Post-COVID Workforce Changes and Challenges – How to Get the Work Done

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Employee Benefits Academy
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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.

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Tony's multi-disciplinary legal practice focuses on executive compensation, ESOPs and employee benefit arrangements (including their related tax, accounting, securities and corporate governance issues) in the United States and abroad.

He leads the Firm's Compensation Practice Group. Before entering private practice, Tony served as a judicial clerk to the Hon. Richard F. Suhrheinrich of the United States Court of Appeals for the Sixth Circuit.

- **Corporate Representation:** Advises private and publicly-traded clients and their boards of directors on compensation and benefits matters.
- **Transactions:** Advises clients on compensation and benefit issues associated with corporate transactions
- **Section 409A:** Helps clients comply with all aspects of Section 409A and its application to traditional non-qualified deferred compensation arrangements, equity plans, employment and severance arrangements, bonus arrangements and reimbursement arrangements
- **ESOPs:** Designs and implements a business owner's sale of stock to an employee stock ownership plan for the purpose of triggering an exit strategy, deferring capital gains taxes and implementing succession strategies
- **Executive Representation:** Represents numerous executives in complex negotiations of their hiring or termination of employment

Upcoming 2022 Webinars

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- **Upcoming 2022 webinars**:
  - **September 22**: Cafeteria Plan Non-Discrimination Testing
  - **November 17:** End of Year Benefits "To-Do" List
  - Sign up here: **Employee Benefits Academy Webinar Series - Subscribe**

Special Panelists for Today's Webinar

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Workforce Changes Resulting from COVID

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- Remote Working Conditions – Home Offices
- Reduced Face-to Face Meetings
  - Video Conferences Replaced Normal Personal Interaction
  - Strict Protocols for Any Personal Interaction
  - Hiring and Training Complexities
- Less Travel
- Anxiety, Burnout, Depression
- Government Subsidies
- Many Left the Workforce

Workforce Changes Resulting from COVID

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- At the same time, human resources and benefits professionals faced tremendous workload challenges
  - Benefits changes to 401(k) plan design resulting from the CARES Act
  - Health and other welfare plan design resulting from rapidly passed legislation and other federal government guidance
  - Many had to deal with workforce reductions and layoffs
    - Severance programs
    - Managing ways to continue health benefits
  - Communication challenges
  - Training on new remote technologies

Workforce Changes Resulting from COVID

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- Employee desires, needs and expectations have shifted
  - Family, physical health and mental health priorities
  - Employees seem to value health (physical and mental) as more important today than before the COVID pandemic

Remote Workforce – Compensation Trends

- Compensation by remote worker's city
  - Current trends
  - Potential Issues
    - Competing against higher markets
    - Reduced pay and attrition
    - Administrative burdens
  - Pros
    - Pay equity
    - Cost effective competitive wages

Remote Workforce – Compensation Trends

- Compensation on location-agnostic pay models
  - Current trends
  - Potential Issues
    - At risk of possible biases
    - Difficult to compete in expensive job markets
  - Pros
    - More financial autonomy
    - Reduced administrative burden

COVID-Related Benefit Plan Changes

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- As the COVID pandemic started and progressed, a waive of legislation and other government guidance created numerous opportunities for benefit plan changes to help deal with difficulties caused by the pandemic
- These changes affected both qualified retirement (401(k)) plans, as well as health and other welfare plan benefits
- HR and benefits specialists had to digest this legislation and other guidance, determine whether they would incorporate some or all of the permitted changes, and implement the changes they desired to make

COVID-Related Benefit Plan Changes

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- 401(k) Plans
- CARES Act (2020)
  - Increased Plan Loans
    - Maximum loan amount increased to $100K/100% of account balance
    - Increased loans required to be taken by September 22, 2020
    - Loan repayment deferred for one year
    - Any loan repayment due on or after March 27, 2020 to December 31, 2020 could be deferred for up to one year
  - In-service distributions
    - In-service distribution in an amount up to $100K for "qualified participants"
    - Qualified participant – Generally anyone who (or whose family member lived with individual) was diagnosed with COVID or experienced adverse financial consequences due to COVID (Self-certification of qualifications permitted)

COVID-Related Benefit Plan Changes

- CARES Act (2020)
  - Required minimum distributions could be waived for 2020
- To the extent these optional amendments were adopted, they had to be operationally implemented in 2020
- Formal plan amendments must be adopted by December 31, 2022

COVID-Related Benefit Plan Changes

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- Health and Welfare Plans
- CARES Act
  - Expanded health FSAs to allow reimbursement for non-prescription drugs and feminine care products
  - Waived deductibles for telemedicine for HSA-eligible participants during 2020 and 2021
- IRS Notice 2020-29
  - Allowed mid-year changes to health benefits, health FSAs and/or dependent care FSAs without a change in status (Could allow for some or all covered benefits)
  - For plan year or grace period ending in 2020, allowed continued use of FSA funds through December 31, 2020

COVID-Related Benefit Plan Changes

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- IRS Notice 2020-33
  - Increased health FSA carryover from $500 to $550 (indexed for inflation in future years)
- Consolidated Appropriations Act (2021)
  - Provided employers with two options to provide relief to employees with unused health and/or dependent care FSA funds for plan years ending in 2020 and 2021
    - Option 1 – Extended carryover provision to allow participants to carry over any unused FSA amounts remaining at the end of the 2020 and/or 2021 plan years to the following plan year
    - Option 2 – Extended grace period (extend from 2 ½ months to 12 months) following end of 2020 and 2021 plan years
  - Both options gave employees up to 12 months to use leftover FSA amounts in 2020 and 2021

COVID-Related Benefit Plan Changes

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- Consolidated Appropriations Act (2021)
  - Extended through the end of the 2021 plan year the provision that allows a mid-year election change under a health or dependent care FSA without a status change event
  - FSAs could be amended to permit employees who cease participation in a health FSA during the 2020 or 2021 plan year (e.g., upon termination of employment to continue to receive reimbursements of unused FSA contributions for expenses incurred through the end of the plan year in which participation ceased (including any extended grace period provided for under the plan's terms, as described above)
- Health and welfare plan amendments generally required to be adopted by the end of the year following the year in which the provision applied

Multigenerational Workforce

- Most businesses now have a workforce comprised of 4 and sometimes even 5 different generations
- Each generation brings differences in how they approach work, work/life balance, authority, learning, career growth and loyalty
- As baby boomers leave the workforce, Gen X and Millennials move into leadership roles

Multigenerational Workforce

- Baby Boomers (1946-1964)
  - Continually learning; enjoy intellectual stimulation
  - Enjoy face-to-face, in-person contact
  - Resistant to being perceived as “old”
  - Optimistic
  - Loyal
- Gen X (1965-1980)
  - Self-reliant
  - Less trust of large institutions
  - Family and friends more important than to Baby Boomers
  - Time is critical

Multigenerational Workforce

- Millennials (1981-1996)
  - Internet is No. 1 resource
  - Demand transparency
  - Expect training, guidance and information
  - Must see career opportunities; tendency to be impatient
- Gen Z (After 1996)
  - Hard working problem solvers
  - Value conscious; devoted to social causes
  - Private
  - Desire prompt and frequent feedback

Phased Retirement

- Baby Boomers have reached, or will soon reach retirement age
- The COVID pandemic caused many Baby Boomers to leave the workforce sooner than expected
  - A Pew Resource Center report indicated that, during the 3rd quarter of 2020, during the height of the pandemic, 30 million Baby Boomers left their jobs
  - Many reported that the pandemic had given them a new perspective and a different feeling about continuing work under the conditions of the pandemic
- Some Baby Boomers may have left temporarily, perhaps to wait out the pandemic; some have likely retired permanently
- The trend of Baby Boomers retiring will likely continue

Phased Retirement

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- With Baby Boomers retiring, many earlier than expected, companies are faced with many challenges
  - Retention of valuable corporate intelligence, knowledge, and critical skills, and maintaining organizational continuity
  - Quickly training new organizational leaders, often in a remote environment
  - Costs of hiring and retaining new workers, as Baby Boomers retire
- Retirement can be emotionally challenging for workers as well
  - Loss of co-worker friendships and interaction
  - Sense of worth
  - Replacing years of a busy work schedule with new personal projects

Phased Retirement

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- A phased retirement program or arrangement can help businesses and individuals with the difficulties that retirements can cause
- Phased retirement refers to a broad range of flexible retirement arrangements, which allows employees reaching retirement age to continue working in some capacity, but on a reduced schedule, or in a different role, and typically with lower earnings than during full-time employment
- Phased retirement programs can be formal or informal, and can apply on a special one-off basis to particular individuals, or more broadly to employees meeting certain criteria (e.g., age plus service, working in a particular organization, etc.)

Phased Retirement

- Examples may include
  - Retaining a retiring employee on a consulting basis to provide temporary transitional services
  - Allowing reduced work hours and/or work weeks as employees transition to full retirement
  - Sabbaticals
  - Allowing employees to work for a portion of the year

Phased Retirement

- Phased retirement programs can create tricky legal and economic issues
- Pension Plans
  - Pension plans often calculate benefits on the basis of end-of-career earnings, which may be reduced under a phased retirement program; cash balance plans provide accruals based on earnings
  - Most pension plans do not allow in-service distributions, which would prohibit an individual in a phased retirement program from drawing his/her benefits while continuing to work under the arrangement
  - The SECURE Act permits pension plans to allow for in-service distributions as early as age 59 ½, which, if adopted by the employer, may assist employees in phased retirement programs

Phased Retirement

- 401(k) Plans
  - Assuming an employee's earnings will decrease during a phased retirement program, the employee will contribute less to his/her 401(k) plan, or have to increase his/her deferral percentage
  - Matching contributions will likely decrease as well
  - The individual will likely not have a separation from employment for purposes of taking a distribution from his/her 401(k) plan account; although many 401(k) plans permit in-service distributions beginning at age 59 ½
  - Allowing employees to continue to participate in the 401(k) plan during a phased retirement program may help the plan from a non-discrimination testing standpoint

Phased Retirement

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- Health and Welfare Plans
  - Many medical plans require employees to work at least 30 hours per week to be eligible based on ACA minimums; such a requirement could result in phased retirement workers losing company-provided health coverage
  - However, there is not a 30-hour per week requirement, and the health plan could be amended (if necessary) to cover the phased retirement workers (but be careful about non-discrimination requirements)
  - With lower earnings during phased retirement, the individual will likely have to pay relatively more for company-provided health coverage
  - Other welfare benefits (e.g., dental, disability, group life insurance) can be offered, however, like health benefits, the cost during phased retirement will be relatively higher for the individual; additionally, group life insurance is typically based on a multiple of earnings, and, accordingly an employee may have lower coverage amounts upon entering phased retirement

Phased Retirement

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- IRC 409A considerations
  - If the individual participated, or participates, in a non-qualified deferred compensation plan of the company (e.g., SERP, deferred compensation plan, LTI, etc.) consideration will need to be given as to whether the phased retirement program has created a "separation from service" under IRC 409A
  - Reduction in hours to less than 20% of previous employment creates a presumption of a separation from service
  - Reduction to no less than 50% of previous employment creates a presumption that a separation from service has not occurred
  - Reduction between 20% - 50% creates no presumption (case-by-case analysis)

Phased Retirement

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- Social Security Benefits
  - Individuals in phased retirement programs will need to consider whether they need or want to start drawing Social Security benefits
  - Social Security benefits can commence as early as age 62, however, there is a reduction if benefits commence before normal retirement age (NRA) – age 67 for individuals born in 1960 or later
    - Reduction = 5/9 of 1% per month prior to NRA up to 36 months; if commencement is more than 36 months before NRA, an additional reduction of 5/12 per month applies
    - Social Security benefits are increased if commencement is delayed beyond NRA (the increase is 8% per year for individuals born in 1943 or later

Phased Retirement

- Social Security Benefits
  - Social Security benefits are reduced further if commenced before NRA, and the individual continues to work and earns over a threshold amount
    - 2022 Limit = $19,560 - $1 reduction for every $2 earned over the limit
    - If attaining the NRA during the year, limit = $51,960 - $1 reduction for every $3 over the limit
    - Reductions no longer apply upon attaining NRA
    - Reductions apply to earnings from employment, not to investment income, etc.
  - Social Security benefits are generally taxable; if earning additional compensation through a phased retirement program, may want to consider amount deducted from paycheck to avoid a large tax bill

Questions?

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Upcoming Webinars

Executive Compensation Academy

- Title: Navigating Compensation Rules Applicable to Financial Institutions
- When: August 11, 2022
- Time: 10:00 am – 11:00 am CT

  11:00 am – 12:00 pm ET

Employee Benefits Academy

- Title: Cafeteria Plan Non-Discrimination Testing
- When: September 22, 2022
- Time: 10:00 am – 11:00 am CT

  11:00 am – 12:00 pm ET