

Davis & Gilbert
ADVANTAGE

Top 10 Benefits and Compensation Questions in Light of the Novel Coronavirus

FOR MORE INFORMATION

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The COVID-19 outbreak has raised a number of concerns for companies regarding their benefit plans. Congress has provided guidance on some key issues, but for others companies must interpret existing guidance under unprecedented conditions to determine the appropriate steps they should take.

Davis & Gilbert benefits and compensation attorneys **Mark Bokert, Alan Hahn, Rachel Rosenberg, William Szanzer** and **Gabrielle White** address key questions companies are facing about their benefit plans in the age of COVID-19. If you have additional questions regarding benefits and compensation matters, please contact them or the D&G attorney with whom you have regular contact.

1 Q: My company sponsors a medical plan for employees. Does the medical plan need to cover COVID-19 testing? Does it need to cover telehealth visits?

A: Under both the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), plans must cover COVID-19 testing and related services without applicable cost-sharing, such as copays or coinsurance.

Insurance carriers should have updated their requirements, but employers with self-funded plans should confirm with their third-party administrator that these changes have been made and check their plan documents to determine whether any amendments are necessary.

In addition to testing, both the FFCRA and CARES Act indicate that coverage for telehealth services must be offered.

2 Q: My company has to lay off some employees and place others on furlough. Can they remain on the company's health plan?

A: Regardless of what the workforce change is called, the plan terms will govern employees' continued eligibility. If a loss of coverage is required under the plan terms, employees would be eligible for continued coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA). Under normal circumstances, if an employer were to keep individuals on the plan after the termination event, the insurer (including any stop-loss carrier for self-insured plans) could refuse to pay for claims unless employees elected COBRA coverage. However, many insurers (including stop-loss insurers) are willing to allow affected employees to remain on active coverage (as opposed to COBRA coverage) for an extended period under certain circumstances as a result of the pandemic. Employers should check with their insurance carrier.

3 Q: Can employees access funds in their 401(k) retirement accounts?

A: There are only limited circumstances whereby active employees can access their 401(k) accounts. However, active participants are allowed to take out a loan from their account, up to specified maximums, which they must repay, and can also request a distribution due to financial hardship. There are strict requirements as to what constitutes a financial hardship. Some plans may have more liberal distribution provisions, such as permitting in-service withdrawals after attaining age 59½.

The CARES Act increased the maximum plan loan from \$50,000 to \$100,000 and provides that plan loans with repayment due dates in 2020 are delayed a year without violating the terms of the loan.

The CARES Act also allows participants to take a coronavirus-related distribution in 2020 of up to \$100,000. Ordinarily hardship distributions are subject to a 10 percent early withdrawal penalty, but the CARES Act waives that penalty for coronavirus-related distributions. There are several technical requirements that must be satisfied in order for a distribution to constitute a coronavirus-related distribution.

4 Q: Can employees who have been laid off or furloughed receive a distribution from their retirement account?

A: Terminated employees can request a distribution from their retirement accounts. However, if it is not rolled over into another qualified retirement plan or an individual retirement account, the distribution will be subject to an excise tax. Care must also be taken that any termination is a bonafide termination. This may be problematic for short-term terminations. Employers must also evaluate whether any mass layoffs (generally 20 percent of the workforce) could constitute a partial plan termination, which would trigger mandatory vesting requirements.

5 Q: My company has union employees and has to contribute to a union pension plan. Is there anything we should be aware of?

A: Employers who contribute to a union pension plan should coordinate with their ERISA counsel before laying off employees. In addition to the labor considerations, a large layoff could constitute a complete or partial withdrawal from the fund, triggering a responsibility to pay a large sum of money, called withdrawal liability, to the fund.

6 Q: My company sponsors a 401(k) plan. What is our responsibility in light of the recent stock market volatility?

A: Sponsors of 401(k) plans should call ad hoc committee meetings for their 401(k) retirement plan committee. At those meetings, committee members should discuss next steps with their investment advisers and ERISA counsel. The specific circumstances of each plan will determine whether any changes are necessary, but failure to conduct a review and make a thoughtful and informed decision in light of current conditions could lead to fiduciary breach claims.

7 Q: My company is having cash flow issues and needs to reduce/defer salaries for certain employees. Can we do that?

A: Before reducing salaries, employers will need to refer to any agreements between the employer and individual employees. Many higher level employees may have negotiated Good Reason provisions in their agreements, which will allow them to resign and receive severance in the event of a salary reduction unless they agree to the reduction. In some instances, there may be a provision allowing a reduction if it is an across-the-board reduction for similarly situated employees.

2020 salaries, or any portion thereof, can be deferred until no later than March 15, 2021, provided that the company enters into a written salary deferral agreement with the individual(s). If the deferred salary will not be paid before March 15, 2021, the deferral raises tax implications under Section 409A of the Internal Revenue Code (Section 409A). Section 409A significantly limits the ability to defer salary beyond March 15, 2021 unless strict requirements are met.

8 Q: In light of the pandemic, the performance goals our company set for 2020 performance-based compensation are likely unachievable. What should we do?

A: Employers should review incentive compensation arrangements to determine what discretion, if any, they have to modify performance goals.

Employers should review equity compensation arrangements to determine whether the forms of awards they have granted historically continue to make sense. Companies that have granted stock options may now have a fair market value lower than the stock options' exercise price and may wish to consider repricing stock options or canceling them and replacing them with a different type of equity award.

9 Q: Are there any issues our company should be considering with respect to our nonqualified deferred compensation arrangements?

A: Nonqualified deferred compensation arrangements are subject to strict requirements under Section 409A. Any changes should be discussed with counsel. For example, employees who made their 2020 elections in 2019 may wish to make changes to their elections, but these elections generally cannot be revoked without violating 409A. There is a limited exception that allows individuals to cancel their election due to an unforeseeable emergency. There are strict requirements around any such cancellation.

**10 Q: My company is worried about key individuals leaving.
What can we do to keep them from quitting?**

A: Employers may want to consider implementing retention arrangements that only payout if key individuals remain employed through certain dates or the achievement of certain benchmarks. There are various designs that can be used for these arrangements.