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Benefits Year in Review and a Look Ahead to the Upcoming Year

Presentation for:
Employee Benefits Academy
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Scott's practice focuses on assisting businesses implement and maintain valuable executive compensation arrangements and employee benefits.

Scott is a member of the firm's Employee Benefits group, and has offices in Dallas and Atlanta. Scott works on all legal aspects of executive compensation and employee benefits, as well as ERISA litigation matters. His practice includes working with businesses to put in place and maintain executive employment agreements and deferred compensation arrangements, qualified retirement plans and health and welfare plans. He helps lead the firm's Health Care Reform initiative. Scott regularly advises clients on issues involving deferred compensation (including Internal Revenue Code Sections 409A, 162(m) and 280G). He has also worked with a number of companies in designing and implementing cash balance plans and other qualified retirement plans, including 401(k) plans. Scott works closely with the fiduciary administrative committees of clients' benefit plans and helps them through the murky waters of ERISA's fiduciary requirements. He also advises on the employee benefit aspects of corporate transactions and financings.

Scott has significant experience in agency inquiries concerning employee benefit plans, including inquiries and audits by the Internal Revenue Service, Department of Labor and Pension Benefit Guaranty Corporation. He also regularly provides substantive support to ERISA litigation matters, including Enron-like fiduciary breach litigation and retiree medical claims. Scott is also experienced in general governance matters and the securities aspects of employee benefits.

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Kelly practices in the tax group with a concentration in the area of executive compensation and employee benefits.

She has worked with both public and private companies on an array of employee benefit matters, focusing on qualified retirement plans, health and welfare plans and executive compensation arrangements. Her experience includes helping clients navigate and comply with the complex and numerous legal requirements associated with the administration of equity compensation and employee benefit plans and advising companies on fiduciary duties with respect to qualified retirement plans.

She works with entities on all stages of benefit plan matters, including advising companies on the design and implementation of new plans, drafting documents, counseling companies on the maintenance and correction of plans and finally, assisting in merging or termination of plans. She is experienced in design and implementation of employee stock ownership plans (ESOPs) as well as ESOP transactions.

Michelle Lewis

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Michelle concentrates her practice in the areas of health and welfare plans, qualified retirement plans, and executive deferred compensation plans.

She delivers insightful and practical advice to clients in addressing a broad spectrum of employee benefit issues, including drafting plan documents, preparing IRS submissions, resolving ERISA and Internal Revenue Code compliance issues, advising on benefit claims and appeals, addressing various litigation issues, and negotiating employee benefit vendor contracts and HIPAA business associate agreements.

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Upcoming 2020 Webinars

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- **2021 webinars**:
  - **January 28**: Cafeteria Plan Mid-Year Election Change Rules
  - **February 25**: Deferred Compensation Arrangements - Key 409A Issues
  - **March 25**: Legal Updates on DOL Guidance for 401k Investments and Fiduciary Rule
  - **April 22**: ERISA Fiduciary Litigation Update
  - **May 20**: Public Company ESOP Issues
  - **June 24**: Key Issues for HSAs, HRAs and FSAs
  - **July 22**: Employment and Benefits Issues in M&A Transactions
  - **August 26**: Basics and Update on IRS and DOL Correction Programs
  - **September 23**: Self-Directed IRAs and investments relating to the same
  - **October 28**: Navigating controlled group and affiliated service group rules
  - **November 18**: Year-End Benefit Plan Requirements/End of Year Benefits "To Do" List
  - **December 16**: Benefits Year in Review and a Look Ahead to the Upcoming Year
- Sign up here: Employee Benefits Academy Webinar Series - Subscribe

Discussion Overview

- Qualified retirement plan changes for 2021
- Welfare plan changes for 2021
- How a Biden administration might impact retirement plans
- How a Biden administration might impact welfare plans
- DOL investment guidance, including ESG investing, and DOL audit activity
- IRS priority guidance for retirement plans
- Workplace and benefits considerations due to coronavirus pandemic

Changes to Qualified Retirement Plans for 2021

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SECURE Act Changes for 2021:

- Plan Sponsors must allow certain long-time part-time employees to participate in defined contribution plan
  - Plan must have dual eligibility requirements where an employee must complete either one-year of service with 1,000 hours or three consecutive years of service where the employee completes at least 500 hours of service.
  - Can exclude employees who complete 3 years of 500 hours from matching & nonelective contributions. If you provide employer contributions to this group, a year of vesting service is reduced to 500 hours per year (not typical 1,000 hours of service).
  - Flexibility in excluding employees from nondiscrimination, coverage and top heavy testing.
  - IRS issued guidance in September in the form of Q&A (Notice 2020-68)

Changes to Qualified Retirement Plans for 2021 (con't)

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SECURE Act Changes for 2021:

- Lifetime Income changes for defined contribution plans:
  - Annual benefit statements must include a lifetime income disclosure describing the monthly payments the participant would receive if the participant's total account balance was paid as a single life annuity and qualified joint and survivor annuity.
    - DOL issued Interim Final Rule in September, 2020 to take effect on September 18, 2021.
    - Interim Final Rule requires specific language/explanations and optional model language for annual benefit statements
  - Fiduciaries can be protected from liability for selection of insurance provider for a Guaranteed Retirement Income Contract ("GRIC")
  - Greater portability of "lifetime income investments"
- Expands eligibility for small employers to participate in multiple employer plans

Welfare Plan Changes for 2021

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- CARES Act
  - Expanded health FSAs to allow reimbursement for non-prescription drugs and feminine care products
    - Review cafeteria/flexible benefit plan terms to confirm whether an amendment is needed
    - Due to prior IRS guidance, some plans may have a specific exclusion for non-prescription drugs
  - Other changes – consider whether to extend into 2021
    - Waived deductibles for telemedicine permitted for HSA-eligible participants into the 2021 plan year
    - Coverage for COVID-19 related treatment

Welfare Plan Changes for 2021 (con't)

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- IRS Notice 2020-29
    - Allowed mid-year changes to health benefits, health FSAs and/or dependent care FSAs without a change in status event
        - Optional for plan sponsors; could choose to offer for some or all covered benefits (e.g., offer for FSA but not health plan enrollment)
    - Allowed extension of plan year or grace period ending in 2020 through December 31, 2020
- IRS Notice 2020-33
    - Increased health FSA carryover from $500 to $550, and indexed to inflation going forward
- Plan amendments required by December 31, <u>2021</u>
    - Can be retroactive to January 1, 2020 so long as eligible employees are informed of the changes

Welfare Plan Changes for 2021 (con't)

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- EBSA Disaster Relief Notice 2020-01
  - Extends deadlines to furnish certain required notices (including SPDs, SMMs) so long as there is a good faith effort to furnish as soon as administratively practicable
- DOL, EBSA, IRS and Treasury Joint Guidance
  - Tolls time limits on certain participant actions until the end of the "outbreak period"
    - Special enrollment
    - COBRA notification of a qualifying event, election, and payment
    - Claims submissions, appeals, and external review request deadlines
- The "outbreak period" is defined as beginning March 1, 2020 and ending 60 days after the end of the declared COVID-19 national emergency (or other date identified by EBSA)
  - Will extend into 2021

Biden Administration Impact on Retirement Plans

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- Appointed Jared Bernstein to serve on Biden's Council of Economic Advisors
  - Bernstein is viewed as an ESOP proponent to help wealth inequality
- Offer more tax credits for small businesses to sponsor 401(k) plans
- Change tax treatment for pre-tax contributions to 401(k) plans
  - Replace tax deduction with a flat tax credit for contributions
  - Contributions would be included in gross income and proposal provides for a 26% refundable tax credit for each $1 contributed
- Discussion around requiring employers who do offer 401(k) plans provide some payroll deduction and deposit into individual retirement accounts or participate in a state-run IRA program

Biden Administration Impact on Retirement Plans (con't)

- Offer ability to save for retirement for family caregivers
  - Proposal would allow family caregivers to make catch-up contributions to retirement accounts, even if they are not earning an income
- Proposes to pass Butch Lewis Act
  - Passed in the House in 2019 to provide funding and loans to underfunded multiemployer pension plans
- Supports tax on financial transactions
  - Implement tax when a security is bought or sold – which would impact securities bought and sold within retirement plans

SECURE Act 2.0 House Bill

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- House bill introduced in October referred to as the SECURE Act 2.0
  - Increase Required Beginning Date to age 75
  - Reduce penalty tax from 50% to 25% for failing to timely take required minimum distributions
  - Eliminate required minimum distributions for an individual with aggregated retirement account balances that do not exceed $100,000
  - Require new plans to automatically enroll participants at 3%
  - Add an age 60 catch-up contribution provision to contribute an additional $10,000
  - Provide guidance/opportunity for companies to make matching retirement plan contributions for participants making qualified student loan payments

SECURE Act 2.0 House Bill (con't)

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- Provide for multiple employer plans for 403(b) plans so that non-profit companies can consolidate plans (or join a plan) to provide retirement options for employees
- Make changes to the Saver's Credit to increase the credit and maximum income eligibility amount
- Provide a safe harbor for employers to correct elective deferral failures to their qualified retirement plan
- Expand IRS's correction program to provide that more types of errors can be corrected without IRS approval
- Create a national, online database or lost participant accounts managed by the PBGC so employees can find lost accounts

Biden Administration Impact on Welfare Plans

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- COVID-19 is expected to be a top priority
  - Expect expanded testing and vaccine programs
- Possible expansion of the ACA (or elimination)
  - Supreme Court heard oral arguments on the ACA on November 10 and is expected to issue its ruling in *California v. Texas* by mid-2021
    - The case centers on whether the individual mandate is unconstitutional without an associated tax penalty, and whether the individual mandate can be separated from the rest of the law if it is found to be unconstitutional
    - Oral arguments created a general expectation that the Court will generally preserve the law. A decision striking down all, or significant portions, of the law could have wide-ranging implications

Biden Administration Impact on Welfare Plans (con't)

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- If ACA stands, expect a push for expansion of the ACA by creating a public option and expanding premium tax credits
    - Because such proposals would require legislative action, President-elect Biden could also focus on proposals that can be achieved through executive or administrative action
        - For example, he could expand outreach and enrollment through the ACA marketplaces. He suggested that he would reinstate rules prohibiting health care discrimination based on gender identity

Biden Administration Impact on Welfare Plans (con't)

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- Actions to lower prescription drug costs
- Surprise medical billing legislation
- President-elect Biden said he would prioritize enforcement of federal mental health parity laws

Department of Labor Investment Guidance and ESG Investments

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- Final Regulations Effective January 12, 2021

  - Confirms and consolidates previous DOL guidance regarding the requirement under ERISA that plan fiduciaries select plan investments based solely on financial considerations

  - Deals specifically with fiduciary obligations concerning the selection of investments based on environmental, social and corporate governance (ESG) considerations

  - Provides guidance and creates documentation requirements where non-pecuniary (i.e., ESG) considerations are used as part of the investment decision-making process

Department of Labor Investment Guidance and ESG Investments (con't)

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- General Rule – A fiduciary's evaluation of an investment must be based solely on pecuniary factors (with a limited exception described below); a fiduciary may not subordinate the interests of plan participants to other objectives, and may not sacrifice investment returns or take on additional investment risks to promote non-pecuniary benefits or goals. Factors which should be considered in making an investment decision include:
  - Overall diversification of the plan's investment portfolio
  - Liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan
  - The projected return of the portfolio relative to the funding objectives of the plan

Department of Labor Investment Guidance and ESG Investments (con't)

- Non-Pecuniary Factors – When choosing among investment alternatives, if the plan fiduciary is unable to distinguish on the basis of pecuniary factors alone, the fiduciary may use non-pecuniary factors as the deciding factor provided that the fiduciary documents:
  - Why pecuniary factors were not sufficient to select the investment
  - How the selected investment compares to alternative investments with regard to the factors listed above
  - How the chosen non-pecuniary factor or factors are consistent with the interests of plan participants in their financial benefits under the plan
- Application to 401(k) plans - Subject to meeting the requirements listed above, a fiduciary may use non-pecuniary factors to ultimately make an investment decision for an individual account plan that allows participants to choose from among a broad range of investment alternatives (a 404c plan); however, such a fund may not be the QDIA for the plan

Department of Labor Audit/Investigation Initiatives

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- The DOL has Continued its Audit/Investigation Initiatives Even During the COVID Pandemic
  - In fiscal year 2020 (October 1, 2019 – September 30, 2020), the DOL closed 1,222 civil investigations, with 754 of those investigations resulting in monetary results for plans or other corrective actions
  - Current DOL initiatives include:
    - Ensuring timely and accurate contributions
    - Enforcing retirement plan distributions to terminated vested participants, and required distributions under the MRD rules, including processes for locating "lost participants"
    - Investigating investment decision-making to insure prudent processes and prevent conflicts of interest
      - Particular initiatives include plan sponsors including proprietary funds, as well as investments in ESG alternatives

Department of Labor Audit/Investigation Initiatives

- Proper payment of plan expenses
- Health plan administration
  - ACA enforcement
  - Mental health parity
  - Proper claims administration (including issues such as cross-plan offsetting)
  - Excessive service provider fees
  - Abusive MEWAs
- ESOPs – insuring fair market value of employer stock in transactions involving the ESOP, as well as preventing conflicts of interest where individuals contracting with the ESOP also serve in a fiduciary capacity

Department of Labor Audit/Investigation Initiatives

- Steps that fiduciaries can take to prepare for a potential DOL audit:
  - Confirm that all plan documentation (including plan document, amendments, SPD, SMMs, loan policies, hardship distribution policies, investment policies and the like) are in place and in good order
  - Confirm that plan administration is consistent with plan documentation
  - Respond to participant inquiries/complaints in a timely and respectful manner, as some investigations stem from participant complaints to the DOL
  - Consider the plan’s administration in light of the key DOL initiatives described above

IRS priority guidance for Qualified Retirement Plans

List of priority projects half of last year's list to 14 projects

Anticipated that these will continue after Biden becomes President

List includes:

- Regulations for electronic delivery of notices and participant elections
  - DOL issued updated regulations for electronic delivery of DOL governed notices in 2020
- Regulations for Code Section 401(a)(9) updating life expectancy and distribution period tables and other Code Section 401(a)(9)
- Regulations relating to SECURE Act modifications for 401(k) plans

IRS priority guidance for Qualified Retirement Plans (con't)

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- List continued:
  - Guidance on student loan payments and qualified retirement and 403(b) plans
    - Pending House Bill SECURE Act 2.0 proposes to allow employers to make matching contributions in qualified retirement plans with respect to any qualified student loan payments made by employees.
  - Guidance on missing participants and uncashed checks
  - Regulations under Code Section 417(e) updating the minimum present value requirements for defined benefit plans
  - Regulations for reporting requirements for the Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits

2021 Benefits and Employee Program Considerations in Light of Coronavirus Pandemic

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- With a worldwide pandemic which has substantially impacted much of our economy and created financial volatility and significant health concerns (physical and emotional), as well as a hotly contested and confrontational national election and social and political unrest, 2020 has created much for HR professionals to think about as they attempt to navigate the time and deal with employee and business needs
- Workplace considerations
  - Transition to virtual work environments
  - Workplace safety protocols for essential workers and employees with a need to work from the office

2021 Benefits and Employee Program Considerations in Light of Coronavirus Pandemic

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- Workplace considerations (cont.)
  - Re-opening considerations
    - Timing
    - Combination of virtual and office work going forward
      - Changes in expectations of in office work
      - Some employers are limiting in-office time to needs-based only with requirement to reserve office space for meetings, etc.
      - Some employers moving to "ROWE" philosophy - Results Only Work Environment, with emphasis on completing work, but not requiring that work be completed during normal business hours and/or at the office
- Home Office Benefits
  - Many employers struggling with home office set-up benefits
    - Should employers get involved in assisting employees with setting up home offices; worker's compensation issues
    - In addition to laptop computers and system access – printers, scanners, desks, ergonomic office chairs?

2021 Benefits and Employee Program Considerations in Light of Coronavirus Pandemic

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- Parking and Transportation Benefits
  - With more employees working virtually, perhaps on a long-term basis, what transportation and parking benefits should be provided?
- Physical and Mental Health Benefits
  - Many employers are enhancing and communicating with employees about available mental health benefits
    - Expanding and emphasizing use of EAP
    - Can create tricky issues concerning EAP constituting an ERISA group health plan
  - Many employers are enhancing and communicating use of telemedicine benefit services
    - Under the CARES Act and IRS guidance, telemedicine benefits may be provided with no co-pay (even for high deductible health plans with an HSA) through 2021
    - Issues arise as to whether a stand-alone telemedicine benefit would constitute an ERISA group health plan

2021 Benefits and Employee Program Considerations in Light of Coronavirus Pandemic

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- Paid Time Off Considerations
  - Some employers are considering reverting aggregate PTO policies to distinguish between sick days and other PTO, to insure that employees are not working while they are sick
  - Many employers have implemented programs to allow employees to donate PTO to co-workers in need as a result of the pandemic
- Childcare Assistance
  - Some childcare programs that employers have implemented and/or are considering include:
    - Onsite daycare
    - Providing virtual activities for children while parents are working remotely
    - Providing virtual tutoring sessions for employees' children

2021 Benefits and Employee Program Considerations in Light of Coronavirus Pandemic

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- Financial Assistance
  - Some financial assistance-related programs that employers have implemented and/or are considering include:
    - Financial educational sessions
    - Complimentary advisory sessions with financial advisors
    - Finding creative ways to help employees pay down their student debt, such as allowing payments through the donation of unused PTO
- Considerations Relating to Vaccine Availability
  - Mandating or encouraging vaccine to return to work
    - Employer may want to address in an employee policy
    - Any policy (formal or informal) should address exceptions for religions beliefs and ADA considerations

2021 Benefits and Employee Program Considerations in Light of Coronavirus Pandemic

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- Ensure group health plan includes ACA requirements for COVID-19 vaccinations
  - No cost sharing
  - In-network or out-of-network
- Collecting and storing employee data concerning the vaccine
  - Source of the data; group health plan/other HIPAA considerations
  - Other security and privacy considerations
  - Best practice – maintain confidentiality; limit access to information to limited designated individuals for business purposes; do not disclose
- Monitor federal and state recommendations and rules on prioritizing vaccine rollout, and adapt appropriately
- Continue to maintain workplace safety measures
- Much more information and guidance to come