergency related to COVID-19.

Over-the-Counter Drugs and Menstrual Care Products – HSAs, FSAs and HRAs

The CARES Act eliminates the requirement to have a prescription for over-the-counter drugs to qualify for tax-favored reimbursement from HSAs, health reimbursement accounts ("HRAs"), and health FSAs. Menstrual care products likewise will be considered qualified medical expenses payable from those accounts. These changes are effective for expenses incurred after December 31, 2019.[9]

Coverage of Preventive Services and Vaccines for COVID-19

The CARES Act requires group health plans to cover COVID-19 preventive services and vaccines without cost-sharing in the same manner as other preventive services required under the ACA. This would include items, services, or immunizations that are intended to prevent or mitigate COVID-19 and that have an "A" or "B" rating from the United States Preventive Services Task Force ("USPSTF") or a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved ("ACIP"). Under the ACA, a plan is not required to cover a preventive service or item until a year or more after the service or vaccine receives the required recommendation for coverage. For COVID-19 preventive services and vaccines, the CARES Act requires plans to cover these services and vaccines within 15 business days after the required recommendation.

The Agencies issued interim final regulations implementing the coverage of COVID-19 vaccines and testing. The regulations are effective immediately and will stay in effect until the end of the COVID-19 public health emergency. In contrast to the general ACA preventive service rules, the interim final regulations require plans to provide coverage for COVID-19 preventive services regardless of whether the service or immunization is recommended for routine use and regardless of whether it is provided by

[9] Although not clear, it appears that a plan amendment is required by December 31, 2020 to implement these changes.

an in-network or out-of-network provider. The regulations do not apply to grandfathered health plans, excepted benefits, or short-term limited duration insurance, although a CMS toolkit[10] issued alongside the regulations encourages all such plans to provide coverage without cost sharing.

Guidance on Sharing Protected Health Information

The CARES Act directs the Secretary of HHS to issue guidance related to the sharing of patients' protected health information during the COVID-19 public health emergency. The guidance is to be issued within 180 days of the enactment of the CARES Act.

HHS has issued guidance and bulletins reminding covered entities that the privacy rule still applies during the COVID-19 crisis and providing guidance on the ways in which patient information may be shared under HIPAA.[11]

2. <u>FAQ Guidance on Summary of Benefits and Coverage, Employee Assistance Programs, and Onsite Clinics</u>

In addition to the guidance described above, the April 11, 2020 FAQs provide guidance on the required summary of health care benefits and coverage ("SBC"), employee assistance programs (EAPs"), and onsite clinics. These provisions are further described below.

Summary of Benefits and Coverage

Generally, a plan that makes a material modification that would affect the terms of an SBC must provide 60 days advance notice of the change. However, the Agencies will not take enforcement action against any plan that makes a modification to provide greater coverage related to the diagnosis and/or treatment of COVID-19, without providing 60 days advance notice, or any plans that add benefits, or reduce or eliminate cost sharing, for telehealth and other remote care services. Plans must provide notice of the changes as soon as reasonably practicable.

These non-enforcement policies will apply with respect to changes made during the period during which a public health emergency declaration or a national emergency declaration related to COVID-19 is in effect. The Agencies will take action against plans that limit or eliminate other benefits, or increase cost-sharing, to offset the costs of increasing the generosity of benefits related to the diagnosis and/or treatment of COVID-19. If a plan reverses benefit changes when the public health emergency ends, a plan will have satisfied its obligation to provide advance notice of a material modification if the plan had previously given notice of the general duration of the changes (e.g., only during the

[10] *See* https://www.cms.gov/files/document/COVID-19-toolkit-issuers-MA-plans.pdf.

[11] *See* https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-covid19/index.html.

public health emergency) or provides such notice within a reasonable timeframe before reversal.

States may impose additional standards or requirements on health insurance issuers with respect to the diagnosis or treatment of COVID-19, to the extent that such standards or requirements do not prevent the application of a federal requirement.

EAPs and On-Site Clinics

An EAP is an "excepted benefit" for ACA purposes if the EAP satisfies certain requirements, including that the EAP does not provide significant benefits in the nature of medical care. An EAP that offers benefits for COVID-19 testing while a public health emergency declaration or a national emergency declaration is in effect will be considered an "excepted benefit" and will not be considered to provide benefits that are significant in the nature of medical care. Thus, an EAP can provide these benefits without losing its treatment as an "excepted benefit."

An on-site clinic may also offer benefits for diagnosis and testing for COVID-19 and still be considered an "excepted benefit."

3. <u>Extension of Certain Plan Deadlines</u>

On April 28, 2020, the DOL and IRS issued a final regulation for publication regarding the extension of certain benefit plan deadlines.[12] The regulation requires benefit plans to disregard the "Outbreak Period" when determining whether certain participant deadlines have been satisfied. For purposes of the following relief, the term "Outbreak Period" refers to the period from March 1, 2020 until 60 days after the announced end of the COVID-19 national emergency or such other date announced by the DOL and the IRS in a future notice.

All group health plans, disability and other employee welfare benefit plans, and employee pension benefit plans subject to ERISA or the Code must disregard the Outbreak Period for all plan participants, beneficiaries, qualified beneficiaries, or claimants wherever located in determining the following periods and dates:

- The 30-day period (or 60-day period, if applicable for certain rights relating to Medicaid) to request special enrollment.
- The 60-day election period for COBRA continuation coverage.
- The date for making COBRA premium payments.

[12] On this same date, the DOL also issued EBSA Disaster Relief Notice 2020-01 and COVID-19 FAQs to extend the time for plans to furnish certain statements required under ERISA and provide additional guidance on ERISA requirements.

- The date for individuals to notify the plan of a qualifying event or determination of disability.

- The date within which individuals may file a benefit claim.

- The date within which claimants may file an appeal of an adverse benefit determination.

- The date within which claimants may file a request for an external review.

- 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.

With respect to group health plans, and their sponsors and administrators, the Outbreak Period shall be disregarded when determining the date for providing a COBRA election notice.

4. Cafeteria Plan and HDHP Guidance

On May 12, 2020, the IRS issued two notices providing employers additional flexibility with respect to cafeteria plans, health FSAs, and dependent care FSAs:

- Notice 2020-29: provides guidance relating to mid-year election changes, extended claims periods, and HDHPs.

- Notice 2020-33: provides guidance relating to carryovers from health FSAs.

Notice 2020-29

Notice 2020-29 expands the mid-year election changes permitted under cafeteria plans with respect to employer-sponsored coverage, health FSAs, and dependent care FSAs during calendar year 2020. An employer is permitted, but not required, to allow one or more of these changes, provided any changes are prospective and comply with applicable nondiscrimination rules. The relief may be applied retroactively to January 1, 2020 for cafeteria plans that permitted mid-year election changes consistent with these requirements prior to the issuance of the notice.

With respect to employer-sponsored coverage, an employer may permit an employee to:

- Make a new election, if the employee initially declined to enroll;

- Revoke an existing election and make a new election to enroll in different health coverage sponsored by the same employer (including changing enrollment from self-only coverage to family coverage); and

- Revoke an existing election, provided the employee attests in writing that he or she is enrolled, or immediately will enroll, in other health coverage not sponsored by the employer.

The employer may rely on the written attestation of an employee unless the employer has actual knowledge that the employee is not, or will not be, enrolled in other comprehensive health coverage. The notice includes an example of an acceptable attestation.

With respect to health or dependent care FSAs, an employer may permit an employee to revoke an existing election, make a new election, or decrease or increase an existing election. Employers are permitted to limit mid-year election changes under health FSAs and dependent care FSAs to amounts no less than the amounts that were already reimbursed.

Cafeteria plans may be amended to allow participants until December 31, 2020 to spend unused amounts remaining in a health FSA or dependent care FSA at the end of a grace period or plan year ending in 2020.[13] Although the guidance applies to cafeteria plans with either a grace period or carryover feature, calendar year plans with a carryover are not able to use this relief.

An individual with unused amounts in a health FSA who is allowed an extended period to incur expenses will not be eligible to contribute to an HSA during the extended period, unless the health FSA is an HSA-compatible health FSA. The extended claim period provision applies January 1, 2020 through December 31, 2020.

Plan amendments to reflect the additional mid-year election changes or extended claims period for the 2020 plan year must be adopted on or before December 31, 2021. The amendment may be effective retroactively to January 1, 2020, but the plan must operate in accordance with the notice and inform all eligible employees of the changes.

Notice 2020-29 also provides guidance on HDHPs. Under earlier guidance issued on March 11, 2020, the IRS permits HDHPs to cover the testing and treatment of COVID-19 prior to the application of the deductible.[14] Notice 2020-29 clarifies the relief provided in the earlier guidance as follows:

- The relief applies with respect to the reimbursement of expenses incurred on or after January 1, 2020.

[13] For example, if a health FSA has a plan year ending June 30, 2020 and a $500 carryover, the plan can be amended to permit claims incurred through December 31, 2020 to be paid from amounts contributed for the plan year ending June 30, 2020. If an employee has $1,900 remaining as of June 30, 2020, then the employee can use those funds to pay for expenses incurred through December 31, 2020. Normally, only $500 would be eligible to be carried over beyond June 30, 2020.

[14] Notice 2020-15.

- The testing and treatment of COVID-19 includes items or services required to be covered with no cost sharing under the Families First Act and CARES Act.

Carryovers

Prior to Notice 2020-33, health FSAs could permit up to $500 in unused amounts in a participant's health FSA to be carried over to pay or reimburse medical care expenses incurred in next year. Notice 2020-33 adjusts the maximum carryover to an amount equal to 20% of the maximum health FSA contribution for that plan year. The maximum amount that can be carried over from a plan year starting in 2020 is $550 (20% of $2,750, the indexed 2020 health FSA limit).

A plan generally must be amended on or before the last day of the plan year from which amounts may be carried over. For the 2020 plan year, a plan amendment must be adopted on or before December 31, 2021 and may be effective retroactively to January 1, 2020. Retroactive amendments are permitted only if the plan operates in accordance with the change and notifies eligible employees. When amending its plan, an employer will need to decide whether to automatically incorporate future increases.

B. Retirement Plans

The CARES Act includes provisions impacting retirement plans. Specifically, the CARES Act provides for "coronavirus-related distributions" from IRAs, qualified plans, 403(a) plans, 403(b) plans, and governmental 457(b) plans. Plan sponsors may choose whether to permit these distributions. The CARES Act also provides guidance on repayment of coronavirus-related distributions, loans from 401(a), 403(a), and 403(b) plans to individuals who would be eligible to receive a coronavirus-related distribution, required minimum distributions for 2020, and plan amendments.[15]

The IRS has issued FAQs providing additional guidance on the retirement plan provisions included in the CARES Act. The IRS guidance confirms that it is optional for employers to adopt distribution and loan provisions. In addition, an employer is permitted to choose whether, and to what extent, to provide for coronavirus-related distributions and/or loan changes under the CARES Act.

As a result of the COVID-19 pandemic, the IRS has also issued guidance impacting safe harbor plans, the physical presence requirement for certain participant elections, and partial plan terminations. This guidance is further discussed below.

In addition, Section I.A. of this report includes a discussion of regulations requiring plans to extend certain benefit plan deadlines by disregarding the "Outbreak Period." This guidance

[15] The CARES Act includes guidance on single-employer plan minimum funding contributions that would otherwise be due during 2020. This provision is not applicable to plans not covered by the minimum funding rules of ERISA and the Code (e.g., governmental or church plans).

applies to retirement plans in addition to welfare plans. See Section I.A. above for a discussion of these regulations.

1. Coronavirus-Related Distributions

A coronavirus-related distribution is a distribution made on or after January 1, 2020 and before December 31, 2020[16] to a qualified individual. The CARES Act defines a qualified individual as:

- an individual who is diagnosed with the virus SARS-CoV-2 or COVID-19 by a CDC-approved test;

- an individual whose spouse or Code § 152 dependent is diagnosed with the virus SARS-CoV-2 or COVID-19 by a CDC-approved test; or

- an individual who experiences adverse financial consequences as a result of:

    - being quarantined, 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 business owned or operated by the individual due to such virus or disease; or

    - such other factors as may be determined by the Secretary of the Treasury.

In June, the IRS issued Notice 2020-50, which provides that individuals who experience adverse financial consequences as a result of the following also will be considered qualified individuals for purposes of coronavirus-related distributions:

- the individual having a reduction in pay or self-employment income due to COVID-19 or having a job offer rescinded or start date for a job delayed due to COVID-19;

- the individual's spouse or member of the individual's household being quarantined, furloughed or laid off, or having work hours reduced due to COVID-19; being unable to work due to lack of childcare due to COVID-19; having a reduction in pay/self-employment income due to COVID-19; or having a job offer rescinded or start date for a job delayed due to COVID-19; or

[16] Although the statute states the distribution must be made before December 31, 2020, a subsequent IRS FAQ states that the distribution must be made by December 30, 2020.

- closing or reducing hours of a business owned or operated by the individual's spouse or a member of the individual's household due to COVID-19.

A plan administrator can rely on an employee's certification that the employee meets the applicable conditions to receive a coronavirus-related distribution, unless the administrator has actual knowledge to the contrary.[17] Notice 2020-50 includes a sample certification.

The CARES Act and Notice 2020-50 also impose the following rules and restrictions on coronavirus-related distributions:

- The aggregate amount of coronavirus-related distributions may not exceed $100,000 for a taxable year from all plans maintained by an employer and any member of the employer's controlled group.[18]

- A coronavirus-related distribution can be made from an eligible retirement plan (i.e., a 401(a) plan, 403(a) plan, 403(b) plan, governmental 457(b) plan, or IRA).

- A distribution received by a qualified individual as a beneficiary can be treated as a coronavirus-related distribution (but cannot be recontributed).

- A reduction or offset of a qualified individual's account balance to repay a plan loan is permitted to be treated as a coronavirus-related distribution (however, loans that are treated as deemed distributions are not coronavirus-related distributions).

- Correction distributions (e.g., 402(g) or ADP/ACP corrections) are not coronavirus-related distributions.

- The 10% early distribution penalty under Code § 72(t) does not apply to a coronavirus-related distribution.

- Coronavirus-related distributions are not subject to 20% mandatory withholding but will be subject to 10% withholding unless the employee makes a different withholding election.

[17] Notice 2020-50 states that a plan administrator may not rely on an individual's self-certification if the plan sponsor has actual knowledge that the individual does not meet the requirements. This "actual knowledge" requirement does not impose an obligation on the plan sponsor to inquire into whether the individual satisfies the applicable requirements. *See also*, IRS Coronavirus-related relief for retirement plans and IRAs questions and answers, at https://www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers.

[18] For taxpayers, an IRS FAQ states that the aggregate limit of $100,000 applies to all plans and IRAs.

- The requirement to provide a rollover notice (402(f) notice) does not apply to coronavirus-related distributions.

- A coronavirus-related distribution is treated as satisfying the distribution restrictions otherwise applicable to 401(k), 403(b) and governmental 457(b) plans.

- Unless otherwise elected by an individual, any amount required to be included in gross income for a coronavirus-related distribution will be ratably included in gross income over the three taxable years beginning with the taxable year of the distribution.[19]

A qualified individual can treat a distribution as a coronavirus-related distribution on his or her tax return even if an employer does not treat a distribution as coronavirus-related under the employer's plan.[20]

2. Repayment of Coronavirus-Related Distributions

An individual who receives a coronavirus-related distribution may make one or more contributions to an IRA, qualified plan, 403(a) plan, 403(b) plan, or governmental 457(b) plan (of which the individual is a beneficiary) in an amount no greater than the amount of the distribution. The contribution(s) can be made at any time during the 3-year period beginning on the day after receipt of the distribution. The individual who makes such a repayment shall be treated as having received the coronavirus-related distribution and having transferred the amount to an eligible retirement plan in a direct trustee-to-trustee transfer within 60 days of the distribution so that the participant does not owe federal income tax on the distribution.

According to Notice 2020-50, the IRS anticipates that eligible retirement plans will accept recontributions of coronavirus-related distributions, which are treated as rollover contributions. However, the IRS also recognizes that eligible retirement plans are not required to accept rollover contributions and clarifies that plans do not have to change their terms or procedures to accept recontributions of coronavirus-related distributions.[21]

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[19] An employee can choose to include the entire distribution in income for 2020.

[20] A plan is required to report a coronavirus-related distribution on Form 1099-R even if it is repaid in the same year by using code 2 (early distribution exception applies) or code 1 (early distribution, no known exception) in box 7.

[21] A Form 8915-E will be used by the recipient to report the receipt of a coronavirus-related distribution and the repayment of a coronavirus-related distribution. Notice 2020-50 provides examples of how distributions are included in income and how repayments at various times are reported by the taxpayer.

3. Plan Loan Changes

The following changes apply to loans from 401(a), 403(a) and 403(b) plans, and apply only to individuals who would be eligible to receive a coronavirus-related distribution as described above:

- For loans made to a qualified individual from March 27, 2020 to September 22, 2020: (i) the $50,000 loan maximum is increased to $100,000; and (ii) the "50% of vested benefit" loan limitation is increased to 100% of the vested benefit.

- If a loan is outstanding on or after March 27, 2020, and any repayment on the loan is due from March 27, 2020 to December 31, 2020, the due date shall be delayed for up to one year. Any subsequent repayments will be adjusted to reflect this delay in the due date and any interest accruing during such delay. In determining the 5-year maximum term of the loan, the 1-year delay is disregarded.

Notice 2020-50 also provides a repayment safe harbor when certain requirements are satisfied.

4. Waiver of 2020 Required Minimum Distributions

Required minimum distributions for 2020 are not required for defined contribution 401(a) plans, 403(a) and 403(b) plans, governmental 457(b) plans, and for IRAs. In addition to participants who are already receiving required minimum distributions because they reached age 70½ before 2019, the waiver applies to:

- participants who turned age 70½ in 2019 but did not take their distribution until 2020; and

- participants with an April 1, 2021 required beginning date due to retirement.

Required minimum distributions for any year after 2020 shall be determined without regard to the 2020 waiver. In addition, the 5-year distribution period applicable when a participant dies before distribution of the participant's entire interest is to be determined without regard to 2020. The extension also provides a surviving spouse with an additional year to commence lifetime income payments if the commencement was otherwise due in 2020.

The IRS included a model plan amendment in Notice 2020-51. The amendment includes an election regarding whether 2020 required minimum distributions were eligible for direct rollover from the plan.

Notice 2020-51 also provides that distributions paid in 2020 (or paid in 2021 for the 2020 calendar year for an employee with an April 1, 2021 required beginning date) that are equal to required minimum distribution amounts or are part of certain periodic payments can be rolled over into eligible retirement plans. The 60-day rollover deadline was extended to August 31, 2020. The Notice also includes the following clarifications:

- If a plan made a 2020 distribution that would have been a required minimum distribution but for the SECURE Act change, then the plan will not have a failure due to not treating it as eligible for rollover and not providing 402(f) notice.

- Distributions can be rolled over back into the same plan if the plan permits rollovers.

- Anti-cutback relief is not provided in certain situations. For example, if a plan permits distribution of amounts equal to 2020 required minimum distributions without regard to the CARES Act waiver, then an amendment to eliminate that right would violate anti-cutback rules.

- The CARES Act waives required minimum distributions for 2020 regardless of whether the employee's required beginning date is April 1, 2021.[22]

5. <u>Amendment Deadline</u>

For plans other than governmental plans, the amendment deadline for the retirement plan changes described in Section II.B.1. through Section II.B.4. above is the last day of the first plan year beginning on or after January 1, 2022.

6. <u>Safe Harbor Plan Guidance</u>

In June, the IRS issued Notice 2020-52, which clarifies certain requirements that apply to safe harbor retirement plans and provides relief from some of the requirements because of the COVID-19 pandemic. Specifically, the notice clarifies that a mid-year reduction of contributions only for highly compensated employees ("HCEs") is not a reduction or suspension of safe harbor contributions. However, the reduction would be a mid-year change to the content of the required safe harbor notice. Accordingly, the reduction would require an updated notice and election opportunity for HCEs impacted by the mid-year change.

In the absence of relief, an employer can only reduce or suspend safe harbor contributions during the year if either: (1) the employer is operating at an economic loss; or (2) the plan's safe harbor notice included a statement that the plan may be amended to reduce or suspend safe harbor contributions and that the reduction or suspension will not

[22] For example, an employee attains age 70½ before January 1, 2020 and retires in 2020. Thus, the employee's required beginning date is April 1, 2021. The employee is not required to receive a required minimum distribution for 2020 before April 1, 2021, but must still receive a required minimum distribution for 2021 by December 31, 2021. A 2021 distribution is a required minimum distribution for 2021 up to the total required minimum distribution amount for 2021 (even if made before April 1, 2021) and may not be rolled over. Additional 2021 distributions could be rolled over.

apply earlier than 30 days after all eligible employers are notified of the change. If a plan amendment that reduces or suspends safe harbor contributions was adopted between March 13 and August 31, 2020, then the plan will not be treated as failing to satisfy the requirements in the previous sentence as long as a notice of the reduction or suspension was provided no later than August 31, 2020 and a plan amendment is adopted no later than the effective date of the reduction or suspension. This notice relief is not available for safe harbor matching contributions.

7. <u>Guidance on Physical Presence Requirement for Spousal Consent</u>

In response to the COVID-19 public health emergency, the IRS issued Notice 2020-42 to provide temporary relief from the physical presence requirement in Treasury regulation section 1.401(a)-21(d)(6) for certain participant elections that are required to be witnessed by a plan representative or notary public, including the spousal consent requirement under Code section 417. Provided the requirements set forth in the notice are satisfied, the IRS grants temporary relief from the physical presence requirement for participant elections witnessed by a notary public of a state that permits remote electronic notarization or a plan representative. The temporary relief applies for the period beginning January 1, 2020 and ending December 31, 2020.

8. <u>Partial Retirement Plan Termination FAQs</u>

The IRS issued Q&As[23] clarifying that, generally, employees are not treated as having an employer-initiated severance for partial termination purposes if they are rehired by the end of the applicable period. Thus, employees terminated due to COVID-19 and rehired by the end of 2020 generally would not be treated as having an employer-initiated severance for purposes of determining whether a partial termination occurred during the 2020 plan year.

C. <u>Payroll Tax Deferral Executive Order and Guidance</u>

On August 8, 2020, President Trump issued an Executive Order[24] directing the Secretary of Treasury to defer certain payroll tax obligations as a result of the hardships faced by American workers during the pandemic. The IRS then issued Notice 2020-65 in response to the Executive Order.

The Executive Order and notice permit (but do not require) employers to defer the 6.2% Social Security Tax on employees earning less than $104,000 per year on wages paid during the period of September 1, 2020 through December 31, 2020. The deferral is not applicable to the employer portion of the Social Security tax. The Executive Order and notice permit the deferral

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[23] *See* https://www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers.

[24] *See* https://www.whitehouse.gov/presidential-actions/memorandum-deferring-payroll-tax-obligations-light-ongoing-covid-19-disaster/.

but not forgiveness of the tax. Congressional action would be required before the tax could be forgiven.

D. Church Alliance Comment Letters

The Church Alliance submitted four comments letters on COVID-19 issues – three related to the Paycheck Protection Program ("PPP") and one urging Congress to take actions to protect employee health coverage.

1. Paycheck Protection Program

The CARES Act established the PPP under Section 7(a) of the Small Business Act. Under the PPP, eligible small businesses were permitted to apply to the Small Business Administration ("SBA") for forgivable loans to enable them to pay their employees during the COVID-19 crisis. The Church Alliance submitted three comment letters to the SBA seeking clarification about how certain provisions of the PPP apply to faith-based organizations.[25] The PPP closed at the end of August 9, 2020, and the SBA is no longer accepting applications.

The SBA recently published a notice in the Federal Register[26] seeking approval for two questionnaires that would be sent to PPP borrowers that received loans of $2 million or more. One questionnaire would be sent to for-profit borrowers and the other would be sent to non-profit borrowers that received these loans. The questionnaire would collect additional information that the SBA would use to evaluate whether economic uncertainty made the loan request necessary.

2. Protection of Employee Health Coverage

On April 23, 2020, the Church Alliance submitted a comment letter urging Congress to take action to ensure that employees of faith communities can retain employer-provided coverage during the pandemic. Specifically, the Church Alliance asked Congress to pass legislation providing: (1) subsidized health insurance continuation coverage under both ERISA and non-ERISA plans for employees who have lost their jobs; (2) funding for employer-provided health plans facing significant claims (including church plans); and (3) policies that promote health care coverage for all individuals facing job and economic loss.[27]

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[25] *See* https://church-alliance.org/comment-letters/church-alliance-sends-letter-small-business-administration-seeking-clarification, https://church-alliance.org/comment-letters/church-alliance-files-second-letter-sba, and https://church-alliance.org/comment-letters/church-alliance-files-third-comment-letter-sba-addressing-ppp-loan-program.

[26] 85 Fed. Reg. 67,810 (Oct. 26, 2020).

[27] *See* https://church-alliance.org/comment-letters/church-alliance-urges-congress-protect-employee-health-coverage.

III. PATIENT PROTECTION AND AFFORDABLE CARE ACT

The ACA, which was signed into law by President Obama in March of 2010, imposed sweeping changes on the delivery of health care in this country and has had a major impact on all players in the health care market (including individuals and insurers). Since the ACA's enactment, the Agencies have jointly issued final regulations and other guidance relating to different provisions in the ACA. This report focuses on ACA guidance that was issued in the last year.

A. Contraceptive Coverage Update

Under the ACA, all non-grandfathered plans must provide coverage for certain preventive care services and must cover such services without the imposition of any cost-sharing requirements (such as a co-payment, co-insurance or deductible). These services include contraceptive coverage. Unless entitled to an exemption, non-grandfathered plans had to begin providing these services to women without cost-sharing for plan years beginning on or after August 1, 2011.

The applicable regulations include an exemption for "religious employers," which is defined as churches, conventions and associations of churches, integrated auxiliaries.[28] The regulations also provided for the "accommodation" of certain health care coverage provided by "eligible organizations." For purposes of the accommodation rules, an "eligible organization" is a non-profit entity that:

- opposes coverage for some or all of the contraceptive services required to be covered on account of religious objections;
- holds itself out as a religious organization; and
- maintains in its records a "self-certification" that indicates that it meets the above requirements and makes such self-certification available upon request by the first day of the first plan year for which the accommodation applies.[29]

An employer eligible for the accommodation rules does not have to provide contraceptive coverage to its employees, but contraceptive coverage will be made available by either the health insurance issuer (in the case of fully-insured plans) or a third-party administrator ("TPA") (in the case of self-insured plans). In the alternative, such organizations may qualify for the accommodation by providing HHS with written notification of their objection to providing

[28] An "integrated auxiliary" is defined in the applicable regulations as a tax-exempt (501(c)(3)) organization that is both affiliated with a church and internally supported. An organization is not "internally supported" if both of the following apply: (a) the organization offers goods, services or facilities for sale, other than on an incidental basis, to the general public; and (b) the organization normally receives more than 50% of its support from a combination of governmental sources, public solicitation of contributions, receipts from the sale of admissions or goods, the performance of services, or furnishing facilities in activities that are not unrelated trades or businesses.

[29] The guidance does not elaborate on what it means for an organization to "hold itself out as a religious organization." However, this self-certification does not need to be submitted to any of the Agencies. Thus, it appears that the Agencies do not intend to review the self-certification to make their own determination as to whether the organization does or does not hold itself out as being religious.

contraceptive coverage. HHS and the DOL will then notify insurers and TPAs so that enrollees may receive separate coverage for such services.[30]

On May 4, 2017, the President issued an "Executive Order Promoting Free Speech and Religious Liberty" that instructed the Secretaries of the Agencies to consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate regarding contraceptive coverage. The two rules discussed below are the result of that re-examination. These rules protect religious beliefs (and add exemptions for moral beliefs) and expand exemptions to certain entities and individuals whose non-grandfathered health plans are subject to a mandate of contraceptive coverage through guidance issued pursuant to the ACA.

The first rule[31] issues an expanded exemption to a broader range of entities and individuals that object to contraceptive coverage based on strongly held religious beliefs, while continuing to offer the existing accommodation as an optional alternative. The expanded exemption encompasses non-governmental, non-grandfathered health plan sponsors that also object to the provision of contraceptive coverage based on sincerely held religious beliefs, including publicly held and closely held for-profit corporations (regardless of size), religious employers, nonprofits, higher education institutions, and insurance issuers, to the extent they provide a plan to otherwise exempt entities. The exemption in this rule also allows, but does not require, issuers and employers to omit contraceptives from coverage provided to objecting individuals.

The second rule[32] issued by the Agencies addresses moral exemptions and accommodations for coverage of certain preventive services under the ACA. This rule incorporates conscience protections into the contraceptive mandate and expands exemptions to the mandate to protect certain entities and individuals that object to coverage of some or all contraceptives based on sincerely held moral convictions (but not religious beliefs). Employers that can claim this exemption include non-governmental, privately held for-profit employers (the exemption is not available to plan sponsors that are publicly traded), nonprofits, higher education institutions and insurers.[33]

The rules do not define religious or moral objections. However, the HHS Fact Sheet states:

> Based on case law, the preamble to the rule explains that moral convictions are protected in ways similar to religious beliefs, when the convictions are those: (1) that a person deeply and sincerely holds; (2) that are purely ethical or moral in source and content; (3) but that nevertheless impose … a duty; (4) and that certainly

[30] In 2015, the U.S. Supreme Court granted review of cases addressing the enforcement of the contraceptive coverage mandate. The Court did not rule on the merits of the case and, instead, remanded them back to the appellate courts to "allow the parties sufficient time to resolve any outstanding issues between them." *Zubik v. Burwell*, 136 S. Ct. 1557 (2016). As a result of the remand, the Agencies issued a request for information on alternative ways to structure the accommodation but did not end up making any changes to the accommodation after reviewing the comments.

[31] 83 Fed. Reg. 57,536 (Nov. 15, 2018).

[32] 83 Fed. Reg. 57,592 (Nov. 15, 2018).

[33] In the case of insurers, exempted insurance plans can only be purchased by employers or individuals having moral objections.

> occupy … a place parallel to that filled by … God in traditionally religious persons, such that one could say the beliefs function as a religion.[34]

No self-certification, filing or notice to the Agencies is required under the rules for employers or individuals objecting to the provision of contraceptives on religious or moral grounds. Plans subject to ERISA must continue to follow required notice procedures for changing covered benefits, including revising summaries of benefits and coverage and issuing a summary of material modification within the required timeframe.

After the issuance of the interim final rules, several lawsuits were filed challenging the regulations. In *Pennsylvania v. Trump*, a district court ordered a nationwide preliminary injunction against enforcement of the regulations. The Third Circuit Court of Appeals affirmed the district court's order granting the nationwide preliminary injunction.[35]

The Trump Administration appealed the Third Circuit's decision to the U.S. Supreme Court. On July 8, 2020, the U.S. Supreme Court reversed the Third Circuit's decision and remanded the case with instructions to dissolve the nationwide preliminary injunction on the final regulations.[36]

B. Individual Mandate Litigation Update

In February of 2018, a lawsuit was filed challenging the constitutionality of the individual mandate. Because the U.S. Supreme Court upheld the individual mandate in 2012 as a legitimate use of Congress' taxing power, the plaintiffs argued that the reduction of the individual mandate penalty to zero under the Tax Cuts and Jobs Act makes it unconstitutional. The plaintiffs also argued that the individual mandate cannot be severed from the rest of the ACA and, therefore, the entire law is unconstitutional.

Democratic state attorneys general from several states and the District of Columbia intervened in the case to defend the ACA. They argued that the individual mandate is still constitutional and, even if the court determines it is unconstitutional, it can be severed from the rest of the ACA.

In December 2018, the court declared the individual mandate unconstitutional.[37] The court also declared the entire ACA invalid after determining that the remaining provisions are inseverable from the individual mandate.

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[34] Available at: https://www.hhs.gov/about/news/2018/11/07/fact-sheet-final-rules-on-religious-and-moral-exemptions-and-accommodation-for-coverage-of-certain-preventive-services-under-affordable-care-act.html (quotations omitted).

[35] *Pennsylvania v. Trump*, 930 F.3d 543 (3rd Cir. 2019).

[36] Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367 (2020).

[37] *Texas v. U.S.*, 340 F.Supp.3d 579 (N.D. Tex. 2018).

On appeal, the Fifth Circuit Court of Appeals decided the individual mandate is unconstitutional but remanded the case to the district court to determine which parts of the ACA are severable from the individual mandate.[38]

A coalition of Democratic attorneys general and the U.S. House of Representatives appealed the Fifth Circuit's decision to the U.S. Supreme Court. In March, the U.S. Supreme Court agreed to hear the case.[39] Oral argument occurred in November, but the U.S. Supreme Court has not yet made a decision in the case.

C. <u>Cadillac Tax Repeal</u>

The Cadillac tax was a 40% excise tax on certain high-cost employer-sponsored health care plans (so-called "Cadillac" plans) to the extent that the annual cost for an employee exceeded a threshold amount. The threshold amount was $10,200 for employee-only coverage and $27,500 for coverage other than employee-only and would have been indexed annually. These thresholds would have also been adjusted for plans that carry a higher premium cost because of age and gender demographics of an employer's employees and for qualified retirees and employees in certain high-risk professions.

The Cadillac tax was originally effective in 2018, but was delayed twice by legislation - once until 2020[40] (i.e., tax years beginning after 2019) and subsequently until 2022.[41] At the end of 2019, President Trump signed the 2020 Spending Bill into law, which repealed the Cadillac tax.[42]

D. <u>Patient-Centered Outcome Research Institute Fee Extended</u>

The ACA included a provision imposing a fee on certain health insurance policies and plan sponsors of certain self-insured health plans to fund an institute to perform research on the clinical effectiveness of certain medical treatments, services, procedures, and drugs (the Patient Centered Outcome Research Institute or "PCORI"). The fee was generally imposed on health insurance issuers and plan sponsors of self-insured health plans for each plan or policy year ending after September 30, 2012, and before October 1, 2019.

On December 20, 2019, President Trump signed the 2020 Spending Bill[43] into law, which extends the PCORI fee for 10 years. Accordingly, the PCORI fee will continue to be imposed through plan years ending before October 1, 2029.

In Notice 2020-44, the IRS provided that the adjusted applicable dollar amount used for purposes of calculating the PCORI fee for plan or policy years ending on or after October 1, 2019

[38] *Texas v. U.S.*, 945 F.3d 355 (5th Cir. 2019).

[39] *Id.*, *cert. granted*, *California v. Texas*, 140 S. Ct. 1262 (U.S. March 2, 2020) (No. 19-840).

[40] Public Law 114-113 (2015).

[41] Public Law 115-120 (2018).

[42] See Section I.A. of this report for additional information about the 2020 Spending Bill.

[43] See Section I.A. of this report for additional information about the 2020 Spending Bill.

and before October 1, 2020 is $2.54. The IRS also provided transition relief for calculating the number of covered lives since plan sponsors and issuers may not have anticipated the need to make this calculation for the plan or policy year ending on or after October 1, 2019 and before October 1, 2020 since. Under the transition relief, issuers and plan sponsors may use any reasonable method for calculating the average number of covered lives for such plan or policy year.

E. Final HHS Rule on Section 1557 Nondiscrimination Rules

Section 1557 prohibits discrimination under any health program or activity that received Federal financial assistance on any grounds prohibited by Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination and Employment Act of 1975, and section 504 of the Rehabilitation Act of 1973. The prohibited grounds for discrimination under these laws include race, color, national origin, age, disability, and sex.

In 2016, the DOL issued final regulations implementing Section 1557.[44] Later that year, plaintiffs filed a lawsuit against HHS, arguing that it exceeded its authority in interpreting sex discrimination as including gender identity and termination of pregnancy. The district court agreed and enjoined[45] and later vacated[46] the portion of the regulations relating to gender identity and termination of pregnancy.

In June 2020, HHS issued final regulations[47] substantially narrowing portions of the 2016 regulations, including the removal of the prohibition on discrimination based on gender identity and sex stereotyping.[48] Prior to the effective date of the final regulations, the U.S. Supreme Court ruled that sex discrimination under Title VII includes discrimination based on sexual orientation and gender identity.[49] As a result of the Supreme Court ruling, at least two federal district courts have blocked parts of the final regulations from going into effect.[50] Additional lawsuits on the regulations are still pending.

F. Summary of Benefits and Coverage Update

A new template for SBCs will be required for plan years beginning on or after January 1, 2021. The new template was originally posted in November 2019, but corrections were made in revised documents posted in February 2020. The revised template can be found at

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[44] 81 Fed. Reg. 31,376 (May 18, 2016).

[45] *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

[46] *Franciscan Alliance, Inc. v. Azar*, 414 F.Supp.3d 928 (N.D. Tex. 2019).

[47] 85 Fed. Reg. 37,160 (June 19, 2020).

[48] The final regulations include an exemption for self-insured health plans unless such plans receive Federal financial assistance or are principally engaged in the business of providing health care. Importantly, the final regulations include the clarification requested by the Church Alliance that the exemption for self-insured health plans applies to employer-sponsored plans not covered by ERISA, such as self-insured church plans, and to excepted benefits.

[49] *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020).

[50] *See, e.g.*, *Walker v. Azar*, No. 20-CV-2834 (FB) (SMG), 2020 WL 4749859 (E.D.N.Y. Aug. 17, 2020) and *Whitman-Walker Clinic, Inc. v. Dep't. of Health & Human Servs.*, No. 20-1630 (JEB), 2020 WL 5232076 (D.D.C. Sept. 2, 2020).

https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/summary-of-benefits.

G. Health Coverage Reporting Under Code Sections 6055 and 6056

On October 2, 2020, the IRS issued Notice 2020-76, which provides guidance on the reporting requirements under Code sections 6055 and 6056. Code section 6055 requires providers of minimum essential coverage to file and furnish reports about such coverage while Code section 6056 requires applicable large employers to file and furnish reports about the health insurance offered to full-time employees. The reporting is required to be made using Form 1095-B or 1095-C, as applicable.

The notice extends the due date for furnishing the 2020 Forms 1095-B and 1095-C to individuals from January 31, 2020 to March 2, 2021. The notice does not extend the deadline for filing required forms with the IRS.

For 2020, the notice also provides relief from the penalty for failing to furnish the statement required under Section 6055. Because the individual shared responsibility payment is zero for 2020, the IRS recognizes that an individual does not need the information on Form 1095-B for federal income tax purposes. The penalty relief only applies if the following two requirements are satisfied:

1. The reporting entity prominently posts a notice on its website stating that an individual may receive a copy of the Form 1095-B upon request and including an email address and physical address where a request may be sent and a telephone number that the individual can use for any questions.

2. The reporting entity must furnish a Form 1095-B to a responsible individual within 30 days of the date a request is received.

The penalty relief also applies to the requirement to furnish Form 1095-C to any employee enrolled in an applicable large employer's health plan who is not a full-time employee, provided the two requirements described above are satisfied. However, the penalty relief does not apply to the requirement for applicable large employers to furnish Form 1095-C to full-time employees or the requirement to file Form 1095-B or 1095-C with the IRS.

In past years, the IRS has provided relief from the penalties that apply when reporting entities report incomplete or incorrect information on the return if the reporting entity can show it made a good-faith effort to comply with the reporting requirements under Code section 6055 and 6056. The notice extends this relief for 2020 and states that this is the last year the IRS and Treasury Department intend to provide this relief.[51]

[51] The notice also requests comments on certain questions about the reporting requirements. All comments must be submitted by February 1, 2021.

H. Employer Mandate

The employer mandate still applies despite elimination of the individual mandate penalty. In June 2020, the Treasury Inspector General issued a report encouraging stricter enforcement.[52] The report noted that revenues from the employer mandate are significantly below assumptions made by the Congressional Budget Office.

I. Drug Manufacturer Coupons and QSEHRAs

On May 7, HHS issued final regulations[53] on certain aspects of the ACA, including drug manufacturer coupons. Under the final regulations, to the extent consistent with state law, any drug manufacturer's coupons or other forms of support that are paid to reduce an enrollee's cost sharing amount may, but are not required to be, counted towards the annual cost-sharing limitation. The final regulations also recognize that, to meet the requirements of Code section 223, an HDHP may only take into account the net amount incurred by the individual when determining whether the individual has satisfied the deductible. Accordingly, a conflict may exist for plans that count drug manufacturer coupons toward the participant's deductible and cost sharing limitation if the participant is also enrolled in an HSA. HHS notes that the IRS and Treasury continue to review comments on this issue to determine if additional guidance is necessary.

The final regulations also create a special enrollment period for individuals enrolled in a qualified small employer health reimbursement arrangement ("QSEHRA") with a non-calendar plan year. During the new special enrollment period, participants are permitted to enroll or change individual health insurance coverage either through an exchange or outside of an exchange for each new QSEHRA plan year.

Finally, the final regulations increase the maximum annual limitation on cost-sharing for 2021 to $8,550 (i.e., a $400 increase) for self-only coverage and $17,100 (i.e., an $800 increase) for other than self-only coverage.

J. Proposed Regulations and FAQs on Grandfathered Health Plans

On July 10, 2020, the Agencies issued proposed regulations[54] that would amend the current grandfathered plan rules as follows:

- The limitation on increases in cost-sharing would be amended to provide another option for measuring the maximum permitted increase. The new option would determine permitted increases by reference to the most recently published "premium adjustment percentage," which is published annually by HHS and better accounts for changes in the cost of health coverage over time.

[52] *See* https://www.treasury.gov/tigta/auditreports/2020reports/202043028fr.pdf.

[53] 85 Fed. Reg. 29,164 (May 14, 2020).

[54] 85 Fed. Reg. 42,782 (July 15, 2020).

- HDHPs that must increase cost-sharing amounts to remain an HDHP would not lose grandfathered status.

The new rules would apply 30 days after publication of final rule.

IV. REGULATORY INITIATIVES AND OTHER GUIDANCE

A. Internal Revenue Service

1. SECURE Act Guidance

In September, the IRS issued guidance on certain provisions of the SECURE Act and the Bipartisan American Miners Act of 2019 (the "Miners Act") in Notice 2020-68. Importantly, the notice provides question and answer guidance on the following provisions of the SECURE Act and Miners Act:

- The small employer automatic enrollment credit;
- The repeal of the maximum age for traditional IRA contributions;
- Participation for long-term, part-time employees in 401(k) plans;
- Qualified birth or adoption distributions;
- Difficulty of care payments from employers;
- Reduction in minimum age for in-service distributions;
- Plan amendment deadlines.

The IRS states that the notice is not intended to provide comprehensive guidance on the SECURE Act and Miners Act but, instead, is intended to provide guidance on particular issues to assist in the implementation of those provisions. The IRS also states that it will continue to analyze the provisions of both acts and anticipates issuing further guidance in the future.

2. Disaster Relief

The IRS will postpone certain retirement plan deadlines for affected taxpayers in the event of a presidentially-declared disaster, which often includes severe storms (e.g., tornados and hurricanes), wildfires, floods, or earthquakes. An affected taxpayer is generally a person who lives in or has a business in an area impacted by the disaster.

After a disaster is declared, the IRS will issue a news release describing the type of relief, the eligible taxpayers, and the relief period. Section 8 of Revenue Procedure 2018-58 lists the retirement plan deadlines that the IRS may postpone. If the news release for a disaster does not limit the relief, then all of the deadlines listed in the revenue procedure will be postponed.[55]

The IRS issued several news releases over the past year providing tax relief for certain disasters. The news releases are listed on the IRS's website.[56]

3. Required Amendments List and Operational Compliance List

The IRS issued Notice 2019-64 and Notice 2020-83, which contains the 2019 required amendments list and 2020 required amendments list, respectively. The IRS publishes a required amendments list annually now that the 5-year remedial amendment cycle for individually-designed plans has been discontinued. The required amendments list is divided into two parts. Part A lists the changes that generally would require an amendment to most plans or to most plans of a certain type. Part B lists changes that will not require an amendment to most plans but may require an amendment if a plan has an unusual provision.

Notice 2019-64 lists two changes in Part A and no changes in Part B. The changes listed in Part A are the final regulations relating to hardship distributions and the final regulations regarding cash balance and hybrid defined benefit plans. Notice 2020-83 lists no changes in Part A and two changes in Part B. The changes listed in Part B are the SECURE Act provision requiring "difficulty of care" payments to be treated as compensation for retirement contribution limitations and the CARES Act provision requiring the application of cooperative and small employer charity pension plan rules to certain charitable employers.

Plan sponsors will generally be required to adopt an item on the required amendment list by the end of the second calendar year following the year the required amendments list is published. The IRS has a webpage that provides links to required amendment lists from previous years and the amendment deadlines set forth therein.[57]

The IRS also publishes an "Operational Compliance List"[58] which identifies changes in qualification requirements during a calendar year. This list is helpful for plan sponsors to achieve operational compliance even before required amendments are adopted by plans. It may also be a helpful tool to identify mandatory and discretionary plan amendments as well as other significant guidance that impacts daily plan operation.

4. Final UBIT Regulations Under Code Section 512(a)(6)

The Tax Cuts and Jobs Act added section 512(a)(6) to the Code. Section 512(a)(6) requires a tax-exempt organization with more than one unrelated trade or business to

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[55] *See* https://www.irs.gov/retirement-plans/disaster-relief-for-retirement-plans-and-iras.

[56] *See* https://www.irs.gov/newsroom/tax-relief-in-disaster-situations.

[57] See https://www.irs.gov/retirement-plans/required-amendments-list.

[58] The Operational Compliance List is available at the following website only and will not be published in an Internal Revenue Bulletin: https://www.irs.gov/retirement-plans/operational-compliance-list.

calculate UBIT separately for each trade or business. Some have suggested that investments by the retirement plan of a tax-exempt organization in alternative investments might be considered a trade or business for purposes of this provision.

On June 23, 2020, the Church Alliance submitted its third comment letter[59] regarding Code section 512(a)(6). The comment letter was filed in response to the proposed regulations that limit the ability of tax-exempt organizations to pool separate limited partnership interests that result in UBIT.

On November 19, 2020, the IRS issued final regulations under Code section 512(a)(6).[60] The final regulations reflect favorably several comments made by the Church Alliance on the proposed regulations, and also were revised to make it clear that income from most retirement plan partnership investments can be aggregated for purposes of the UBIT rules. The final regulations are effective for taxable years beginning on or after the date they are published in the Federal Register. In addition, taxpayers may choose to apply the regulations to earlier taxable years beginning on or after January 1, 2018. Alternatively, a taxpayer may rely on a reasonable, good-faith interpretation of Code section 512(a)(6) for such taxable years.

5. Guidance Clarifying Deadline for Hardship Distribution Amendments

The IRS issued Revenue Procedure 2020-9 to clarify the amendment deadlines for changes made to the September 2019 final regulations regarding hardship distributions of elective deferrals. Plans are required to be amended as a result of the final regulations: (1) to remove a plan provision suspending employee contributions following a hardship distribution of elective deferrals; and (2) to require an employee's representation relating to his or her need for a hardship distribution. The revenue procedure also clarifies that all plan amendments that relate to a plan's hardship distribution provisions and that are effective no later than January 1, 2020 are treated as integral to the amendments required by the September 2019 regulations.

Pre-approved plans generally must adopt interim amendments by the end of the plan's remedial amendment period, which is described in Rev. Proc. 2016-37. However, the IRS is permitted to extend the deadline for plan amendments by statute or guidance. The revenue procedure extends the deadline for plan amendments relating to the September 2019 regulations, and all amendments that are integral to those amendments, to December 31, 2021.

Individually-designed plans generally must adopt plan amendments correcting disqualifying provisions by the end of the second calendar year that begins after the change appeared on the Requirement Amendments List. The changes required by the September

[59] *See* https://church-alliance.org/comment-letters/church-alliance-files-third-comment-letter-addressing-ubti-matters.

[60] *See* https://www.irs.gov/pub/irs-drop/td-9933.pdf (to be published in the Federal Register).

2019 final regulations must be adopted by December 31, 2021 since the changes appeared on the 2019 required amendments list.[61]

6. Updated Safe Harbor Rollover Notices

On August 6, 2020, the IRS issued Notice 2020-62 to provide two updated model 402(f) notices that can be provided to recipients of eligible rollover distributions. One of the model 402(f) notices can be used for distributions that are not from a designated Roth account and the other can be used for distributions from a designated Roth account. The model 402(f) notices reflect the SECURE Act changes applicable to qualified birth or adoption distributions and required minimum distributions. The notice also confirms that a plan administrator is not required to provide a 402(f) notice to a recipient of a qualified birth or adoption distribution under the SECURE Act or a coronavirus-related distribution under the CARES Act.

7. Distributions from Terminating 403(b) Plans

On November 5, 2020, the IRS issued guidance on distributions from terminating 403(b) plans that fund benefits through section 403(b)(7) custodial accounts. The guidance reflects changes made by the SECURE Act, which is further discussed in Section I.A. of this report.

Under Revenue Ruling 2020-23, the IRS will permit section 403(b) retirement plans that fund benefits through section 403(b)(7) custodial accounts to terminate by distributing individual custodial accounts in kind. If the custodial account complies with certain requirements, then no part of the custodial account will be included in a participant's or beneficiary's gross income until amounts are actually paid out.[62]

8. Final Regulations Updating Required Minimum Distribution Tables

On November 5, 2020, the IRS issued final regulations[63] updating the life expectancy and distribution period tables used to calculate required minimum distributions from retirement plans and individual retirement accounts. The changes adjust the tables for longer life expectancies, which would allow individuals to withdraw smaller annual amounts from their retirement plans or accounts. The final regulations apply for distribution calendar years beginning on or after January 1, 2022, subject to certain transition rules set forth therein.

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[61] Notice 2019-64. See Section IV.A.3. of this report for further discussion of the Required Amendments List.

[62] The IRS also requests comments in Notice 2020-80 on the application of the annuity and spousal rights provisions of ERISA relating to distributions from terminating 403(b) plans funded through section 403(b)(7) custodial accounts. Comments must be submitted by February 3, 2021.

[63] 84 Fed. Reg. 60,812 (Nov. 8, 2019).

9. Final Regulations on Withholding for Certain Periodic Retirement and Annuity Payments

The IRS issued final regulations[64] on income tax withholding from certain periodic retirement and annuity distributions to reflect changes made by the Tax Cuts and Jobs Act. Before the Tax Cuts and Jobs Act, if a withholding certificate was not in effect, then Code section 3405(a)(4) required the amount withheld from the periodic payment to be determined by treating the payee as a married individual claiming three withholding exemptions. The Tax Cuts and Jobs Act amended Code section 3405(a)(4) to provide that the amount withheld would be determined under rules prescribed by the Secretary of the Treasury.

For 2018, 2019, and 2020, the IRS issued several notices establishing the default rate of withholding on periodic distributions under Code section 3405(a) when no withholding certificate has been furnished. Under these notices, the default rate of withholding continued to be determined by treating the payee as a married individual claiming three withholding exemptions.[65]

The final regulations provide guidance for periodic payments made after December 31, 2020. Under the final regulations, the Treasury Department and IRS will provide rules and procedures for determining the default rate of withholding on periodic payments "in applicable forms, instructions, publications, and other guidance prescribed by the Commissioner for withholding." In the IRS news release accompanying the final regulations, the IRS indicates that the same default withholding rate will continue to apply for 2021 but that the IRS is considering a change in future years.[66]

10. Final Form 990 Regulations

In May of 2020, the IRS issued final regulations updating the information reporting regulations under Code section 6033.[67] These regulations require organizations exempt from tax under Code section 501(a) to file a Form 990 series return, unless the organization is subect to an exemption. The final regulations update the existing regulations to reflect certain statutory amendments to Code section 6033 and certain IRS rulings that include exemptions from the filing requirements.

The proposed regulations that were issued in 2019 did not incorporate Revenue Procedure 96-10, which relieves from the Form 990 filing requirement certain financial service organizations that are operated, controlled, or supervised by one or more churches, integrated auxilaries, or conventions or associations of churches. The relief provided by Revenue Procedure 96-10 also extends to church benefit boards. The preamble to the

[64] 85 Fed. Reg. 61,813 (Oct.1, 2020).

[65] See Notice 2020-3 for guidance withholding during the 2020 calendar year.

[66] For the IRS news release announcing issuance of the final regulations, see https://www.irs.gov/newsroom/irs-provides-final-regulations-on-income-tax-withholding-on-certain-periodic-retirement-and-annuity-payments.

[67] 85 Fed. Reg. 31,959 (May 28, 2020).

proposed regulations stated that Revenue Procedure 96-10 was not incorporated in the proposed regulations because it is unclear whether there is a continuing need for it to apply.

The Church Alliance filed a comment letter[68] in response to the IRS request for comments on the "continued usefulness" of Revenue Procedure 96-10, and a Church Alliance representative testified at the hearing on the proposed regulations. The comment letter requested that either the filing exemption in Revenue Procedure 96-10 be incorported into the regulations or the revenue procedure remain in effect. As a result of this comment letter, the preamble to the final regulations states that the Revenue Procedure 96-10 remains in effect and that the IRS intends to continue to study the applicability of this guidance. The preamble also notes that Code section 501(c)(3) supporting organizations are not eligible to rely on the filing relief provided in the revenue procedure.

11. IRS Escheatment Guidance

The IRS issued two pieces guidance on the escheatment of missing participant retirement funds – Revenue Procedure 2020-24 and Revenue Ruling 2020-46.

In Revenue Ruling 2020-24, a qualified plan paid a small pre-tax retirement plan balance to a state unclaimed property fund. The ruling provides that a plan payment of a participant's pre-tax retirement plan balance to a state unclaimed property fund is subject to withholding and should be reported on Form 1099-R. The revenue ruling also includes a transition rule under which a person will not be treated as failing to comply with these requirements for payments made before the earlier of January 1, 2022 or the date it becomes reasonably practical to comply with such requirements.

In Revenue Procedure 2020-46, the IRS revised the procedures for a waiver of the 60-day rollover period. The revenue procedure permits individuals who locate their money in a state unclaimed property fund to self-certify that they satisfy the requirements for a waiver from the 60-day rollover period. If an individual satisfies the waiver requirements, then the individual is permitted to make a rollover to a plan even if the 60-day rollover period has passed. The revenue procedure also includes model language that can be used for the self-certification.

12. Church Alliance Efforts on Pre-Approved Plan Guidance Permitting Participation by QCCOs and Non-QCCOs

The SECURE Act clarified that both qualified church controlled organizations ("QCCOs") and non-QCCOs can participate in section 403(b)(9) plans.[69] On June 26, 2020, the Church Alliance submitted a comment letter requesting that the IRS issue guidance allowing pre-approved volume submitter 403(b)(9) plans to be amended with a "snap on" amendment permitting QCCOs and non-QCCOs to participate. The comment

[68] *See* https://church-alliance.org/comment-letters/comment-proposed-reporting-regulations-under-internal-revenue-code-irc-section-6033.

[69] *See* https://church-alliance.org/comment-letters/church-alliance-files-letter-irs-requesting-expedited-guidance-amending-403b9-plans.

letter included a draft "snap on" amendment. The comment letter also asked the IRS to clarify a discrepancy in the "stretch IRA" provision of the SECURE Act.

In addition to submitting the comment letter, the Church Alliance met telephonically with IRS and Treasury officials to discuss the need for guidance allowing church plans with pre-approved 403(b)(9) plans to permit QCCOs and non-QCCOs to participate in such plans. In addition to discussing the need for 403(b) pre-approved plan guidance, the Church Alliance and government officials discussed the need to update Revenue Ruling 2011-1 to reflect the changes made in the Protecting Americans from Tax Hikes Act of 2015 ("PATH Act") and an issue that has arisen with respect to the section 401 "stretch IRA" provision included in the SECURE Act. The Church Alliance sent officials a "thank you" letter for the meeting outlining the issues that were discussed.

13. Proposed Regulations on Direct Primary Care Arrangements and Health Care Sharing Ministries

On June 6, 2020, the IRS issued proposed regulations[70] regarding the treatment of amounts paid for certain medical care arrangements under Code section 213, including direct primary care arrangements and health care sharing ministries. Under the proposed regulations, amounts paid for direct primary care arrangements and health care sharing ministry memberships qualify as amounts paid for medical care under Code section 213. Therefore, the amounts paid for these arrangements may be reimbursed by an HRA. In most cases, however, an individual with one of these arrangements would not be eligible to contribute to an HSA.

A direct primary care arrangement is a contract between an individual and one or more primary care physicians under which the physician(s) agree to provide medical care for a fixed annual or periodic fee without billing a third party. These arrangements are generally combined with an HDHP.

The proposed regulations define a health care sharing ministry as an organization:

- Which is described in Code section 501(c)(3) and exempt from taxation under Code section 501(a);
- Members of which share a common set of ethical or religious beliefs and medical expenses without regard to the State in which a member resides or is employed;
- Members of which retain membership even after developing a medical condition;
- Which has been in existence (or a predecessor of which has been in existence) continuously since December 31, 1999; and

[70] 85 Fed. Reg. 35,398 (June 10, 2020).

- Which conducts an annual audit that satisfies certain requirements.

14. Proposed Regulations Regarding Tax on Compensation in Excess of $1 Million Paid by Certain Tax-Exempt Organizations

The Tax Cuts and Jobs Act added Section 4960 to the Code, imposing an employer-paid 21% excise tax on excess executive compensation paid by tax-exempt organizations. In December of 2018, the IRS issued Notice 2019-09 to provide interim guidance on the excise tax. Over the summer, the IRS issued proposed regulations[71] on the excise tax that incorporates the guidance from the notice and includes additional guidance.

Under Code section 4960, excess executive compensation includes:

- Any *remuneration* paid (other than an excess parachute payment) by an applicable tax-exempt organization for a taxable year with respect to employment of any *covered employee* in excess of $1 million, plus

- Any excess *parachute payment* paid by such organization to any covered employee.

A "covered employee" is any employee (or former employee) of an applicable tax-exempt organization if the employee is one of the five highest compensated employees of the organization for the taxable year or was a covered employee of the organization (or a predecessor) for any preceding taxable year beginning after December 31, 2016. The covered employee list must be monitored and will grow over time.

"Remuneration"[72] means wages as defined for income tax withholding purposes, but does not include any designated Roth contribution. Remuneration is treated as paid when there is no substantial risk of forfeiture of the rights to such remuneration, even if it has not yet been actually received by the covered employee. It is important to note that wages for withholding purposes does not include compensation received in exercise of ministry by an ordained, licensed or commissioned pastor, and such compensation will therefore not be treated as remuneration under Code Section 4960.

For purposes of determining whether an employee is one of the five highest-compensated employees for a year, remuneration paid by the organization and certain related organizations is aggregated. Some commenters expressed concern that the excise tax would apply to situations in which an employee of one organization performs limited, temporary, or volunteer services for a related applicable tax-exempt organizations. The proposed regulations include rules to address these concerns.

[71] 85 Fed. Reg. 35,746 (June 11, 2020).

[72] The proposed regulations do not include a grandfathering rule, but do include rules that have the effect of grandfathering certain compensation. Under one such rule, any nonqualified deferred compensation that vested prior to the first day of the first taxable year of the tax-exempt organization beginning after December 31, 2017 is not considered remuneration under Code section 4960.

A "parachute payment" is a payment in the nature of compensation to (or for the benefit of) a covered employee if the payment is made as a result of the employee's involuntary separation from employment, and the aggregate present value of all such payments equals or exceeds three times the base amount.[73] The excise tax applies as a result of an excess parachute payment, even if the covered employee's remuneration is less than $1 million. Parachute payments do not include payments under a qualified retirement plan, a simplified employee pension plan, a simple retirement account, or a Section 403(b) tax-deferred annuity. Parachute payments include nonqualified deferred compensation payments. Accordingly, the 21% excise tax could be triggered if an executive (covered employee) participates in a nonqualified deferred compensation plan, is involuntarily terminated, and as a result receives a large payment from a nonqualified plan.

Payments from 457(b) plans do not count as excess parachute payments, but are treated as wages and therefore constitute remuneration for Code section 4960 purposes. Payments from 457(f) plans also constitute remuneration.

Until the final regulations are issued, taxpayers may rely on the guidance provided in either Notice 2019-09 or the proposed regulations. Taxpayers may also base their positions on a reasonable, good faith interpretation of the statute that takes into consideration any relevant legislative history.

15. Proposed Updates for Group Exemption Letters

On May 1, 2020, the IRS released Notice 2020-36, which contains a "proposed revenue procedure" updating the procedures set forth in Rev. Proc. 80-27 for group exemptions. Under a group exemption, the IRS recognizes a group of organizations consisting of a central organization and subordinate organizations as tax-exempt if the subordinate organizations are affiliated with and under the general supervision or control of the central organization and certain requirements are satisfied. If finalized, the proposed revenue procedure would make substantial changes to the procedures that are currently set forth in Rev. Proc. 80-27, which may impose additional administrative burdens on central organizations with group exemption letters. Several churches have filed comment letters on the notice.

16. Proposed Regulations on Qualified Plan Loan Offsets

On August 17, 2020, the IRS issued proposed regulations[74] on the extended rollover period for a qualified plan loan offset ("QPLO"), which was permitted by the Tax Cuts and Jobs Act. A QPLO is defined as a plan loan offset amount that is treated as distributed from a qualified employer plan to an employee or beneficiary solely because of (1) the termination of the qualified plan; or (2) the failure to meet the repayment terms of a plan loan because of a severance from employment with the employer.

[73] "Base amount" is defined as the average annualized compensation includible in the covered employee's gross income for the five taxable years ending before the date of the employee's separation from employment.

[74] 85 Fed. Reg. 51,369 (Aug. 20, 2020).

A plan loan offset generally must be rolled over to an eligible retirement plan within 60 days of the date of the offset. In contrast, a QPLO can be rolled over at any time up to the participant's income tax filing deadline (including extensions) for the taxable year in which the loan offset is treated as distributed.[75]

The proposed regulations state that QPLO amounts are subject to most of the same rules applicable to rollovers of other plan loan offsets, provide guidance on the rollover period applicable to QPLOs, set forth definitions for important terms, establish a standard for determining when a plan loan offset has been distributed as a result of a severance from employment, and provide several examples illustrating these rules. The regulations are proposed to apply to plan loan offset amounts that are treated as distributed on or after the date the final regulations are published, but taxpayers may rely on them prior to such date.

17. Retirement Plan Limits for 2021

The cost-of-living and required statutory limit adjustments applicable to retirement plans for 2021 are as follows:[76]

Contribution limit for defined contribution plan under Code § 415(c)	**$58,000** (*$1,000 increase*)
Benefit limitation for defined benefit plan under Code § 415(b)	**$230,000** *(unchanged)*
Elective deferral limit under Code § 402(g)	**$19,500** *(unchanged)*
Age 50 catch-up contribution limit under Code § 414(v)	**$6,500** *(unchanged)*
Age 50 catch-up contribution limit for SIMPLE plan	**$3,000** (*unchanged*)
Contribution limit for a Code § 457(b) eligible deferred compensation plan	**$19,500** (*unchanged*)
Annual compensation limit under Code § 401(a)(17)	**$290,000** (*$5,000 increase)*
HCE compensation definition dollar threshold[77]	**$130,000**[78] *(unchanged)*
Dollar threshold limitation for key employee determination in top-heavy plan	**$185,000** *(unchanged*)
Contribution limit for a SIMPLE retirement plan	**$13,500** *(unchanged)*

[75] The proposed regulations clarify that distributees who do not request an extension for the income tax filing deadline may be treated as though they had requested an extension for purposes of the rollover deadline if certain requirements are satisfied.

[76] IRS Notice 2020-79.

[77] This definition of highly compensated employee is also used in several welfare plan nondiscrimination tests.

[78] For the 2021 plan year, an employee who earns more than $130,000 in 2020 is an HCE. For the 2022 plan year, an employee who earns more than $130,000 in 2021 is an HCE.

Participant compensation eligibility amount under Code § 408(k)(2)(C) for simplified employee pension (SEP) employer contributions	**$650** *($50 increase)*

18. Health Savings Account Limits

The IRS has announced the maximum contribution levels for HSAs and out-of-pocket spending limits for HDHPs that must be used in conjunction with HSAs for 2021.[79] The relevant amounts for 2021 are as follows:

Annual HSA contribution limit	**$3,600 –** individual coverage *($50 increase)* **$7,200 –** family coverage *($100 increase)*
Catch-up contribution limit over age 55	**$1,000** *(no change)*
Maximum HDHP out-of-pocket limit	**$7,000 –** individual coverage (*$100 increase*) **$14,000 –** family coverage (*$200 increase*)
HDHP minimum deductible	**$1,400 –** individual coverage (*no change*) **$2,800 –** family coverage (*no change*)

19. Flexible Spending Account and Qualified Transportation Fringe Benefit Limits

The IRS has announced the maximum contribution levels for health care and dependent care FSAs.[80] In addition, the IRS announced the limit on the total amount of payments and reimbursements under a QSEHRA. The IRS also announced the monthly limitation under Code Section 132(f)(2)(A) regarding the aggregate fringe benefit exclusion amount for transportation in a commuter highway vehicle and any transit pass as well as the monthly limitation under Code section 132(f)(2)(B) regarding the fringe benefit exclusion amount for qualified parking. The relevant amounts for 2021 are as follows:

Annual contribution limit for Health Care FSA	**$2,750** *(unchanged)*
Maximum cafeteria plan carryover amount (if permitted)	**$550** (*unchanged*)
Annual contribution limit for Dependent Care FSA	**$5,000**[81] *(unchanged)*
QSEHRA Payment and Reimbursement Limit	**$5,300 –** individual coverage (*$50 increase*) **$10,700 –** family coverage

[79] Rev. Proc. 2020-32.

[80] Rev. Proc. 2020-45.

[81] The maximum tax-exempt benefits for dependent care assistance is not indexed for inflation and remains unchanged at $5,000. The maximum for a dependent care flexible spending account is $2,500 (rather than $5,000) for married taxpayers filing separately.

	(*$100 increase*)
Monthly contribution fringe benefit exclusion limit for Qualified Mass Transportation and Qualified Parking	**$270** *(unchanged)*

B. Department of Labor

This section of the report focuses on DOL guidance issued over the last year under ERISA. The guidance in this section does not apply to plans that are not subject to ERISA, such as non-electing church plans, but may provide useful information to and suggest "best practices" for such plans.

1. Final Electronic Disclosure Rules

In May, the DOL issued final regulations[82] that provide new safe harbors for electronic disclosure of documents. The final regulations were effective July 27, 2020 and only apply to retirement plans. In addition, the final regulations only apply to documents required by ERISA or DOL regulations and not to disclosures required under the Code.

The final regulations provide two new safe harbors for electronic disclosure – the notice and access safe harbor and the direct email safe harbor. The new safe harbors are in addition to the existing safe harbor regulations. Accordingly, ERISA plans are permitted to continue relying on the existing DOL safe harbors for electronic delivery.

Under both new safe harbors, participants and beneficiaries entitled to receive covered documents must either provide the employer or plan administrator with an electronic address (e.g., an e-mail address or internet-connected smartphone number) or have an e-mail address assigned by the employer for this purpose. If an employee terminates employment, then the plan administrator must take steps to ensure that the individual's electronic address is still valid or obtain a new electronic address. In addition, if an electronic address becomes inoperable, then the plan administrator must promptly take steps to fix the problem or treat the individual as if he or she opted out of electronic delivery while taking reasonable steps to fix the problem.

A plan administrator would be required to furnish a one-time paper notice that some or all covered documents will be furnished electronically. The notice must be sent to current employees before using the safe harbor and to all new employees. The final regulations specify the information that must be included in the notice. Participants who prefer to receive the disclosures on paper will be permitted to opt out of electronic disclosure.

Under the notice and access safe harbor, the plan administrator would be required to provide participants a notice of internet availability by e-mail at the time a covered document is made available on the website. The covered document must remain available on the website for at least a year or, if later, until it has been superseded by a subsequent

[82] 85 Fed. Reg. 31,884 (May 27, 2020).

document. The final regulations include a description of the content that must be included in the notice. Although the notice must be furnished separately from other documents, one notice can be issued for several types of covered documents. If one notice is used for several documents, then it must be furnished at least once each plan year and no more than 14 months following the prior notice.

Under the direct email safe harbor, documents may be sent directly to the recipient using the email address provided by the recipient or assigned by the employer for employment-related purposes. Instead of providing a notice of internet availability, the email must satisfy certain requirements set forth in the regulations.

2. Fiduciary Guidance

In 2016, the DOL issued a final rule[83] updating and expanding the definition of the term "fiduciary" under ERISA. The United States Court of Appeals for the Fifth Circuit struck down the DOL's fiduciary rule in 2018, finding that the DOL exceeded its authority in promulgating the rule.[84]

On June 29, 2020, the DOL issued a final rule[85] implementing the Fifth Circuit's vacatur of the 2016 rule by reinstating the regulations in effect prior to the 2016 regulations. The final rule also removes two prohibited transaction exemptions that were published with the 2016 rule and returns the prohibited transaction exemptions that were amended by the 2016 rule to their pre-amendment form.

On the same day, the DOL issued a proposed prohibited transaction exemption[86] that would require fiduciaries to provide investment advice in accordance with three "impartial conduct standards." Under these standards, fiduciaries would be required to provide investment advice that is in the best interest of the investor, accept no more than reasonable compensation, and make no materially misleading statements.

3. Final Rule on Financial Factors in Selecting Plan Investments

On October 30, 2020, the DOL issued a final rule[87] amending the "investment duties" regulation under ERISA. The amendment requires plan fiduciaries to select investments and investment courses of action based solely on "pecuniary" factors and prohibits fiduciaries from subordinating the interests of participants or beneficiaries to other objectives. When choosing investments, the regulations only allow plan fiduciaries to use "non-pecuniary" factors if the fiduciary is unable to decide on an investment using pecuniary factors alone. In this case, the fiduciary is required to document the decision in

[83] 81 Fed. Reg. 20,946 (Apr. 8, 2016).

[84] *Chamber of Commerce v. U.S. Dep't of Labor*, 885 F. 3d 360 (5th Cir. 2018).

[85] 85 Fed. Reg. 40,589 (July 7, 2020).

[86] 85 Fed. Reg. 40,834 (July 7, 2020).

[87] 85 Fed. Reg. 72,846 (Nov. 13, 2020).

the manner set forth in the regulations.[88] Examples of "nonpecuniary" factors include environmental, social, and governance factors.

The regulations are effective January 21, 2021 and generally only apply to prospective investment decisions.

4. Mental Health Parity Self-Compliance Tool

In June, the DOL proposed updates to the Self-Compliance Tool that is intended to enable group health plans, plan administrators, and plan sponsors to determine whether a plan complies with the requirements of the Mental Health Parity and Addiction Equity Act and ERISA.[89] This document would update the Self-Compliance Tool that the DOL issued in 2018 to integrate recent guidance, update compliance examples, include a discussion of best practices for establishing an internal compliance plan, and incorporate additional examples of treatment limitations that may be a warning sign of potential violations.

5. Updated Model COBRA Notice

In May, the DOL issued updated versions of the model COBRA general notice and the model COBRA election notice along with FAQs about the updated notices.[90] The updated notices include additional details about the interaction between Medicare and COBRA. For example, the notices explain the potential advantages to enrolling in Medicare before, or instead of, electing COBRA and that a COBRA election for a Medicare-eligible individual may impact Medicare enrollment and certain out-of-pocket costs.

6. DOL Proposed Regulations on Proxy Voting and Shareholder Rights

The DOL has proposed regulations[91] amending the "investment duties" regulations to provide guidance on how to exercise shareholder rights, including proxy voting. The regulations would clarify sub-regulatory guidance and individual letters issued over the years, which provide that, when voting proxies and exercising shareholder rights, plan fiduciaries must consider factors that may affect the value of plan investments and not subordinate the interests of participants and beneficiaries to other objectives. The DOL is concerned that certain aspects of the sub-regulatory guidance have led to confusion and misunderstanding.

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[88] The final regulations also prohibit an investment from being used as a qualified default investment alternative ("QDIA") if any non-pecuniary factors were used in its selection. Plans have until April 30, 2022 to comply with the special rule for QDIAs. The extended compliance date applies because the final rule prohibits an investment alternative from being used as a QDIA if non-pecuniary factors were used in selecting it, even if it was selected prior to the issuance of the final rule.

[89] *See* and https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/compliance-assistance-guide-appendix-a-mhpaea-proposed-updates.pdf.

[90] *See* https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[91] 85 Fed. Reg. 55,219 (Sept. 4, 2020).

The proposed regulations include provisions that would:

- Require fiduciaries to vote any proxy where the fiduciary prudently determines that the decision would have an economic impact on the plan.

- Prohibit fiduciaries from voting any proxy unless the fiduciary determines the matter has an economic impact on the plan.

- Set forth certain "permitted practices" to allow fiduciaries to adopt certain proxy voting policies and parameters that serve the plan's economic interest.[92]

- If the authority to vote proxies is delegated to an investment manager, the responsible plan fiduciary must require the investment manager to document that the proxy voting decisions or recommendations were based on the expected economic benefit to the plan.

The Church Alliance submitted comments on the proposed regulations to the American Benefits Council ("ABC") for inclusion in the ABC's comment letter on the regulations.[93]

7. Interim Final Rule on Lifetime Income Illustrations

The SECURE Act includes a provision requiring defined contribution plan administrators to provide participants with lifetime income illustrations that show the participant's current account balance both as a single life annuity and a qualified joint and survivor annuity income stream. Plan administrators are required to provide these illustrations annually.

On August 18, 2020, the DOL issued an interim final rule[94] implementing this provision of the SECURE Act. The interim final rule provides that the illustrations can be included in the regular pension benefit statement required under ERISA section 105 or in a separate disclosure. The rule also provides administrators with assumptions that must be used in preparing the illustrations and model language that can be used to satisfy this requirement.

[92] If a fiduciary decides to adopt policies or parameters, then the proposed rule would require the fiduciary to review it at least once every two years and make it available to plan participants.

[93] A copy of the comment letter can be found at: https://www.americanbenefitscouncil.org/pub/?id=BC5223AC-1866-DAAC-99FB-615C75D6525E.

[94] 85 Fed. Reg. 59,132 (Sept. 18, 2020).

C. Internal Revenue Service, Department of Labor, and Health and Human Services Joint Guidance

1. Final Regulations on Disclosure of Price and Cost-Sharing Information

The Agencies jointly issued final regulations[95] requiring most group health plans to make disclosures to participants, beneficiaries, enrollees, and, under certain circumstances, the public. The final regulations apply to insured and self-insured group health plans, other than grandfathered plans, excepted benefits, health care sharing ministries, expatriate plans, short-term limited duration insurance, HRAs, and other account-based plans. The preamble to the final regulations also states that the final regulations do not apply to "Denominational Health Plans."[96]

Specifically, the regulations require group health plans to make advance disclosures of the cost-sharing information specified in the regulations to participants, beneficiaries, and enrollees through an internet-based self-service tool on an internet website and in paper form upon request. Examples of the disclosures that are required to be made are estimated cost-sharing amounts for covered items and services, negotiated rates that plans have agreed to pay in-network providers for covered items and services, and the maximum amount that would be paid to out-of-network providers for items or services.[97] This disclosure requirement is effective for plan years beginning on or after January 1, 2023 for an initial list of 500 items and services and for plan years beginning on or after January 1, 2024 for all items and services required to be disclosed.

The final regulations also require plans to make price transparency information available to the public on an internet website through three machine-readable files that are updated monthly. The three files include disclosure of payment rates negotiated between plans and providers for all covered services, the allowed amount and billed charges for services provided by out-of-network providers, and pricing information for prescription drugs. This disclosure requirement is effective January 1, 2022.

The Agencies impose the ultimate responsibility for the disclosures on plans and not third-party administrators. However, plans may contract with other parties to provide the required disclosure if the plan monitors the other party to ensure the disclosures are timely made. In addition, the final regulations include safe harbors under which a plan will

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[95] 85 Fed. Reg. 72,158 (Nov. 12, 2020).

[96] The Church Alliance submitted a comment letter on the proposed regulations. In the comment letter, the Church Alliance specifically requested that denominational health plans be exempt from these requirements. The Agencies discussed this request in the preamble to the final regulations and included language stating that the requirements do not apply to "Denominational Health Plans." *See* https://church-alliance.org/comment-letters/comment-proposed-health-care-transparency-coverage-regulations-january-29-2020.

[97] The regulations also require plans to provide a notice that includes certain information when disclosures are made. The notice can be provided in paper form or incorporated into the internet-based self-service tool. A model notice was included in the proposed regulations and can be found at https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/transparency-in-coverage-draft-model-disclosure.pdf.

not be considered as failing to comply with the final regulations if the plan acted in good faith and with reasonable diligence under the circumstances set forth in the regulations.

D. Equal Employment Opportunity Commission

1. Update on Wellness Regulations

The Americans with Disabilities Act ("ADA") generally prohibits employers from making disability-related inquiries and medical examinations unless the inquiry or exam is "voluntary" and part of an employee health program available at the employee's worksite. Title II of the Genetic Nondiscrimination Act of 2008 ("GINA") includes an exception to the prohibition on the use of genetic information for voluntary wellness programs that do not condition inducements for employees on the provision of genetic information.

On May 16, 2016, the Equal Employment Opportunity Commission ("EEOC") finalized rules on employer wellness programs under both the ADA and GINA. The final rules generally allow incentives of up to 30% of the cost of self-only coverage for participation in a wellness program.

In October of 2016, the American Association of Retired Persons ("AARP") filed a lawsuit against the EEOC arguing that the 30% incentive is inconsistent with the requirement that the wellness program be "voluntary" under the ADA and GINA. AARP also argued that employees who cannot afford to pay a 30% increase in premiums would be forced to disclose protected information even if they would not otherwise choose to disclose such information.

The U.S. District Court for the District of Columbia ruled[98] in August of 2017 that the EEOC failed to adequately justify its interpretation of the term "voluntary" as permitting a 30% incentive and remanded the rules to the EEOC for reconsideration. The Court decided not to vacate the rules because of concerns that vacating the rules would have "significant disruptive consequences."

In September of 2017, the EEOC filed a status report with the Court stating that it intended to issue proposed rules by August of 2018 and final rules by October of 2019. The EEOC's report also indicated that any amended rule probably would not be applicable until the beginning of 2021 so that employers have time to bring their plans into compliance.

AARP then filed a motion requesting the court to reconsider its decision and vacate the rules. On December 20, 2017, the court vacated the 30% incentive portion of the rules as of January 1, 2019 and directed the EEOC to propose new rules by August 31, 2018, stating that the 2021 timeframe for the new rules is "unacceptable."[99] Consistent with that decision, on December 20, 2018, the EEOC issued final rules removing the incentive section of the ADA regulations at 29 C.F.R. 1630.14(d)(3) effective as of January 1, 2019.

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[98] AARP v. U.S. Equal Employment Opportunity Comm'n, 267 F.Supp.3d 14 (D.D.C. 2017).

[99] *AARP v.* U.S. Equal Employment Opportunity Comm'n, 292 F.Supp.3d 238 (D.D.C. 2017).

Although the ADA's 30% incentive provision has been removed, the other ADA wellness requirements remain in effect, such as the ADA notice requirement.

On June 11, 2020, the EEOC had a public hearing during which the commissioners agreed to proceed with a new proposed rule.[100] The text of the new proposed rule has not been released but a draft of the new proposed rule was discussed during the meeting.[101]

2. <u>Upcoming Religious Discrimination Guidance</u>

On November 17, 2020, the EEOC issued a proposed update to the religious discrimination section of its Compliance Manual,[102] which was last updated in 2008. The updated section would reflect recent case law under Title VII of the Civil Rights Act relating to religious discrimination and the legal protections available to certain religious employers, including the ministerial exception. The proposal is subject to public input until December 17, 2020.

V. LITIGATION

A. Challenges to Church Plan Status

Numerous lawsuits have been filed in the last several years challenging the availability of the ERISA church plan exemption to defined benefit plans sponsored by a number of different religiously affiliated health care systems. In 2017, the U.S. Supreme Court unanimously decided in *Advocate Health Care Network et al. v. Stapleton et al.,*[103] that church plans can be established by church-affiliated organizations (in this case, church-affiliated hospitals) and do not have to be established by the church with which they are affiliated, as plaintiffs were claiming in this and other cases. Although many cases settled after the Supreme Court's decision in *Advocate*, church plan status litigation is not over.

In one recent case, the Eighth Circuit affirmed the district court decision that the plan at issue was a church plan and, therefore, was exempt from ERISA.[104] The Eighth Circuit remanded the case to the district court for a determination as to whether the plaintiffs had standing for their alternate claim that the church plan exemption violates the Establishment Clause of the First Amendment. The district court dismissed the Establishment Clause claim for a lack of standing since the deprivations claimed by the plaintiffs did not establish a concrete injury.[105]

The Church Alliance continues to monitor the progress of church plan status cases.

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[100] *See* https://www.eeoc.gov/newsroom/eeoc-holds-remote-public-meeting-wellness-nprm.

[101] For a transcript of the meeting, see https://www.eeoc.gov/meetings/meeting-june-11-2020-discussion-notice-proposed-rulemaking-wellness-programs/transcript.

[102] *See* https://beta.regulations.gov/document/EEOC-2020-0007-0001.

[103] 137 S. Ct. 1652 (2017).

[104] *Sanzone v. Mercy Health*, 954 F.3d 1031 (8th Cir. 2020).

[105] *Sanzone v. Mercy Health*, No. 4:16 CV 923 CDP, 2020 WL 6483951 (D.C. Mo. Nov. 4, 2020).

B. Fee Litigation

New cases continue to be filed alleging that retirement plan sponsors and committees are breaching their ERISA fiduciary duties to the plan and plan participants by paying excessive and unreasonable fees to retirement plan recordkeepers, administrative service providers, and investment providers. These cases have been filed against large, for-profit companies sponsoring 401(k) plans and college and university 403(b) plans. According to a new analysis from *Bloomberg Law*, class action lawsuits on excess plan fees have increased about fivefold between 2019 and 2020.[106] Bloomberg indicates that the increase in lawsuits is at least in part attributable to the COVID-19 pandemic.

One of the lawsuits involved Portico Benefit Services. Portico Benefit Services was served with a complaint in 2015, alleging poorly performing investment options and excessive plan administration fees. In January 2020, Portico decided to settle the lawsuit because additional litigation was no longer financially prudent or in the best interests of plan members and beneficiaries.[107]

The U.S. Supreme Court may also consider fee litigation involving two 403(b) plans sponsored by Northwestern University. In a Petition for a Writ of Certiorari, the plaintiffs argue that the appeal court's dismissal of their complaint conflicts with other federal appeals decisions involving similar issues, thereby creating a circuit split.[108] The Supreme Court has asked the U.S. solicitor general for an opinion in the case before the justices decide if they will hear it.[109]

C. Housing Alliance Litigation Update

In *Freedom From Religion Foundation v. Lew*,[110] the Freedom from Religion Foundation ("Foundation") challenged the exclusion of the housing allowance from the gross income of a minister on Constitutional grounds. In 2019, after years of litigation, the Seventh Circuit Court of Appeals reversed the district court decision and held that Code section 107(2) is constitutional and does not violate the Establishment Clause.[111] The Foundation announced that it would not seek review of the case by the Supreme Court.[112]

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[106] *See* https://news.bloomberglaw.com/employee-benefits/401k-fee-suits-flood-courts-on-pace-for-fivefold-jump-in-2020.

[107] *See* https://www.porticobenefits.org/NewsEvents/News/2020_01_09_MessageToMembers.

[108] Divane v. Northwestern Univ., 953 F. 3d 980 (7th Cir. 2020), petition for cert. filed, Hughes v. Northwestern Univ. (June 19, 2020).

[109] *Hughes v. Northwestern Univ.*, No. 19-1401, 2020 WL 5882202 (U.S. Oct. 5, 2020).

[110] 983 F. Supp. 2d 1051 (W.D. Wis. 2013). The Freedom From Religion Foundation had filed an identical lawsuit in California prior to filing the complaint in this action.

[111] *Gaylor v. Mnuchin*, 919 F.3d 420 (7th Cir. 2019). The Seventh Circuit agreed with the district court that the Freedom From Religion Foundation and its members that were plaintiffs had standing to sue.

[112] On June 14, 2019, the Foundation announced that although it had full confidence in the merits of its position to challenge the clergy housing allowance, it "did not feel the same confidence" in how the current Supreme Court would rule in the case. However, the Foundation noted that by not pursing the challenge at this time, it was making it "possible

Shortly after the decision, the Humanist Society of Greater Phoenix announced that it planned to challenge the constitutionality of the parsonage allowance.[113] However, it does not appear that this lawsuit has been filed, to date. We are also not aware of any additional lawsuits that have been filed over the last year challenging the housing allowance exemption.

D. Form 990 Litigation Update

Nonbelief Relief, the charitable arm of the Freedom from Religion Foundation, filed a complaint[114] in the U.S. District Court for the District of Columbia on October 11, 2018, after its tax-exempt status was automatically revoked. The IRS revocation notice said the organization failed to file a Form 990 information return for three consecutive years. In its complaint, Nonbelief Relief said it objects to having to file Form 990 while churches and church-related organizations do not.

The IRS filed a motion to dismiss the lawsuit. On January 10, 2020, the court dismissed the legal challenge.[115] Because Nonbelief Relief was no longer a tax-exempt organization and had not expressed an intent to reapply, the court determined that the injury was not ongoing or imminent and that Nonbelief Relief lacked standing to obtain the requested relief.

The court stated that the decision does not mean the church exemption from filing Forms 990 is immune from judicial review and suggested a few ways in which Nonbelief Relief could bring another suit. After the decision, Nonbelief Relief indicated that it will be refiling its challenge in the future after "jumping through some legal hoops."[116]

E. Pharmacy Benefit Manager Preemption Litigation

In *Rutledge v. Pharmaceutical Care Management Association*,[117] the Court of Appeals for the Eighth Circuit held that ERISA preempts an Arkansas state law that regulates maximum allowance cost ("MAC") lists created by pharmacy benefit managers ("PBMs"). MAC lists generally establish reimbursement rates at which PBMs will reimburse pharmacies dispensing generic drugs. The PBM in the case argued that the Arkansas law regulates plan administration and is, therefore, preempted by ERISA. The State of Arkansas argued that the law simply regulates the PBM reimbursement rates and is, therefore, protected from ERISA preemption.

Arkansas submitted a petition for a writ of certiorari with the U.S. Supreme Court. The U.S. Solicitor General recommended that the case be heard by the Court and that the Court decide

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for another challenge to be taken in the future" if the make up of the Supreme Court changed. (*See* https://ffrf.org/news/news-releases/item/34911-clergy-housing-allowance-boondoggle-continues-for-now).

[113] *See* https://www.azmirror.com/2019/07/19/phoenix-humanists-to-claim-tax-break-to-tax-code/.

[114] *Nonbelief Relief, Inc. v. Kautter*, No. 18-cv-2347 (D.D.C. 2018).

[115] *Nonbelief Relief, Inc. v. Rettig*, No. 18-2347 (TJK), 2020 WL 122974 (D.D.C. January 10, 2020).

[116] *See* https://ffrf.org/news/news-releases/item/36797-breaking-news-ffrf-to-continue-challenging-church-tax-benefits.

[117] *Rutledge v. Pharm. Care Mgmt. Ass'n*, 891 F. 3d 1109 (8th Cir. 2018).

in favor of Arkansas. The Court granted the writ of certiorari on January 10, 2020 and heard oral arguments in October.[118] A decision has not been issued in the case.

VI. OTHER

A. Church Alliance State Law Working Group

Following the enactment of a Rhode Island state law requiring reporting for church defined benefit plans, the Church Alliance Core Lawyer Working Group decided to create a State Law Monitoring Work Group. This group reviews and monitors state law developments impacting church plans to determine whether the Church Alliance needs to comment or take other action.

B. Social Security Cost of Living Adjustments

On October 13, 2020, the Social Security Administration announced the cost-of-living adjustments for 2021.[119] The cost-of-living adjustments for 2021 are as follows:

Increase in monthly benefits	1.3%
Maximum earnings subject to Social Security taxes	$142,800 (*$5,100 increase*)
Maximum earnings subject to Medicare taxes	Unlimited
Exempted earnings amount:[120] • In year prior to year during which retiree reaches full retirement age • In year during which retiree reaches full retirement age	 $18,960 *($720 increase)* $50,520 *($1,920 increase)*

[118] *Id.*, *cert. granted*, 140 S. Ct. 812 (U.S. Jan. 10, 2020) (No. 18-540).

[119] Social Security Press Release, October 13, 2020, https://www.ssa.gov/news/press/releases/2020/#10-2020-1.

[120] The "exempted earnings amount" is the amount of annual earnings a retiree who is under full retirement age can earn without a reduction in Social Security benefits. There is no reduction for a retiree who has attained full retirement age.

APPENDIX A – SUMMARY OF RETIREMENT PLAN CHANGES IN THE SECURE ACT AND OTHER YEAR-END LEGISLATION

On December 20, 2019, President Trump signed into law the Further Consolidated Appropriations Act, 2020 (the "2020 Spending Bill"). Components of the 2020 Spending Bill, including the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act"), the Bipartisan American Miners Act of 2019, and the Taxpayer Certainty and Disaster Tax Relief Act of 2019, include changes to the Internal Revenue Code (the "Code") and the Employee Retirement Income Security Act ("ERISA") that impact retirement plans. The following is a brief summary of the legislative changes and should not be construed as legal advice to address particular situations. It was prepared shortly after passage of the 2020 Spending Bill.

Provision	Effective Date
Required Beginning Date: The age at which required minimum distributions are required to begin has increased from 70½ to 72. This change does not apply to qualified charitable distributions from IRAs, nor does it apply for purposes of required actuarial increases in a defined benefit plan for active service after reaching age 70½.	Distributions required to be made after December 31, 2019 to individuals who attain age 70½ after December 31, 2019.
Required Distributions for Designated Beneficiaries: IRAs and defined contribution plans are subject to required minimum distribution rules for distributions to designated beneficiaries after the death of the IRA owner/participant. The SECURE Act requires, with important exceptions, that these distributions be completed by the end of the 10th calendar year following the IRA owner's/participant's year of death. Exceptions apply if the designated beneficiary is a surviving spouse, disabled, chronically ill, not more than ten years younger than the IRA owner/participant, or a minor child of the IRA owner/participant. The new rule also does not apply to certain commercial annuities in effect on December 20, 2019. The 5-year rule that applies when there is no "designated beneficiary" continues to apply. This change eliminates the common planning technique referred to as the "stretch IRA."	Distributions by reason of the death of an IRA owner/ participant after December 31, 2019 (December 31, 2021 for governmental plans and certain collectively bargained plans).
In-Service Distributions at Age 59½ for Pension Plans and Governmental 457(b) Plans: Defined benefit plans, money purchase pension plans and governmental 457(b) plans may now permit in-service distributions at age 59½. Previously, the minimum age for in-service distributions from these plans was 62.	Plan years beginning after December 31, 2019.

Provision	Effective Date
This change was included in the Bipartisan American Miners Act of 2019 rather than the SECURE Act. Thus, it is not clear if the amendment timing provisions of the SECURE Act (see "Period for Amending Retirement Plans" below) also apply to plan amendments implementing this change. Further guidance is needed on this point.	
Penalty-Free Plan Withdrawals for Birth or Adoption: A new penalty-free "qualified birth or adoption distribution" of up to $5,000 may be allowed from a qualified defined contribution plan, IRA, 403(b) plan, 403(a) plan, or governmental 457(b) plan. The distribution must be taken within one year of the birth or finalized legal adoption of a child who is under age 18 or physically or mentally incapable of self-support. The distribution would be exempt from the 10% early distribution penalty, the 20% mandatory withholding requirement, and the Code § 402(f) notice requirement. A "qualified birth or adoption distribution" can be contributed to a qualified defined contribution plan, 403(b) plan, 403(a) plan, governmental 457(b) plan or an IRA. There is no time limit on when that contribution must occur. Although some guidance has been issued, additional guidance is needed.	Distributions made after December 31, 2019.
Special Disaster-Related Rules for Use of Retirement Funds: • "Qualified disaster distributions" up to $100,000 are not subject to the 10% penalty tax under Code § 72(t) and can be included in income ratably over a 3-year period. Such distributions can be rolled back into a qualified plan or an IRA for up to 3 years after the distribution. Such distributions can be made without regard to rules that otherwise restrict distributions and are not eligible for rollover. Applies to distributions taken on or after the first day of the incident period of a qualified disaster and before June 17, 2020. • If a hardship distribution was taken for the purchase or construction of a principal residence but was not used due to a qualified disaster, such amounts can be re-contributed. Applies to hardship distributions taken during the period beginning on the date that is 180 days before the first day of the incident period and ending on the date that is 30 days after the last day of the incident period.	The relief applies to disasters that occurred prior to December 20, 2019 and are declared major disasters during the period beginning January 1, 2018 and ending February 18, 2020. Plan amendments to implement these provisions are required on or before the last day of the first plan year beginning on or after January 1, 2020 (January 1, 2022 for governmental plans).

Provision	Effective Date
• The maximum loan limit for qualified individuals is increased to the lesser of (1) \$100,000, or (2) the greater of 100% of the employee's present value of the nonforfeitable accrued benefit or \$10,000. Applies from December 20, 2019 to June 17, 2020. A "qualified individual" is an individual whose principal place of abode is located within a qualified disaster area and who has sustained an economic loss by reason of such qualified disaster. Loan repayments for "qualified individuals" can be extended for up to 1 year (or if later, until 180 days after enactment of the Disaster Relief Act, June 17, 2020). Any subsequent loan repayments will be appropriately adjusted to reflect the delay in the due date and any interest that accrues during such delay. Applies to due dates occurring during the period beginning on the first day of the incident period and ending on the date that is 180 days after the last day of such incident period.	
Automatic Extension of Filing Deadlines Related to Certain Disasters: Certain deadlines for filing tax returns, paying taxes and performing certain other acts will be automatically extended by 60 days for certain individuals affected by federally declared disasters. An automatic extension also applies to the deadline for making contributions to a qualified retirement plan, completing rollovers, withdrawing excess IRA contributions and recharacterizing IRA contributions.	Applies to federally declared disasters declared after the date of the Disaster Relief Act, December 20, 2019.
Period for Amending Retirement Plans: The SECURE Act provides an extended period for amending plan provisions affected by the SECURE Act, known as a "remedial amendment" period, until the last day of the first plan year beginning on or after January 1, 2022. The applicable period for governmental and collectively bargained plans is the last day of the first plan year beginning on or after January 1, 2024. In addition, the SECURE Act confirms that amendments made during the remedial amendment period will not result in an impermissible "cut-back" of benefits. Exceptions: Amendments for disaster-related distributions and loans have an earlier deadline. See "Special Disaster-Related Rules for Use of Retirement Funds" above. Also, further guidance is needed regarding the amendment deadline for age 59½ in-service distributions from pension plans and governmental 457(b) plans (see "In-Service Distributions at Age 59½ for Pension Plans and Governmental 457(b) Plans" above).	December 20, 2019.

Provision	Effective Date
Safe Harbor 401(k) Plans: • For safe harbor plans that utilize nonelective safe harbor contributions (rather than safe harbor matching contributions), the annual safe harbor notice requirement has been eliminated. • A plan can be amended to become a nonelective safe harbor plan for a plan year (1) any time before the 30th day before the end of the plan year; or (2) on or after the 30th day before the end of the plan year, if the amendment is made by the last day for distributing excess contributions for the plan year (the close of the following plan year), and the nonelective contribution is at least 4%.	Plan years beginning after December 31, 2019.
Automatic Enrollment: For plans that utilize the automatic enrollment safe harbor design (qualified automatic contribution arrangements, or QACAs), the maximum percentage to which an automatic deferral can be increased has changed from 10% to 15%. However, for the first year of plan participation, 10% is still the maximum automatic deferral percentage.	Plan years beginning after December 31, 2019.
Long-Term Part-Time Employees: • 401(k) plans that impose a service requirement must permit participation by an employee who has worked 3 consecutive 12-month periods in which the employee completes at least 500 hours of service during each of those periods. This rule is in addition to the existing 1-year/1,000 hour rule. • An employer is not required to make nonelective or matching contributions on behalf of employees who become eligible under the new rule, even if such contributions are made to other eligible plan participants. An employer can also exclude such employees from testing under the nondiscrimination (including safe harbor), coverage and top-heavy rules. • For determining vesting in employer contributions, each 12-month period for which an employee has at least 500 hours of service must be counted as a year of service for vesting purposes in the plan. • The new rule does not apply to collectively bargained plans.	Plan years beginning after December 31, 2020, except that 12-month periods of service prior to January 1, 2021 will not be taken into account.

Provision	Effective Date
Increased Penalties for Failure to File Certain Retirement Plan Returns: Several penalties have been increased for failures to file certain retirement plan returns or to provide required statements. • Form 5500: The penalty for failure to file a Form 5500 is increased from $25 a day to $250 a day with the maximum penalty for any failure increased from $15,000 to $150,000. • Form 8955-SSA: The penalty for failure to file a registration statement for deferred vested participants (Form 8955-SSA) is increased from $1 to $10 a day for each plan participant with respect to whom the failure applies with the maximum penalty imposed for a plan year increased from $5,000 to $50,000. Failures with respect to reporting changes in status of plan participants on the Form 8955-SSA are also increased from $1 to $10 a day for each participant with respect to whom the failure applies, with the maximum penalty imposed for a plan year increased from $1,000 to $10,000. • Withholding Notice: The penalty for failure to provide required withholding notices is increased from $10 to $100 per each failure with the maximum penalty increased from $5,000 to $50,000 for the total combined failures by a person or entity during a calendar year.	Applies to returns, statements, and notifications required to be filed, and notices required to be provided, after December 31, 2019.
Plan Loan Limitations: Plans are not allowed to use credit card or similar arrangements for distribution of plan loan funds.	Loans made after December 20, 2019.
Small Employer Tax Credits for New Plans: • Employers with less than 100 employees are eligible to receive tax credits for three years equal to 50% of certain costs paid or incurred in connection with starting a retirement plan. The $500 cap on these credits has been increased to $5,000 in certain circumstances. • Employers with less than 100 employees that add an automatic enrollment feature are eligible for a new tax credit of up to $500 for each of the first three years that automatic enrollment is added to the plan.	Taxable years beginning after December 31, 2019.

Provision	Effective Date
Relief for Closed Defined Benefit Plan: Defined benefit pension plans that are "closed" to new hires but in which current participants continue to accrue benefits may be unable to satisfy certain nondiscrimination, coverage and participation requirements. The SECURE Act provides relief that results in satisfaction of these requirements and also provides relief for plans that are frozen or that discontinue certain benefits rights, or features.	December 20, 2019, but a plan sponsor can elect to apply the relief retroactively to plan years beginning after December 31, 2013.
Portability of Lifetime Income Options: Qualified defined contributions plans, 403(b) plans, and governmental 457(b) plans can permit participants to take distributions of a "lifetime income investment" (generally, an annuity option) when that investment is no longer an authorized investment option in the plan. The investment can be rolled over to an IRA or taken as a distribution in kind, even if there has not been a distributable event. The distribution will be allowed within 90 days prior to the date such "lifetime income investment" is no longer authorized to be held as an investment option under the plan.	Plan years beginning after December 31, 2019.
Special Rule for Difficulty of Care Payments Excluded from Gross Income: Certain "qualified foster care payments" include "difficulty of care payments" which are excluded from income. The SECURE Act permits difficulty of care payments to increase the IRA contribution nondeductible limit. For defined contribution plans, difficulty of care payments will increase compensation for 415 purposes. A plan contribution based on this increase is treated as an after-tax contribution and a plan does not fail other Code requirements by permitting such contribution.	For IRAs, effective for contributions after December 20, 2019. For defined contribution plans, effective for plan years beginning after December 31, 2015.
Fiduciary Safe Harbor for Selection of Annuities: The SECURE Act provides safe harbor guidelines for plan fiduciaries that select lifetime income options for their defined contribution plans (insured options only; annuities provided by a plan are not covered). The provision describes the required considerations for this relief, including the representations that must be obtained to confirm an insurer's financial capability. There is no requirement to select the lowest cost insurer, but the fiduciary must consider the value of the contract, its features and benefits, and the financial strength of the insurer. Fiduciaries that comply with the applicable requirements shall not be liable for losses resulting from an insurer's inability to satisfy its financial obligations.	December 20, 2019.
Deadline for Plan Adoption: An employer will be treated as having adopted a stock bonus, pension, profit-sharing, or annuity plan as of	Applies to plans adopted for taxable

Provision	Effective Date
the last day of a taxable year if such plan is adopted by the due date (including extensions) for the employer's tax return of the applicable year.	years beginning after December 31, 2019.
Increased Minimum Filing Penalties for Failure to File Tax Return or to Pay Tax: Unless reasonable cause can be shown for the failure, the minimum tax penalty for failure to file a tax return on time will not be less than the lesser of $435 or 100% of the amount required to be shown as tax on the applicable return. The $435 amount is indexed and adjusted with inflation.	Applies to returns with a due date (including extensions) after December 31, 2019.
Combined Form 5500 Reporting for Certain Plans: The Departments of Treasury and Labor are directed to modify the Form 5500 filing rules to permit consolidated reporting for defined contribution plans that have the same trustees, the same one or more named fiduciaries, the same plan administrator, the same plan years and the same investments or investment options.	The modification must be implemented not later than January 1, 2022 and shall apply to returns and reports for plan years beginning after December 31, 2021.
Lifetime Income Disclosure: Defined contribution plans subject to ERISA are required to provide a lifetime income disclosure in one benefit statement during a 12-month period. • The lifetime income disclosure must describe the amount of monthly lifetime income stream payments the participant would be eligible to receive from the plan with respect to the participant's total benefits accrued. • Within one year of the enactment of the SECURE Act (thus by December 20, 2020), the DOL is to issue a model lifetime income disclosure notice and to prescribe assumptions and rules with respect to determining the monthly payments. This guidance has now been issued. Plan fiduciaries, plan sponsors, and other persons will not have liability under ERISA solely by reason of actual plan benefit payments being less than past projected benefit payments.	Applies with respect to benefit statements furnished more than 12 months after the latest of the DOL's issuance of: (1) interim final rules, (2) the model disclosure notice, or (3) the assumptions to be used in projecting lifetime income.
Termination of 403(b) Custodial Accounts: IRS and the Department of the Treasury are directed to issue guidance that will permit a Code § 403(b)(7) custodial account to be distributed in kind to a participant or beneficiary to complete the termination of the Code § 403(b)(7) custodial account arrangement. (Code § 403(b)(1) annuity contract	The guidance will be retroactively effective for taxable years beginning after December 31, 2008.

Provision	Effective Date
arrangements can already be terminated through distribution of annuity contracts to participants and beneficiaries.) For the distributed custodial account to maintain its tax-deferred status, it must continue to meet the Code § 403(b) requirements in effect at the time of the distribution. IRS and Treasury are directed to issue the required guidance within 6 months of December 20, 2019. This guidance has now been issued.	
Participation by Non-QCCOs in Church 403(b)(9) Retirement Income Account Arrangements: The SECURE Act clarifies that church-affiliated employers that are treated as non-qualified church-controlled organizations ("non-QCCOs") under Code § 3121(w)(3)(B) are eligible to participate in Code § 403(b)(9) church retirement income account arrangements. (Examples of non-QCCOs are church-affiliated colleges, universities, hospitals, nursing homes and retirement centers whose facilities or services are offered for sale to the general public <u>and</u> which normally receive more than 25% of their support from governmental sources or receipts from the performance of such services or the furnishing of such facilities.) Churches (*i.e.*, local houses of worship), qualified church-controlled organizations (any church-affiliated organization that is not a non-QCCO), and ordained, commissioned or licensed ministers (regardless of their source of compensation) are also eligible to participate in Code § 403(b)(9) arrangements.	Years beginning before, on or after December 20, 2019.
Multiple Employer Plans; Pooled Employer Plans: • Unrelated employers can participate in a multiple employer defined contribution plan that is treated as a single employer plan, provided a "pooled plan provider" is utilized to administer the plan. These plans are referred to as "pooled employer plans." Many requirements apply to pooled plan providers and the operation of pooled employer plans. • Currently, multiple employer plans are subject to a rule that the entire plan can be disqualified if one participating employer violates plan qualification rules. This is referred to as the "one bad apple" rule. The SECURE Act generally eliminates the one bad apple rule for multiple employer plans that (i) are maintained by employers that have a common interest other than having adopted the plan; or (ii) have a pooled plan provider.	Plan years beginning after December 31, 2020.

Provision	Effective Date
IRA Contributions Based on Non-Tuition Fellowship and Stipend Payments: IRA contributions are based on compensation included in gross income, including special rules for spouses. The SECURE Act expands the definition of compensation to include amounts paid to an individual to aid the individual's pursuit of graduate or postdoctoral study.	Taxable years beginning after December 31, 2019.
Post-70 ½ IRA Contributions and Distributions to Qualified Charities: Currently, individuals who have attained age 70½ before the end of a year may not make contributions to a traditional IRA (other than certain rollover contributions). In addition, IRA owners who have attained age 70½ may direct distributions to qualified charities on a tax-free basis up to $100,000 annually. The SECURE Act removes the age 70½ limitation so that eligible persons older than age 70½ may continue to contribute to a traditional IRA. However, the exclusion for distributions to qualified charities is reduced by a formula reflecting contributions to a traditional IRA made after attaining age 70½. This provision does not apply to Roth IRAs.	Applies to IRA contributions and to distributions from IRAs to qualified charities for taxable years beginning after December 31, 2019.
PBGC Premiums for "CSEC" Plans: All plans subject to Title IV of ERISA (generally, defined benefit pension plans) pay insurance premiums to the Pension Benefit Guaranty Corporation. Currently, covered plans sponsored by cooperatives and small employer charities ("CSEC") pay the same premiums that apply to other covered plans. The SECURE Act provides relief to CSEC plans by permitting the payment of lower premium rates than apply generally, by using rules that applied before 2006.	Premiums payable for plan years beginning after December 31, 2018.
Community Newspaper Plan Funding Relief: Certain community newspaper plans can elect alternative minimum funding standards.	Plan years ending after December 31, 2017.