

Benefit Plans: Developments and Best Practices

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Developments Health and Welfare Plans – Regulations

- **Section 1557**
 - Section 1557 prohibits discrimination on basis of race, color, national origin, sex, age, or disability under health program or activity that is receiving federal financial assistance
 - In general, it does not directly apply to self-funded group health plans – section 1557 reaches them through third-party administrators
 - Twice before (2016 and 2020), final regulations were issued
 - Final regulations published in May 2024 brought back provisions from 2016 regulations
 - Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37522 (May 6, 2024) (available at: <https://www.govinfo.gov/content/pkg/FR-2024-05-06/pdf/2024-08711.pdf>)
 - Following Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), which overturned *Chevron*, three courts have issued orders staying effective date of new regulations
 - *Tennessee v. Becerra*, 2024 WL 3283887 (S.D. Miss. July 3, 2024) (stayed certain provisions nationwide)
 - *Texas v. Becerra*, 2024 WL 3297147 (E.D. Tex. July 3, 2024) (stayed for covered entities in Texas and Montana)
 - *Florida v. Dep't of Health & Human Servs.*, No. 8:24-cv-01080 (M.D. Fla. July 3, 2024) (stayed in Florida)

Developments Health and Welfare Plans – Regulations

- **Mental Health Parity Addiction and Equity Act (MHPAEA)**
 - Congress, IRS, DOL, and HHS continue to emphasize mental health parity
 - Agencies have issued proposed regulations and guidance
 - Proposed regulations would make it more difficult to exclude key treatments for mental health condition and would make it harder for plans to require preauthorization for mental health benefits
 - Requirements Related to Mental Health Parity and Addiction Equity Act (MHPAEA) (available at: <https://www.govinfo.gov/content/pkg/FR-2023-08-03/pdf/2023-15945.pdf>)
 - DOL Technical Release 2030-01P details proposed data requirements for non-quantitative treatment limits (NQTLs) – Technical Release 2030-01P (available at: <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/guidance/technical-releases/23-01.pdf>)

Developments Health and Welfare Plans – Regulations

- **HIPAA privacy rule and reproductive health care**
 - HIPAA allows disclosure of health information in response to certain government requests
 - Dobbs case triggered new state law activity and these regulations are response to potential requests for disclosure to health plans
 - Final regulations were published April 26, 2024 which prohibit use or disclosure of PHI with respect to:
 - Investigating person with respect to reproductive health care
 - Imposing liability for person providing reproductive health care
 - Identifying person providing reproductive health care
 - HIPAA Privacy Rule To Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976 (April 26, 2024) (available at: <https://www.govinfo.gov/content/pkg/FR-2024-04-26/pdf/2024-08503.pdf>)
 - HIPAA Privacy Rule Fact Sheet (available at: <https://www.hhs.gov/hipaa/for-professionals/special-topics/reproductive-health/final-rule-fact-sheet/index.html>)

Developments

Health and Welfare Plans – Case Law

- **Dobbs – Mifepristone litigation (prescription drug that can end pregnancy)**
 - FDA approved mifepristone in 2000; litigation is challenging FDA approval and seeking to revoke approval
 - District Court for Northern District of Texas issued order invalidating FDA's approval
 - *Alliance for Hippocratic Medicine v. FDA*, 668 F. Supp. 3d 507 (April 7, 2023)
 - 5th Circuit enjoined and allowed mifepristone to remain on market while case continues (but limited use to first 7 weeks rather than first 10 weeks of pregnancy)
 - *Alliance for Hippocratic Medicine v. FDA*, 78 F.4th 210 (5th Cir. 2023)
 - In June, Supreme Court ruled that plaintiffs did not have standing
 - “Under Article III of the Constitution, a plaintiff’s desire to make a drug less available for others does not establish standing to sue. Nor do the plaintiffs’ other standing theories suffice. Therefore, the plaintiffs lack standing to challenge FDA’s actions.”
 - *Food & Drug Admin. v. Alliance for Hippocratic Medicine*, No. 23-235, 2024 WL 2964140 (U.S. June 13, 2024)

Developments

Health and Welfare Plans – Case Law

- **Dobbs – Emergency Medical Treatment and Labor Act (EMTALA) litigation**
 - EMTALA requires federally funded hospitals with emergency departments to determine if individual needs medical care and to treat individual
 - HHS issued guidance that EMTALA preempts state law if state law prohibits abortion or has more narrow exceptions than EMTALA
 - District Court for Northern District of Texas held EMTALA did not preempt Texas law
 - *State of Texas v. Bacerra*, 623 F.Supp.3d 696 (N.D. Tex. Aug. 23, 2022); clarification 2023 WL 2467217 (N.D. Tex. Jan. 13, 2023)
 - District Court for Idaho has issued injunction that EMTALA preempts Idaho law
 - *U.S. v. State of Idaho*, 623 F.Supp.3d 1096 (D. Id. Aug. 24, 2022)
 - Supreme Court stayed injunction on January 5, 2024
 - Supreme Court consolidated cases
 - Supreme Court reinstated district court ruling that allows Idaho hospitals to perform emergency abortions despite Idaho state law and remanded to Ninth Circuit for further review
 - *Moyle v. United States*, No. 23-726, 2024 WL 3187605 (U.S. June 5, 2024) and *Idaho v. United States*, No. 23-727, 2024 WL 61829 (U.S. June 5, 2024)

Developments

Health and Welfare Plans – Case Law

- **J&J case**
 - Pharmacy benefit manager (PBM) contracts are one of most complicated contracts
 - Employers use PBMs to obtain better pricing on medications, but process is usually opaque. PBM agreements use variety of different pricing methods, including:
 - Spread Pricing: PBM compensation based on price difference between what PBM pays for medication and what plan is charged
 - Rebates: PBM compensation based on rebates PBM negotiates with drug manufacturers based on purchases
 - Pass-Through Pricing: PBM compensation based on savings or alternative method and price of medications passed through to plan
 - CAA amended section 408(b)(2) of ERISA to provide that health plan brokers and consultants provide disclosure on direct and indirect compensation, and fiduciaries are required to review disclosures to confirm that compensation paid is reasonable compensation
 - Fiduciaries can be liable if they fail to receive disclosures

Developments

Health and Welfare Plans – Case Law

- **J&J case (continued)**
 - Johnson & Johnson (J&J) and plan fiduciaries were sued alleging breach of fiduciary duties in its selection of its PBM
 - *Lewandowski v. Johnson and Johnson*, No. 3:24-cv-00671-ZNQ-RLS (D. N.J. Feb. 5, 2024)
 - Complaint alleges
 - Breach of fiduciary duties with respect to selecting PBM
 - Breach of fiduciary duties with respect to accepting spread pricing
 - Breach of fiduciary duties for failure to monitor PBM and obtain better pricing
 - Complaint has been filed and defendants filed a motion to dismiss on June 28, 2024
- **Navarro v. Wells Fargo & Company**
 - Filed in Minnesota in July 2024
 - Complaint alleges
 - Breach of fiduciary duties with respect to monitoring PBM
 - Prohibited transactions
 - *Navarro v. Wells Fargo & Company*, Civil Action No. 24-cv-3043 (D. MN. July 30, 2024)

Developments Health and Welfare Plans – Case Law

- ***Braidwood Management v. Becerra* – Preventative services cases**
 - Affordable Care Act (ACA) provides for preventative service requirements, including services set by U.S. Preventive Services Task Force (USPSTF) with “A” or “B” recommendation
 - District Court issued opinion and order invalidating ACA preventive care requirements as appointment of USPSTF violated Appointments Clause of Constitution
 - Court concluded that preventative service requirements adopted after March 23, 2010 (ACA adoption date) were vacated and departments enjoined from enforcing requirements
 - Same court also looked at HIV preventative medication (PrEP drugs)
 - Court issued opinion holding required coverage of PrEP drugs violated Religious Freedom Restitution Act (RFRA)
 - *Braidwood Management v. Becerra* (Braidwood I), 627 F.Supp.3d 624 (N.D. Tex. 2022) and *Braidwood Management v. Becerra* (Braidwood II), 666 F.Supp.3d 613 (N.D. Tex. 2023); *aff'd in part, rev'd in part*, 104 F.4th 930, 5th Cir. (June 21, 2024)
 - Fifth Circuit opinion
 - Affirmed enjoined defendants from enforcing preventive-care mandates against plaintiffs who had standing, reversed on nationwide limit, and remanded

Developments Health and Welfare Plans – Case Law

- ***Texas Medical Association v. HHS* cases – Independent dispute resolution cases**
 - No Surprises Act portion of CAA created process for resolving disputes regarding amounts due for certain out-of-network bills
 - IRS, EBSA, and HHS issued interim final rule in October 2021 that provided arbitrators should apply “rebuttable presumption” that qualifying payment amount (QPA) – group health plan’s median contracted rate for same service in same geographic area, adjusted for inflation – is most appropriate rate for service
 - Series of cases invalidated significant portion of regulations
 - See *Texas Medical Association v. HHS* (TMA IV), 2023 WL 5489028 (E.D. Tex. Aug. 24, 2023)
 - Fifth Circuit affirmed on August 8, 2024
 - As result of cases, CMS temporarily suspended IDR process
 - Agencies have now issued new regulations on IDR process
 - See Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges, 88 Fed. Reg. 88494 (Dec. 21, 2023) (available at: <https://www.govinfo.gov/content/pkg/FR-2023-12-21/pdf/2023-27931.pdf>)

Developments

Health and Welfare Plans – Case Law

- **Cases – State regulation of pharmacy benefit manager (PBM) cases**
 - To control costs, many health plans limit in-network costs to one pharmacy chain
 - State legislators concerned this requires residents to travel farther and drives independent pharmacies out of business
 - ERISA generally preempts state laws with respect to private, self-insured health plans – but gray area on these state efforts
 - *Rutledge v. Pharmaceutical Care Management Association*, 141 S.Ct. 474, 480 (2020) – “ERISA does not pre-empt state rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage”
 - 8th Circuit held North Dakota law regulating PBMs was not preempted by ERISA
 - *Pharmaceutical Care Management Association v. Wehbi*, 18 F.4th 956 (8th Cir. 2021)
 - 10th Circuit held Oklahoma law placing limits on networks and prohibition against incentive to use in-network pharmacy were preempted by ERISA
 - *Pharmaceutical Care Management Association v. Mulready*, 78 F.4th 1183 (10th Cir. 2023), pet. for cert. (May 15, 2024)

Developments

Health and Welfare Plans – Case Law

- **Gender identity and transgender protections**
 - *Lange v. Houston County*
 - Title VII prohibits discrimination based on sex
 - County employee brought case alleging health plan discriminated by denying coverage for gender affirming care
 - District court found in favor of county employee
 - *Lange v. Houston County*, 608 F. Supp. 3d 1340 (M.D. Ga. 2022)
 - 5th Circuit affirmed that health insurer can be held liable under Title VII for denying coverage for gender-affirming care to transgender employee on basis employee is transgender
 - *Lange v. Houston County*, 101 F.4th 793 (11th Cir. 2024)

Developments

Health and Welfare Plans – Case Law

- **Wellness incentives**
 - **Diment v. Quad/Graphics, Inc.**
 - Employees challenged employer-sponsored wellness program providing incentives under Americans with Disabilities Act (ADA) alleging incentive was so large wellness program was not voluntary
 - Wellness program incentive if employee completed biometric screening and met certain standards for blood sugar, blood pressure, and cholesterol, among other measures
 - Employees who enrolled but did not complete biometric screening paid approximately \$34 per week (about \$1,800 a year) more than those who completed wellness program
 - Court denied motion to dismiss concluding employees had sufficiently alleged that program was involuntary
 - *Diment v. Quad/Graphics, Inc.*, 2024 WL 2939049 (N.D. Ill. 2024)

Developments

Health and Welfare Plans – Guidance

- **Gender identity and transgender protections**
 - Equal Employment Opportunity Commission (EEOC) provides guidance on workplace discrimination that is updated periodically
 - EEOC guidance on workplace harassment was last updated in 1999
 - EEOC has released updated workplace harassment guidance that includes guidance on discrimination based on gender identity and LGBTQ status as covered under federal law
 - EEOC, Enforcement Guidance on Harassment in the Workplace (available at: <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>)

Developments Health and Welfare Plans – Guidance

- **Health and wellness indemnity programs**
 - Vendors proposing arrangements under which employees contribute on pre-tax basis and receive all or most of contributions back on after-tax basis if employees satisfy minimal requirements (by deducting premiums on pre-tax, no Social Security or Medicare taxes are paid, and no income taxes are paid)
 - IRS has issued guidance that such arrangements do not constitute group health plans
 - “Section 105(b) is limited to amounts paid solely to reimburse expenses incurred for medical care and does not apply to amounts which the taxpayer would be entitled to receive irrespective of whether expenses for medical care are incurred.” Also, section 104(a)(3) “does not apply to the extent that amounts paid are attributable to contributions ... not includable in the gross income of the employee, or paid by the employer”
 - IRS Chief Counsel Memorandum 202323006 (June 9, 2023) (available at: <https://www.irs.gov/pub/irs-wd/202323006.pdf>)

Developments Retirement Plans – Legislation

- **Recent legislation**
 - SECURE Act 1.0 – Signed into law at end of 2020
 - SECURE Act 2.0 – Signed into law at end of 2022
 - Pending – SECURE Act 2.0 corrections
- **SECURE Act 2.0 overview**
 - **Contributions**
 - Roth – Highly paid catch-up in Roth only (effective 2026)
 - Roth – Additional catch-up ages 60, 61, 62, 63 (effective 2025)
 - Student loan match, plan linked emergency savings account (PLESA)
 - **Distributions**
 - RMD age increased (73 effective 2023; 75 effective 2033)
 - RMDs not required on Roth accounts
 - Distributions upon emergency, terminal illness, domestic abuse, federal emergency, and birth and adoption of child
 - Cash out increased to \$7,000
 - **Long-term, part-time employees**
 - 500 hours in 3 years (effective 2024); 500 hours in 2 years (effective 2025)

Developments Retirement Plans – Regulations

- **ESG and proxy voting regulations**
 - 11/13/20 – ESG final rule, 85 Fed. Reg. 72846 (Nov. 13, 2020), 29 C.F.R. § 2550.404a–1
 - 12/16/20 – Proxy final rule, 85 Fed. Reg. 81658 (Dec. 16, 2020)
 - 3/10/21 – DOL issued non-enforcement statement
 - <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/erisa/statement-on-enforcement-of-final-rules-on-esg-investments-and-proxy-voting.pdf>
 - 11/22/22 – Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022); 29 C.F.R. § 2550.404a–1 (new rule)
 - <https://www.govinfo.gov/content/pkg/FR-2022-12-01/pdf/2022-25783.pdf>
 - 1/26/23 – *Utah v. Walsh*, Case No. 2:23-cv-00016-Z (N.D. Tex. Jan. 26, 2023) – Attorney generals of 25 states sue to prevent implementation of new rule
 - 6/01/23 – *Spence v. American Airlines, Inc.*, No. 4:23-cv-00552 (N.D. Tex. June 1, 2023) – Plaintiffs sue over inclusion of ESG fund
 - 9/21/23 – Court in *Utah v. Walsh* finds in favor of DOL
 - *Utah v. Walsh*, 2023 WL 6205926 (N.D. Tex. Sep. 21, 2023), appeal filed (5th Cir. Oct. 30, 2023)
 - 2/21/24 – Court in *Spence v. American Airlines* refused to dismiss case
 - *Spence v. American Airlines, Inc.*, 2024 WL 733640 (N.D. Tex. Feb. 21, 2024)

Developments Retirement Plans – Regulations

- **Forfeitures**
 - 2/27/23 – Use of Forfeitures in Qualified Retirement Plans, 88 Fed. Reg. 12282 (Feb. 27, 2023), 26 C.F.R. § 1.401-7
 - <https://www.govinfo.gov/content/pkg/FR-2023-02-27/pdf/2023-03778.pdf>
 - IRS still to issue final regulations
 - In general
 - Forfeitures will be used for one or more of following
 - (i) To pay plan administrative expenses
 - (ii) To reduce employer contributions under plan
 - (iii) To increase benefits in other participants' accounts in accordance with plan terms
 - Forfeitures to be used within 12 months of end of plan year in which they arose

Developments

Retirement Plans – Case Law

- **Defined contribution plan – Forfeiture litigation**
- **Background**
 - ERISA and Code require plan terms to be in writing
 - Forfeiture provisions often provide forfeitures may be used to reduce future employer contributions, pay plan expenses, and be allocated to participant accounts
- **Cases (not exclusive)**
 - *Perez-Cruet v. Qualcomm Inc.*, No. 3:23-cv-01890 (S.D. Cal. Oct. 16, 2023)
 - Court denied motion to dismiss – *Id.*, 2024 WL 2702207 (S.D. Cal. May 24, 2024)
 - *Hutchins v. HP Inc.*, No. 5:2023-cv-05875 (N.D. Cal. Nov. 14, 2023)
 - Court dismissed claims – *Id.*, 2024 WL 3049456 (N.D. Cal. June 17, 2024)
 - *Barragan v. Honeywell, Inc.*, No. 2:24-cv-01194 (C.D. Cal. Feb. 21, 2024)
 - *Yagy v. Tetra Tech, Inc.*, No. 2:24-cv-01394 (C.D. Cal. Feb. 21, 2024)
 - Court ordered arbitration – *Id.*, 2024 WL 2715900 (C.D. Cal. May 17, 2024)
 - *Matula v. Wells Fargo & Co.*, No. 3:24-cv-03504 (N.D. Cal. June 11, 2024)
- **Complaint allegations**
 - Breach of fiduciary duties to use forfeitures to reduce employer contributions rather than paying plan expenses
 - Prohibited transaction to transfer property from plan to employer

Developments

Retirement Plans – Case Law

- **Defined benefit plan – Risk transfer litigation**
- **Background**
 - There has been significant transfer of pension plan liabilities to provide annuities to insurance companies
 - DOL provided guidance in 1990s (DOL Interpretive Bulletin 95-1) on process of selecting insurance companies to assume annuities
 - Under Interpretive Bulletin 95-1, factors to consider
 - Quality and diversification of annuity provider's investment portfolio
 - Size of insurer relative to proposed contract
 - Level of insurer's capital and surplus
 - Lines of business of annuity provider and other indications of insurer's exposure to liability
 - Structure of annuity contract and guarantees supporting annuities
 - Availability of additional protections (state guaranty associations and extent of guarantees)
- **Cases**
 - *Piercy v. AT&T, Inc.*, No. 1:24-cv-10608 (D. Mass. March 11, 2024)
 - *Schloss v. AT&T, Inc.*, No. 1:24-cv-10656 (D. Mass. March 15, 2024)
 - *Konya v. Lockheed Martin, Corp.*, No. 8:24-cv-00750 (D. Md. March 13, 2024)

Developments Retirement Plans – Case Law

- Defined benefit plan – Risk transfer litigation (continued)
- Complaint allegations
 - Breach of fiduciary duty of prudence – Failing to choose safest annuity provider (Athene)
 - Prohibited transaction – Selecting lowest bidding insurance company allows money not used to purchase annuities to revert to employer or for qualified replacement plan
 - Breach of fiduciary duty – Failing to monitor fiduciaries who select annuity provider
- Considerations
 - Last case to consider issue found no fiduciary breach of duties and also dismissed in part for lack of standing
 - *Lee v. Verizon Communications, Inc.*, 837 F. 3d 523 (5th Cir. 2016)
 - SECURE Act 2.0 requires DOL to review DOL Interpretive Bulletin 95-1 and recommend possible modifications to Congress by end of 2023
 - DOL released initial report on June 24, 2024 and concluded issue needs more study
 - <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/secure-2.0/report-to-congress-on-interpretive-bulletin-95-1.pdf>

Verification Code for Lawyers Attending by Webinar

Announcement of the Verification Code is for states requiring a code.

This verification code is not the code for accreditation.

Best Practices – Payroll Sign-On Bonuses and Loans

- **Sign-on bonuses**
 - Taxable when paid (even if employee does not start until later year)
 - Employee receives sign-on bonus in connection with establishing employer-employee relationship
 - Revenue Ruling 2004-109
 - Because taxable when paid, there should be withholding from sign-on bonus when paid
 - Reported on Form W-2
- **Sign-on loans**
 - Taxable when (and if) forgiven
 - Because taxable when forgiven, there should be withholding from other compensation being paid when forgiven
 - Reported on Form W-2

Best Practices – Payroll Sign-On Bonuses and Loans

- **Sign-on loans and loan requirements**
- **Loan requirements**
 - Loan must be repaid (loan does not need to be included in income when made because of expectation of repayment)
 - Loan documents must include legally binding promissory note executed with legal obligation for repayment or performance of services
 - Loan must bear reasonable rate of interest (exception if loan is \$10,000 or less)
 - 26 U.S.C. § 7872(c)(3); 26 U.S.C. § 7872(f)(10); Limited exception for certain employee relocation loans to purchase new principal residence, 26 U.S.C. § 7872(f)(11)
- **If loan is subsequently forgiven by employer, loan and interest on loan is included at time it is forgiven**
 - Employer must impute income to employee and withhold income and employment taxes on imputed income from other compensation
 - This can lead to payroll complexity depending on frequency of loan forgiveness discussed more under payroll aspects discussion

Best Practices – Payroll Bonuses and Flat Rate Taxation

- Bonuses are considered “supplemental wages”
- Supplemental wages up to \$1 million
 - An employer can opt to apply flat rate of withholding (22% for federal income tax)
 - When choosing between flat rate and aggregate procedure (W-4), employer can treat employees differently
 - IRS Information Letter 2012-0063
 - Conditions to use flat rate withholding
 - Employer has withheld income tax from employee’s regular wages during same calendar year or prior calendar year in which supplemental wages are paid
 - Supplemental wages are separated from regular wages (either paid on separate check or listed on separate line on same check as regular wages)
 - 26 C.F.R. § 31.3402(g)
- Supplemental wages in excess of \$1 million
 - Mandatory flat rate of withholding at top marginal income tax rate (37% for federal income tax)
 - Highest marginal rate only applies to amount above \$1 million

Best Practices – Payroll Nonqualified Plans and Employment Taxes

- Section 3121(v)(2) provides special rule for when nonqualified deferred compensation is subject to employment taxes
 - In general, nonqualified deferred compensation must be taken into account as wages for employment tax purposes as of later of:
 - (i) date on which services creating right to amount are performed, or
 - (ii) date on which right to amount is no longer subject to substantial risk of forfeiture
 - 26 C.F.R. § 31.3121(v)(2)-1(a)(2)
 - Whether substantial risk of forfeiture exists is determined under section 83
 - 26 C.F.R. § 31.3121(v)(2)-1(e)(3)

Best Practices – Payroll Nonqualified Plans and Employment Taxes

- **In general, section 3121(v)(2) means that employment taxes are often due before income taxes on nonqualified deferred compensation**
 - This leads to errors in proper timing of employment taxes
 - **Examples**
 - Employer contributes (or credits) \$10,000 to account balance nonqualified plan that is fully vested to be paid upon termination – employment taxes due at time contribution is made
 - Employer contributes (or credits) \$5,000 to account balance nonqualified plan that vests after three years to be paid upon termination – employment taxes due at time contribution vests
- **Special rule allows employment taxes to be paid later in same year**
 - However, then present value as of date employment taxes is to be used (includes earnings or reasonable rate of interest)
 - 26 C.F.R. § 31.3121(v)(2)-1(e)(5)

Best Practices – Payroll Fringe Benefits and Taxes

- **A de minimis fringe benefit is benefit provided by employer of property or services with value so small that accounting for them is unreasonable or administratively impracticable**
 - Value of benefit is determined by frequency provided to each individual or, if this is not practical, to workforce as whole
 - See section 132(e)
- **Examples**
 - Personal use of photocopier (with restrictions)
 - Group meals
 - Occasional theater or sporting event tickets
 - Coffee, donuts, or soft drinks
 - Flowers or fruit for special occasions
 - Local telephone calls
 - Traditional holiday or birthday gifts with low fair market value
 - 26 C.F.R. § 1.132-6(e)(1)
- **Cash and gift cards are never de minimis**

Best Practices – Payroll Fringe Benefits and Taxes

- **Regulations under Code provide that cash and cash equivalents are never excludable as fringe benefit**
 - “[A] cash equivalent fringe benefit (such as a fringe benefit provided to an employee through the use of a gift certificate or charge or credit card) is generally not excludable”
 - 26 C.F.R. § 1.132-6(c)
- **Value of gift card does not matter**
 - IRS has indicated that gift cards of \$25 or less are to be treated as compensation
 - ABA Tax Section’s Employee Benefits Committee, JCEB Meeting with Internal Revenue Service, Q&A 2 (May 6, 2011)
- **Regulations allow employers to provide employees traditional holiday gifts**
 - An example is turkey (or ham) at holiday
 - 26 C.F.R. § 1.132-6(e)(1)
- **Gifts are form of compensation**
 - Exclusion from compensation for gifts does not include “any amount transferred by or for an employer to, or for the benefit of, an employee”
 - Section 102(c)(1)

Best Practices – Payroll Fringe Benefits and Taxes

- **Prizes are form of compensation**
 - Except as provided under sections 74 and 117, “gross income includes amounts received as prizes and awards”
 - Section 74(a)
- **Exceptions**
 - Qualified scholarships (section 117)
 - Length of service and safety awards (section 274(j))
 - De minimis fringe benefits (section 132)
 - Priv. Ltr. Rul. 2010-05-014 (Feb. 5, 2010); see also Priv. Ltr. Rul. 2011-35-022 (May 20, 2011) (revoking Priv. Ltr. Rul. 2010-05-014 based on variations in distribution)
 - Certain awards that employee transfers to governmental entity or charitable organization
- **Prizes are compensation if from employer’s vendors**
 - ABA Tax Section’s Employee Benefits Committee, JCEB Meeting with Internal Revenue Service, Q&A 2 (May 6, 2011)

Best Practices – Payroll Remote Workers / Employees

- **Remote worker for purposes of this presentation**
 - Employee performing services in state in which
 - (i) employer does not have its corporate headquarters,
 - (ii) employer does not have operations or connections, and (likely)
 - (iii) employer has limited number of employees
- **Considerations**
 - State income taxes
 - Most states have state income tax and withholding requirements
 - State employment taxes
 - Some states have taxes
 - Example: Washington – Washington Cares Fund
 - Example: California – Paid family leave
 - State unemployment insurance
 - State worker compensation
- **Note: Even if employee works only for period of time in another state, employer may have withholding and reporting obligation with respect to state**

Benefit Plans 401(k) Plans – Eligibility

- **Employers have flexibility with eligibility, but Internal Revenue Code and ERISA contain certain requirements**
 - Hours of service
 - In general, cannot exclude employees based on age or hours of service once employee attains age 21 and has completed one year of service
 - Now, cannot exclude long-term part-time employees
 - In 2024, employee who completes 500 hours in 3 consecutive years
 - In 2025 and later, employee who completes 500 hours in 2 consecutive years
 - Contractor misclassification (employee classified as contractor)
 - Misclassification risk
 - Leased employees
 - Leased employees may need to be counted for testing
 - Leased employee service counted for service purposes

Best Practices – Retirement Plans 401(k) Plans – Contributions

- **Employers have fiduciary responsibilities with respect to elective contributions and loan repayments**
 - ERISA requires employer to forward contributions and loan repayments “as of the earliest date on which such contributions or repayments can reasonably be segregated from the employer’s general assets”
 - 29 C.F.R. § 2510.3–102(a)
 - If employer’s plan has fewer than 100 participants, employer has until 7th business day following date amount would have been paid to participant
 - Failure to do so is prohibited transaction and requires correction
 - Need to report on Form 5500
 - Need to calculate and contribute lost earnings
 - Need to pay excise tax on Form 5330

Best Practices – Retirement Plans 401(k) Plans – Distributions

- **Employers have fiduciary responsibilities with respect to elective distributions**
 - DOL and IRS focus on assuring employers are working to locate participants with bad addresses (missing participants)
 - DOL, Missing Participants – Best Practices for Pension Plans (1/12/21)
 - <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance/best-practices-for-pension-plans.pdf>
 - In addition, Internal Revenue Code requires distributions commence by required beginning date (age 73 unless still employed)
 - 26 U.S.C. § 401(a)(9)
 - Failure to address can result in DOL or IRS action

Best Practices – Retirement Plans 401(k) Plan – Investments

- **Employers have fiduciary duties with respect to retirement plan investments**
 - **Most 401(k) plans are intended to fall under section 404(c) of ERISA**
 - If plan meets requirements (offering at least 3 diverse investments, information on investments, etc.), then employer relieved of liability to extent it has prudently selected and retained investments
 - Employer (fiduciary) needs to prudently select, monitor and terminate investments
 - **Best practices**
 - Committee established to oversee investments
 - Committee meets periodically (2 to 4 times annually)
 - Committee obtains advice from investment advisor
 - Committee selects lowest cost investment option (no or low 12b-1 fees)
 - Committee documents decisions