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Hot Topics in Employee Benefits: What We're Seeing

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Agenda

- CARES Act: Plan Sponsor Considerations and COVID-19–related Design Changes
Claire Bouffard
- Executive Compensation
David Zelikoff
- Health & Welfare Tolling Issues: Time Frames Under ERISA (COBRA, HIPAA, Claim Deadlines)
Andy Anderson
- Payroll and Fringe Benefits Considerations
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- Multiemployer Plan Participation Post-COVID
Dan Salemi
- Key Issues for ESOP Companies in the Wake of the COVID-19 Crisis
Brian Hector

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**CARES Act: Plan
Sponsor
Considerations and
COVID-19–related
Design changes**

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CARES Act

- Not the main focus of the retirement portion of the presentation as plan sponsors have been quick to adopt and recordkeepers have been quick to implement.
- CARES Act signed into law March 27, 2020 and provides:
 - Special Coronavirus Distribution (§ 2202(a))
 - Retirement Plan Loan Limits (§ 2202(b))
 - 2020 Required Minimum Distribution Waiver (§ 2203)
 - Department of Labor (DOL) Ability to Postpone Deadlines (§ 3607)
- Defined Benefit Plan Relief (§ 3608)
 - Minimum Contribution Relief (§ 3608(a))
 - AFTAP Relief (§ 3608(b))

Retirement Plan Cost-Saving Changes

Considerations for types of qualified plans

Governance and Collective Bargaining

- With any plan changes or amendments, identify and carefully follow any governance requirements (e.g., board approval, officer authority, delegations, etc.)
- Changes to collectively bargained plans must be bargained with the union.

Defined Benefit Accrual Freezes

- The plan must provide a “204(h) Notice” and amend the plan document; existing benefit accruals must be preserved.

Defined Contribution Plan Suspensions

- The plan must be amended and a summary of material modification or updated summary plan description provided to employees.

Special Considerations for Safe Harbor Defined Contribution Plans

- The plan must confirm that circumstances exist to suspend (economic hardship or required language in safe harbor notice), and must provide an updated safe harbor notice and summary of material modification.
- In addition, the plan must conduct ADP/ACP testing for the plan year of suspension and might consider asking the recordkeeper to conduct projections of testing.

Consequences of Furloughs and RIFs



Plan-Specific Provisions

Review the plan document for provisions that may be specifically triggered by furloughs, layoffs, or reductions in force (e.g., accelerated vesting, right to distribution). Partial plan terminations to be discussed.



Treatment of Action

If an LOA, determine if it may be treated as continued employment for some or all of its duration. If a termination, confirm whether it will trigger distribution requirements, forfeiture of unvested benefits, distributable event. If paid, confirm treatment of pay under plan.



PBGC Requirements

- Examples of reportable events include significant reductions in active plan participants, liquidation or insolvency of a controlled group member, loan default, etc. Timing depends upon the type of reportable event and other facts and circumstances.
- Funding requirements apply if operations at a facility permanently cease, resulting in 15% or greater reduction in employees eligible to participate in any pension plan in the controlled group. These rules require reporting to PBGC within 60 days (unless an exemption applies).

Consequences of Furloughs and RIFs – Partial Termination of Retirement Plan

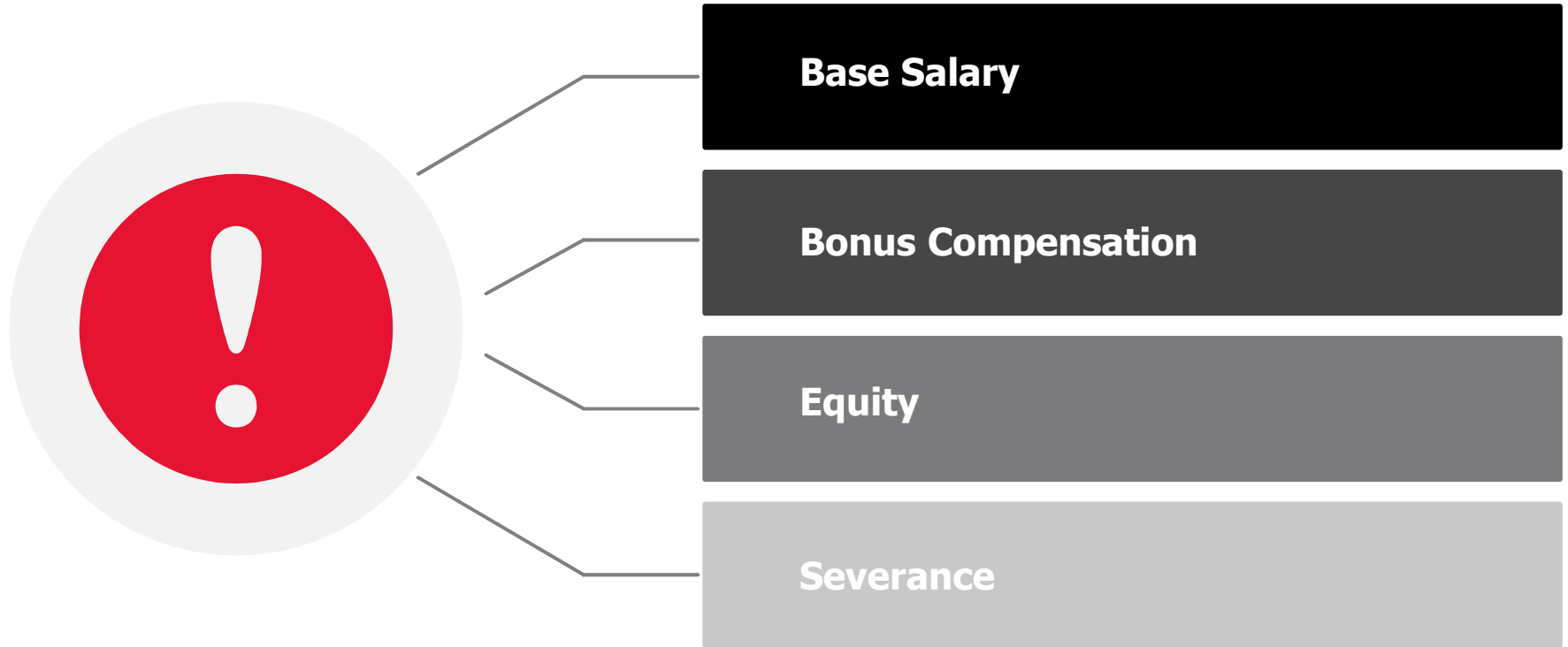
- Facts and circumstances determination
 - Generally a rebuttable presumption that a partial plan termination occurs if employer terminates more than 20% of the plan participants within a specific period
 - Specific period generally is the plan year, but could be longer for related severances from employment (e.g., multiple rolling layoffs that are part of company-wide reduction in force)
 - Can also be caused by exclusion of previously eligible employees or reduction of accruals that cause a reversion to the employer
- Requires full vesting of affected participants

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Executive Compensation

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Compensation Committee Considerations



Base Salary



Reductions

Temporary reduction of
base salary



Deferrals

Deferral of a portion of
base salary to a later tax
year



Equity exchange

Exchange stock for base
salary

Annual Bonus/Long-Term Incentive Bonus

Setting performance goals

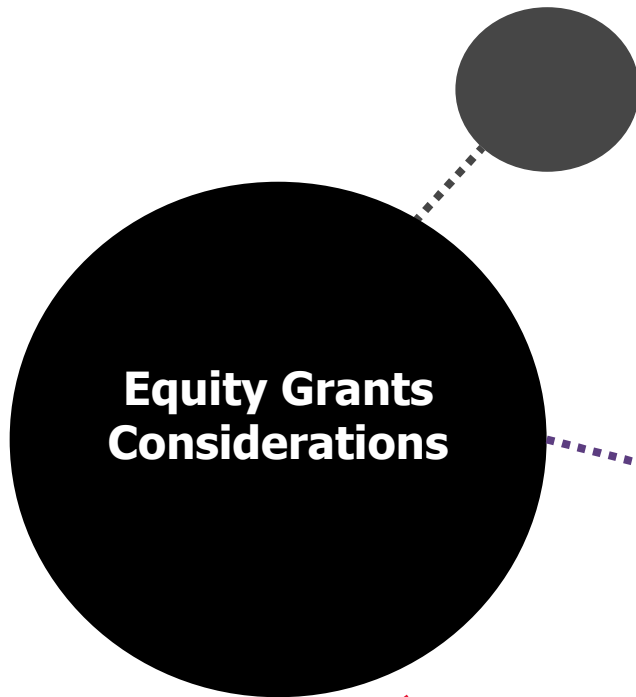
If performance goals have not been set, can typical performance goals be adjusted to take into account the pandemic's impact on the business?

Adjusting existing performance goals

Can existing performance goals be adjusted in light of the pandemic, with adjustments to performance metrics or changes to applicable goals?

Deferring payment

Can bonus payment be deferred to a later tax year?



STOCK OPTIONS

- Timing of grants
- Valuation
- Repricing
- Modifications

RESTRICTED STOCK

- Timing of grants
- Changes to vesting period

RESTRICTED STOCK UNITS

- Timing of grants
- Deferral of delivery of shares



Alternative 1:

Delay 2020 annual equity awards until later in the calendar year, when stock prices may have stabilized and realistic performance goals may be set.



Alternative 2:

Use a stock price based on a trailing average for purposes of setting the number of shares or the exercise price of options (subject to compliance with Section 409A with respect to options).



Alternative 3:

Grant retention equity awards in situations where the performance goals of existing equity awards are unlikely to be met.

Option Repricings

01

- Shareholder Approval
- ISS Considerations

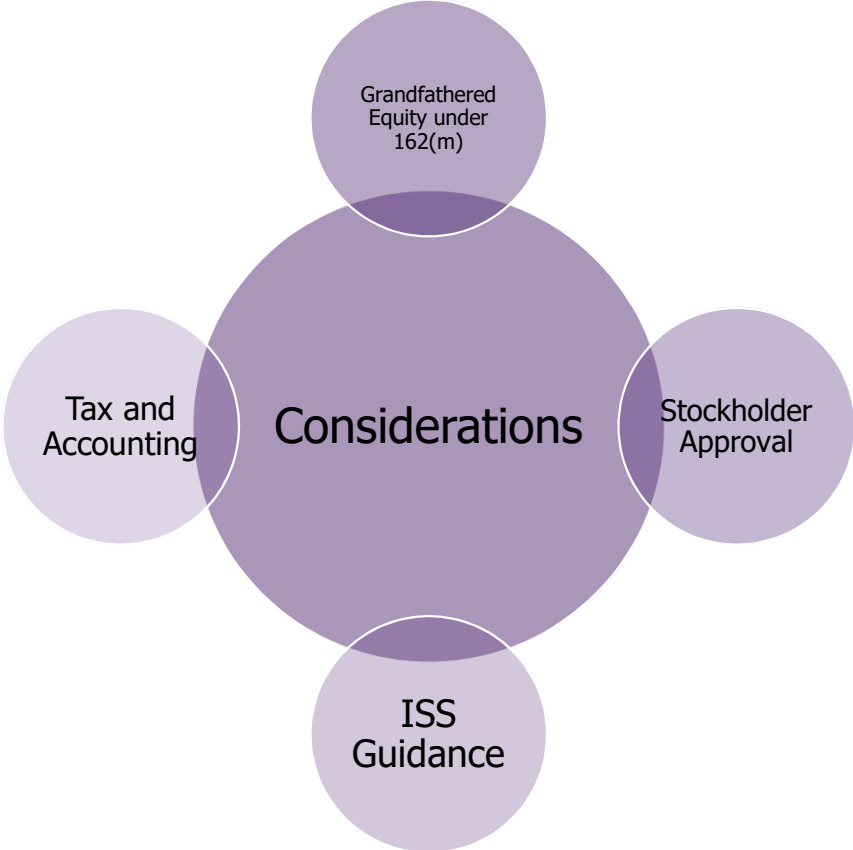
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- Timing of Repricing
- Terms of Repricing

03

- Equity Plan

Additional Equity Considerations



Employment/Severance Arrangements

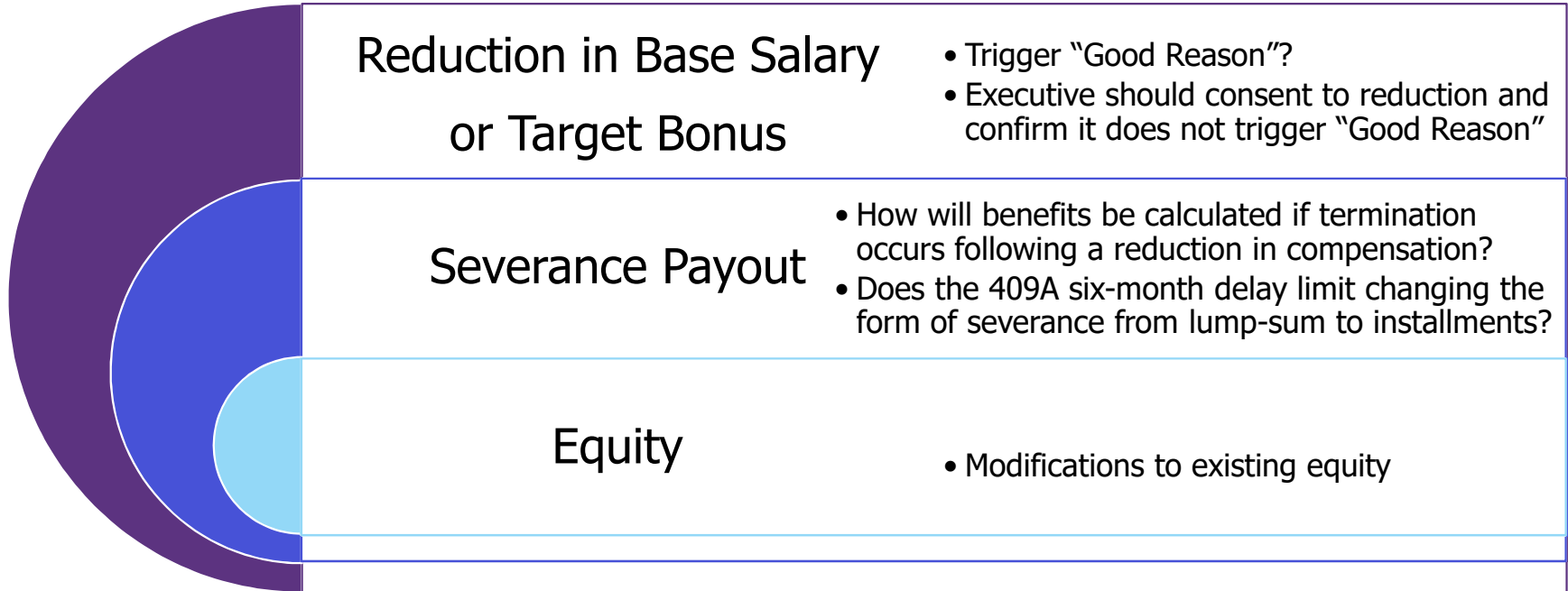
Change to Employment Terms

Any reductions in compensation (base salary, bonus, equity) may conflict with terms of existing agreements with employees

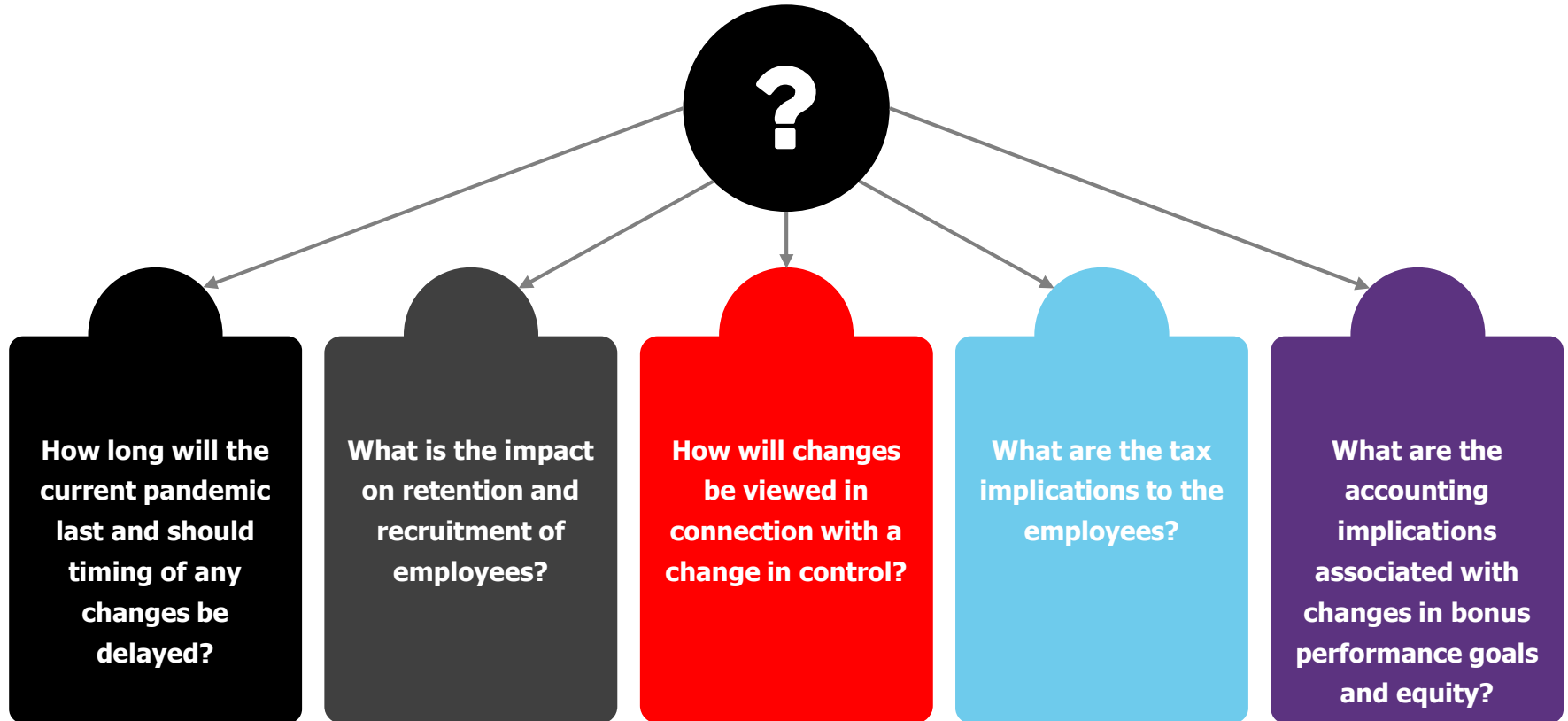
Severance Arrangements

The impact on changes in compensation will need to be taken into account in connection with any terminations while change is in effect

Severance Considerations



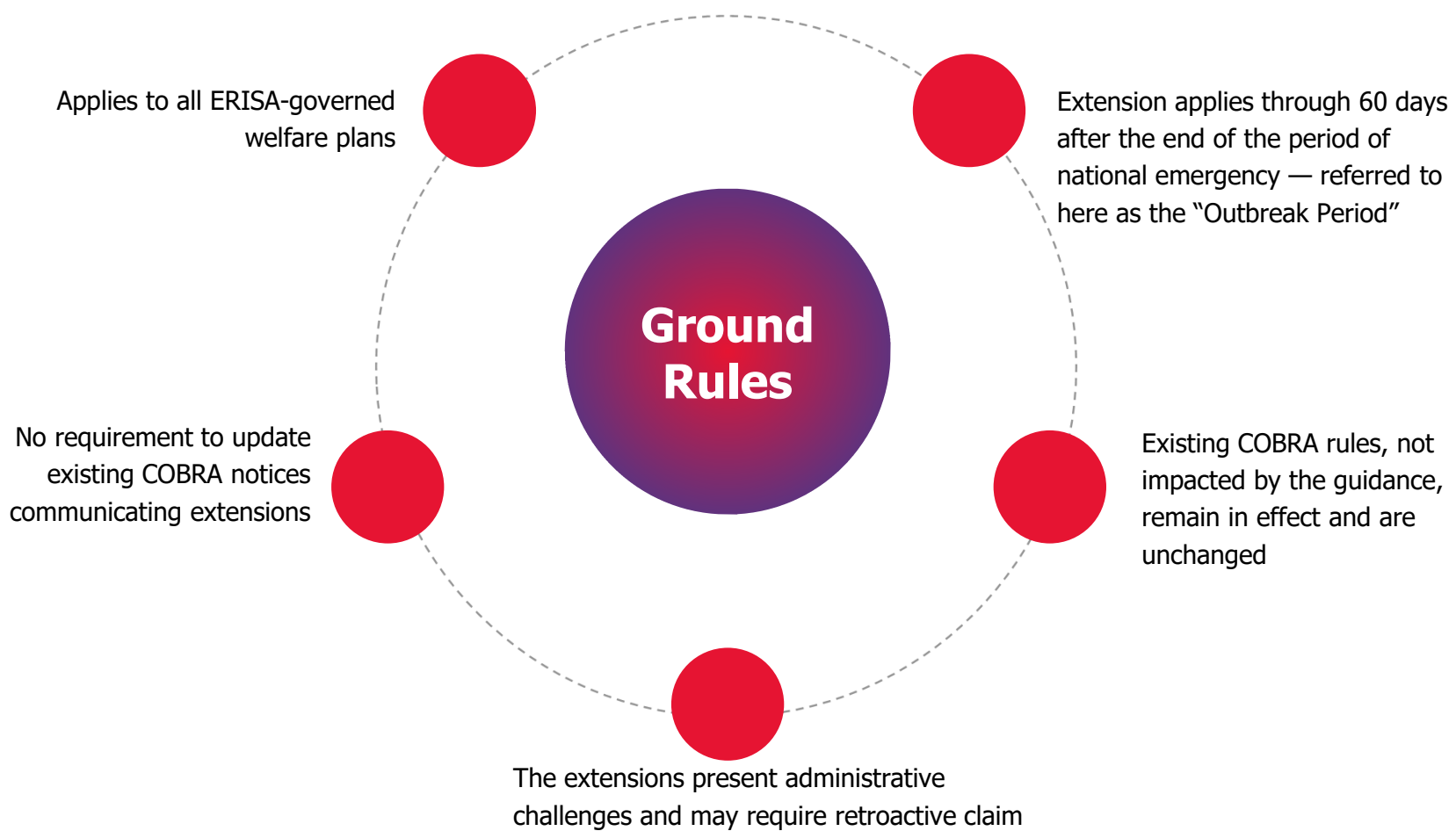
Additional Considerations



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**Health & Welfare
Tolling Issues:
Time Frames Under ERISA
(COBRA, HIPAA, Claim
Deadlines)**

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COBRA Election Notice Extension

- Extends the deadline to provide COBRA election notices through the end of the Outbreak Period
- Only plan administrator relief

Practical implications

Delaying notice will delay COBRA election

Greater potential for requiring retroactive coverage

COBRA election notices are automatically generated and distributed

COBRA Participant Election Extension

- Extends period to make a COBRA election through the end of the Outbreak Period

Practical implications

Will result in retroactive coverage for many more months

Rational QBs will wait even longer to see if they incur claims

No coverage required until a COBRA election is made

And paid for... (see next slide)

COBRA Premium Payment Extension

- The initial COBRA premium payment and ongoing premium payment obligations are extended through the end of the Outbreak Period

Practical implications

QB not required to make COBRA premium payments by ordinary deadlines

Will require retroactive adjudication and coverage of premium payments if payments are eventually made

Long-standing COBRA regulations indicate that coverage can be terminated at the start of an initial election period or subsequent month and then retroactively reinstated if payment is made by the end of the grace period for the initial period or an ongoing month

COBRA Qualifying Event and Disability Extensions

- The 60-day deadline for a QB to notify of events such as divorce, legal separation, loss of dependent child status, or disability determinations is extended through the end of the Outbreak Period

Practical implications

Retroactive adjudication of additional COBRA rights and QB status

Requiring extension of COBRA for 11 months

Retroactive increase in COBRA premiums for disabled QB

HIPAA Special Enrollment Period

- The timeline to request enrollment in a group health plan following a HIPAA special enrollment event is extended through the end of the Outbreak Period

Practical implications

Retroactive coverage when participant reports special HIPAA enrollment event and makes any retroactive premium payment

New dependent, etc.

Benefit Claims and Appeals

- Deadlines to file a benefit claim and to appeal a claim are extended through the end of the Outbreak Period
- Includes external claim procedures

Practical implications

Third-party administrator/plan administrator still must comply with notice requirements

Does not apply to dependent care flexible spending account (DCFSA) (not an ERISA-governed plan)

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Payroll and Fringe Benefits Considerations

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Supplemental Unemployment Benefit Plans

Generally, severance payments paid to former employees are subject to FICA and FUTA tax.

A Supplemental Unemployment Benefit Plan (a SUB-Pay Plan) permits an employer to support laid-off workers (involuntarily separated from service) by supplementing their receipt of state unemployment benefits.

Payments from a SUB-Pay Plan are exempt from:

- both the employee and employer portions of FICA tax, amounting to a 7.65% tax savings for both the employer and employee (up to a wage base of \$137,700 for 2020); and
- FUTA tax, amounting to a tax savings for the employer equal to 6% of the first \$7,000 of wages paid to the employee.

Payments from a SUB-Pay Plan are subject to income tax withholding.

History of SUB-Pay Plans

SUB-Pay Plans were introduced by the IRS in 1956, in Revenue Ruling 56-249, to encourage employers to provide financial assistance to employees in the event of a downsizing.

The exception to FICA and FUTA provided by SUB-Pay Plans has no basis in any statute or regulation. It was the result of combined policy decisions of both the DOL and IRS.

In 2014, in U.S. v. Quality Stores, Inc., the Supreme Court missed the opportunity to opine on the validity of the administrative exception when it addressed the definition of SUB-Pay in Section 3402(o) of the Code for income tax purposes, which does not link SUB-Pay to the receipt of state unemployment benefits.


Since Revenue Ruling 56-249, the IRS has addressed SUB-Pay plans in several subsequent rulings, with the latest in 1990 with Revenue Ruling 90-72.

- In Revenue Ruling 60-330, the IRS concluded that SUB-Pay does not need to be paid from a trust to be exempt from FICA and FUTA tax.
- In Revenue Ruling 77-342, the IRS delinked SUB-Pay from the receipt of unemployment benefits, which was reversed in Revenue Ruling 90-72.
- In Revenue Ruling 90-72, the IRS reiterated that SUB-Pay must be linked to the receipt of unemployment benefits and must not be paid in a lump sum.



SUB-Pay Plan Requirements

The amount of SUB-Pay may exceed the amount of state unemployment benefits.

Several conditions must be met for a SUB-Pay Plan to be exempt from FICA and FUTA tax. 

SUB-Pay cannot be paid in a lump sum (employers that promised a certain amount of severance cannot “cash out” an employee after he or she no longer qualifies for state unemployment benefits).

The plan must not disqualify the employee from receiving unemployment benefits under state law.

The SUB-Pay Plan may be funded through a trust, although not required (most companies set up a trust), or from the general funds of the employer.

The SUB-Pay must be paid after the employee is involuntarily separated from service and only while the employee remains unemployed.

Important SUB-Pay Plan Considerations

Many plan design options, including:

- Reduce SUB-Pay by the amount of an employee's unemployment benefits; or
- SUB-Pay may be offered as a flat percentage of the worker's former pay

Employers that have paid SUB-Pay are not prohibited from rehiring furloughed workers at a later date.

If the SUB-Pay Plan is funded through a Code section 501(c)(17) tax-exempt trust, the trust must be registered with the IRS by filing Form 1024 within 15 months after the month in which the trust was formed.

Some states (like PA) require employers to register the SUB-Pay Plan with the state.

Consider adopting SUB-Pay Plans before an economic downturn to prevent any delays caused by ramping up administration (generally by third-party administrators), state registration, or registering the trust with the IRS.

Employee Retention Credit Under CARES Act

- The recently enacted CARES Act offers employers several options to help retain their employees, including allowing employers to delay the payment of the employer portion of Social Security taxes, the Paycheck Protection Program, and the employee retention credit.
- The refundable tax credit equals 50% of “qualified wages” up to \$10,000 paid by an “eligible employer” financially impacted by COVID-19 to each employee (the maximum amount of the credit is \$5,000 per employee).
- “Qualified Wages” must be paid after March 12, 2020 and before January 1, 2021.

Who Is an Eligible Employer?

01

An employer that carries on a trade or business in 2020, including tax-exempt organizations, that either:

- Fully or partially suspended operations as a result of a government order limiting commerce, travel, or group meetings; or
- A significant decline in gross receipts – When an employer experiences a greater than 50% reduction in quarterly receipts as compared to the same calendar quarter in 2019. When the employer's gross receipts exceed 80% of the comparable quarter in 2019, the employer no longer qualifies for the credit at the end of that quarter.

02

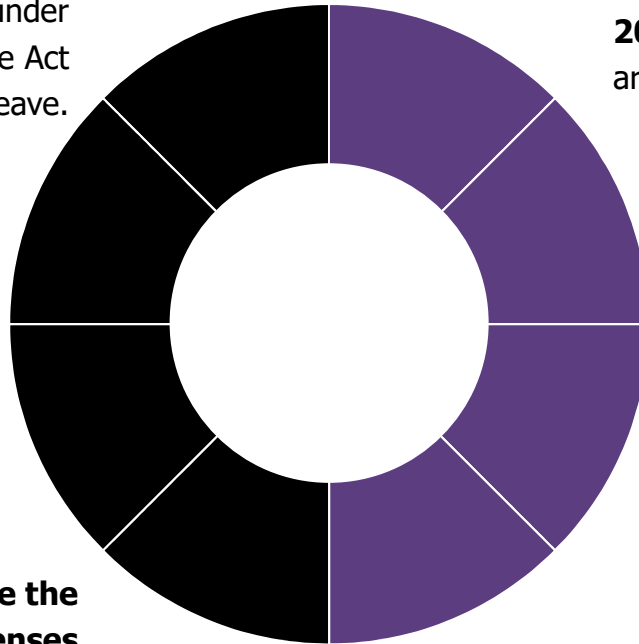
The credit is not available to employers that receive a loan under the Paycheck Protection Program (unless the loan is repaid by May 18, 2020) or to self-employed individuals.

What Are Qualified Wages?

Qualified wages do not include amounts taken into account for the tax credit under the Families First Coronavirus Response Act (FFCRA) for qualified sick and family leave.

If an employer only pays health plan expenses to furloughed workers and does not pay any wages, the health plan expenses alone are qualified wages.

Qualified wages include the employer's health plan expenses allocable to the wages.



For employers who had an average number of full-time employees in 2019 of 100 or less, all employee wages are qualified wages.

For employers who had an average number of full-time employees in 2019 of more than 100, "qualified wages" only include wages paid to an employee for the time the employee is not providing services due to full or partial suspension of operation by governmental order or a significant decline in gross receipts.

Refunds and Advance Payments

- The credit is allowed against the employer's share of Social Security taxes (6.2%).
- For any calendar quarter the amount of the credit exceeds the employer's share of Social Security taxes on all wages, then the excess is applied against any remaining employment tax liability, and the amount of any excess will be refunded to the employer. (The IRS allowed the credit to be claimed against other employment taxes because in Notice 2020-22, the IRS provided that if an employer elected to defer its share of Social Security taxes under Section 2302 of the CARES Act, it could not claim the retention credit against its share of Social Security taxes.)
- In anticipation of receiving the employee retention credit, an employer can fund qualified wages by:
 - Accessing employment taxes, including withholding taxes that are required to be deposited with the IRS (without incurring a failure-to-deposit penalty); and
 - Requesting an advance of the credit by filing Form 7200.

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Multiemployer Plan Participation Post-COVID

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Multiemployer Health and Welfare (H&W) Plans: Specific Issues Under COVID-19 Legislation

Continued Contributions for Employees on FFCRA (FML and Sick) Leave

- DOL guidance strongly suggests that H&W contributions must continue for employees on FFCRA leave
- Collective Bargaining Agreement may also require continued contributions

Multiemployer Plan Extensions of Coverage to Address Layoffs, Employer Delinquencies, and Other Factors Related to COVID-19

- How such extensions are being structured
- Issues for contributing employers

Using Multiemployer H&W Coverage to Satisfy or Partially Satisfy Employer's Obligation to Provide FFCRA Leave

- Multiemployer Plan STD or SUB-Pay Plan Benefits
- Difficulty in coordinating employer FFCRA obligation with multiemployer STD coverage

SUMMARY

Multiemployer Pension Plans: Reforms Proposed under COVID-19 Legislation

Emergency Pension Plan Relief Act or EPPRA (part of HEROES Act)

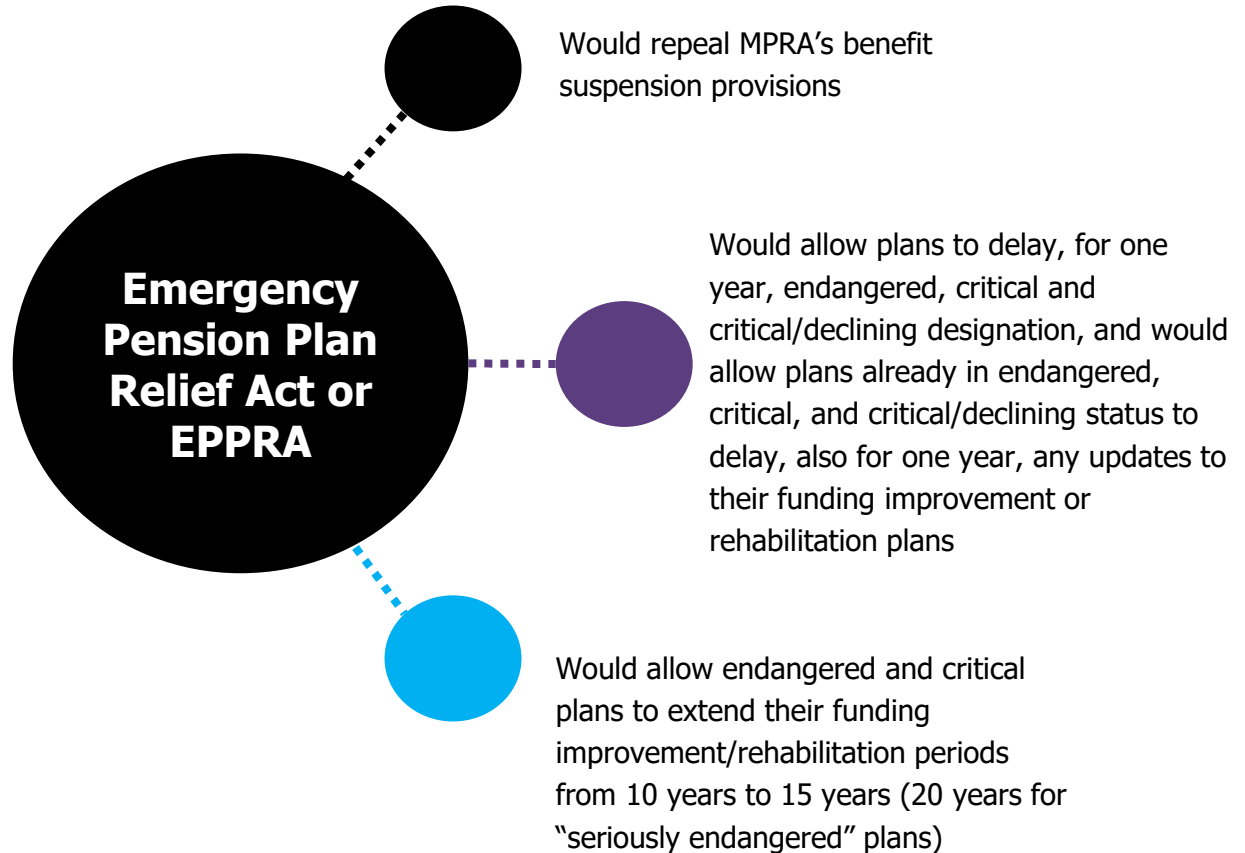
Would create an expanded PBGC partition program for troubled multiemployer pension plans, funded by the Treasury.

DETAILS

Plans eligible for the partition program would include:

- Plans in critical and declining status in any plan year beginning in 2020-2024;
- Plans that have an approved suspension of benefits under MPRA in place on or before the date the EPPRA is enacted;
- Plans that, for any plan year beginning in 2020-2024, are certified to be in critical status, have a funded percentage of less than 40%, and have a ratio of active to inactive participants that is less than 2:3; or
- Plans that are insolvent as of the date of EPPRA's enactment, if the plan (A) became insolvent after December 31, 2014 and (B) has not been terminated as of the date of EPPRA's enactment.

Multiemployer Pension Plans: Reforms Proposed under COVID-19 Legislation



Multiemployer Pension Plans: Reforms Proposed under COVID-19 Legislation

Emergency Pension Plan Relief Act or EPPRA

- **Plans that satisfy a solvency test** would be able to elect to take advantage of certain funding relief that was available to plans in 2008-2009 (i.e., amortization of losses, expanded smoothing periods)
- **Would nearly double the PBGC guarantee**, from \$37.75 per year of credited service under the current formula to \$67.60 per year of credited service under EPPRA. Would also provide for inflation-based adjustments to the PBGC guarantee going forward.

Multiemployer Pension Plan Withdrawal Liability Considerations

- In the course of planning for furloughs, layoffs, or other workforce restructuring, employers that contribute to multiemployer pension plans should be mindful of the risk of triggering a complete or, more likely, partial withdrawal, leading to withdrawal liability

Multiemployer Pension Plans: Three Ways to Trigger a Partial Withdrawal

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01

70% contribution decline

- an employer's "contribution base units" (e.g., hours worked)
- in three consecutive years
- less than 30% of its average annual contribution base units for the two highest years in the preceding five years

02

"Facility Take-out" - when an employer ceases to have an obligation to contribute at one or more (but not all) facilities covered by the plan, if the employer continues to perform the same type of work at the facility

03

"CBA Take-out" - when an employer ceases to have an obligation to contribute under one or more (but not all) CBAs requiring plan contributions, while continuing to perform the same type of work in the union's jurisdiction or transferring the work to another location. Also occurs when work is transferred to another entity owned or controlled by the employer.

Multiemployer Pension Plans: Beware of 70% Contribution Declines

- Furloughs, layoffs, and other similar actions that will substantially reduce contributions to a multiemployer pension plan for an extended period (e.g., three years) can lead to a 70% decline in partial withdrawals, particularly when coupled with an overall slowdown in work as a result of a recession

Multiemployer Pension Plans: Beware of Unusual Changes in Plan Rules Around Participation and Withdrawal

- The combination of investment market volatility and a slowdown/decline in contributions will cause many multiemployer plans to experience declines in funding.
- In addition to the PPA-required actions that underfunded plans must take, it is possible that some plans will consider taking additional action to keep employers from withdrawing or to further penalize withdrawing employers.
 - Withdrawal liability interest rate changes
 - Extra exit fees

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Key Issues for ESOP Companies in the Wake of the COVID-19 Crisis

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Interim ESOP Valuation

1

ESOP companies may want to revisit their recent ESOP valuation, because the recent year-end valuation took into account financial projections that may not materialize this year, so that year-end valuation will be higher than what projections may have warranted.

2

An interim valuation performed for purposes of making distributions and diversifications this year may make sense.

3

Such an interim valuation could also tie in to any management incentive plan or other deferred compensation plan that bases the value of award payments off the most recent ESOP valuation.

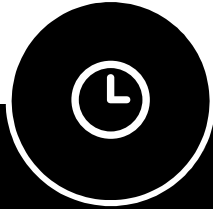
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However, check the terms of the ESOP document — if the ESOP does not already allow for an interim valuation, then case law is clear that there are anti-cutback implications if you amend the ESOP to now allow for an interim valuation.

Interim ESOP Valuation

- The decision to choose an interim valuation for this year is a fiduciary function.
- If an ESOP company chooses to do an interim valuation for this year, it needs to allow for enough time to get the valuation completed and also enough time to get distributions and diversifications processed.
- Consideration should also be given to waiting until the market stabilizes.

ESOP Distribution Provisions



ESOPs may provide for distributions sooner than what the Internal Revenue Code allows as the maximum time limit, and perhaps it allows for lump-sum distributions instead of installments.



If this is the case, ESOP companies should consider whether it makes sense to revise the ESOP's distribution provisions and/or distribution policy to delay distributions and also allow for installments once distributions begin. Any required amendment could be effective as of the beginning of the plan year.

ESOP Transaction and Bank/Seller Loan Documents

ESOP companies may want to consider reviewing their ESOP transaction documents to determine whether and to what extent any provisions could be triggered due to the economic downturn.

For example, if the ESOP company has a bank loan in place, the ESOP company should consider reviewing the credit agreement to determine what the loan covenants state regarding the ESOP (particularly distributions) — in order to avoid any inadvertent violations of the covenants.

In addition, the ESOP company should review the provisions in any outstanding seller notes, other seller loan documents, or other ESOP transaction documents to determine whether any parties (e.g., trustee, noteholders, warrant holders, etc.) need to be notified for any reason.

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QUESTIONS?

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Biography



Andy Anderson

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Leader of Morgan Lewis's health and welfare task force, **Andy R. Anderson** is often recognized for his work in counseling clients on employer, individual, and insurer issues created by the Affordable Care Act, and regulatory compliance issues in relation to the Internal Revenue Code, ERISA, COBRA, HIPAA, and Mental Health Parity. Tax-exempt organizations and Fortune 500 companies turn to Andy for handling their benefit plans, and legal review surrounding welfare benefit plans, government self-correction programs, cafeteria plans, and VEBAs.



Biography



Brian Hector

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Brian D. Hector counsels clients on Employee Retirement Income Security Act (ERISA) and employee benefits issues, including employee stock ownership plans (ESOPs), qualified benefits plans, executive compensation, fiduciary liability, and related securities matters. As head of Morgan Lewis's ESOP Task Force, he advises public and private ESOP clients on corporate governance, succession planning strategies, ownership transition issues, and liquidity transactions. He also represents enterprises before the US Internal Revenue Service (IRS) and Department of Labor (DOL) in a range of ESOP and employee benefits matters.



Biography



Daniel Salemi

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Daniel R. Salemi counsels clients on the full range of issues related to retirement plans, health and welfare plans, plan investments (under ERISA and individual US state laws), and deferred and equity-based compensation arrangements, helping them design and maintain state-of-the-art benefit plans to achieve unique operational goals. Dan's broad experience in the employee benefits area includes the representation of clients in collective bargaining, litigation, and mergers and acquisitions.



Biography



David Zelikoff

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David B. Zelikoff represents and counsels clients in a range of matters related to employee benefit plans and executive compensation agreements. He advises on the design and implementation of tax-qualified, nonqualified deferred compensation, equity compensation, and health and welfare plans, and he helps clients draft and negotiate executive employment agreements, severance arrangements, and change-in-control arrangements. David's clients include tax-exempt organizations, and public/private Fortune 500 and emerging growth companies in the technology and life sciences fields.



Biography



Jacob M. Oksman focuses his practice on employee benefits and executive compensation matters, including the tax treatment of employee and independent contractor benefits outside qualified retirement plans, stock options and other stock-based compensation, executive income deferrals, and golden parachutes.

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Biography



Claire Bouffard

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Claire E. Bouffard counsels clients on employee benefits and executive compensation. She drafts and assists with design of tax-qualified pension and profit-sharing plans, cash or deferred arrangements, health and welfare arrangements, deferred compensation plans, and employment agreements. In addition, Claire reviews, edits, and ensures compliance with plan documents and amendments; drafts communications materials and notices to plan participants; and files voluntary correction program submissions.

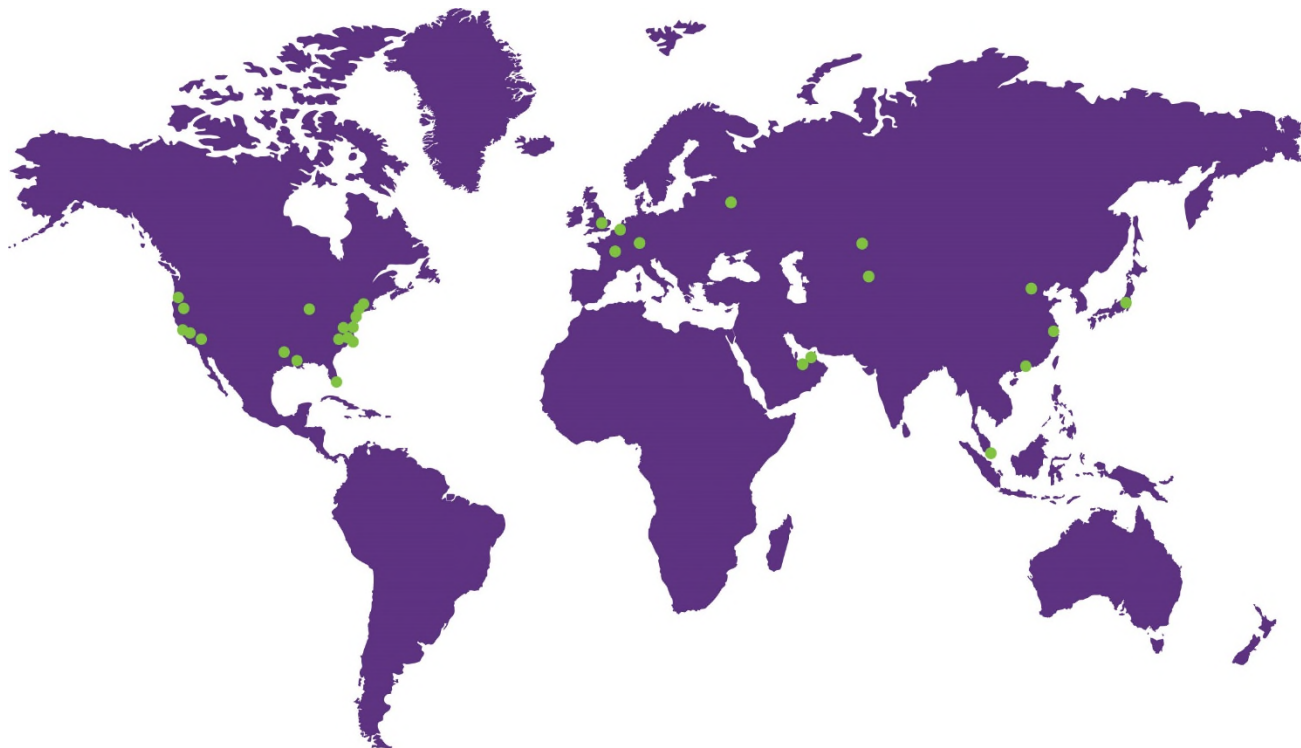


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