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4 Tips For Complying With Coronavirus Benefit Mandates

By **Emily Brill**

Law360 (May 1, 2020, 10:09 PM EDT) -- Employers must act quickly to abide by the new federal directives on employee benefits and paid leave laid out in the recent coronavirus relief packages. Here, Law360 offers four tips to make compliance a cinch.

Choose Approach to 401(k) Access

Companies can use the newest coronavirus law to give workers easier access to their retirement savings. If employers go this route, workers can take larger loans and make penalty-free early withdrawals from their retirement plans.

Bryan Cave Leighton Paisner LLP benefits partner Lisa Van Fleet favors adopting the law's more permissive approach to loans and withdrawals. But employers aren't obligated to do so, she noted — the legislation specifies that these changes are voluntary.

Without a mandate forcing their hand, employers find themselves at a fork in the road, Van Fleet said. Do they want to give coronavirus-affected families easy access to money now, or do they want to maintain tight limits on that access for the sake of safeguarding retirement security?

"I find there to be two camps. One: 'Oh my gosh, these people need help, and we've got to do whatever we can to facilitate participants' access to their money.' Two: 'This money is for retirement,'" Van Fleet said.

Companies adopting the first perspective are more likely to implement the coronavirus law's changes to loan and withdrawals, while employers in the second are more apt to ignore them, she said.

Neither approach necessarily carries more legal risk; fiduciary standards only apply to how companies administer loans and withdrawals, not to a company's choice of what loan and withdrawal options to offer, Van Fleet said.

Nonetheless, companies need to make a choice about what they're going to do: If they want to adopt the changes, they must amend their plans by the end of the 2022 plan year, according to the Coronavirus Aid, Relief, and Economic Security Act.

Keep Timing in Mind

Some provisions in the CARES Act and the Families First Coronavirus Response Act only apply until the pandemic ends. Others are permanent.

Employers should pay attention to the various policies' durations when reading over the laws. They don't want to miss a permanent change to a policy when updating their compliance procedures.

One such permanent change allows workers to use the money they've placed in health savings accounts and flexible spending accounts to buy over-the-counter drugs, said Roberta Casper Watson, the leader of the Wagner Law Group's health and welfare group.

"Before the CARES Act, you couldn't use HSA and FSA funds unless you had a prescription, and now they've dropped that requirement," Watson said. "That's permanent, and that applies to expenses incurred on or after Dec. 31, 2019."

When it comes to temporary policies, employers must act quickly to take advantage of them, Van Fleet said.

"Become familiar with these new provisions as soon as possible, because they're available only for a very limited period of time," Van Fleet said. "Time is of the essence."

Communication Is Key

Attorneys consistently stress the importance of communication — among plan fiduciaries, between employers and employees, and between plans and third-party administrators — for complying with benefits laws. That's no different with the CARES Act and FFCRA, they said.

Employers should gather their benefit plans' fiduciaries for meetings, to review the legislation and come up with a compliance strategy. They should reach out to the plans' third-party administrators. And they should tell workers about the changes they implement, attorneys said.

"The coronavirus legislation gives employees and employers some rights under [the Employee Retirement Income Security Act] that they didn't have. It's important for beneficiaries to know about them," said Julie Selesnick, an attorney in Cohen Milstein Sellers & Toll PLLC's employee benefits practice group.

Analyze Each Worker's Situation

Among the rights granted to employees by the CARES Act and FFCRA are expanded access to paid leave, if they work for a company with under 500 employees.

When employers are making decisions about workers' eligibility for coronavirus-related leave, they should analyze each worker's situation individually, Cohen Milstein partner Shaylyn Cochran cautioned.

"I would caution employers against blanket denials or any type of retaliation. I think it's important that these employers are making individualized assessments of people's situations," Cochran said.

She said she anticipates a future wave of litigation related to coronavirus leave, as employees whose time-off requests have been denied sue to enforce their rights. As a plaintiffs' attorney, she'd be looking to see if an employer had looked at the specifics of a worker's situation before making a decision about leave eligibility, she said.

--Editing by Brian Baresch and Emily Kokoll.

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