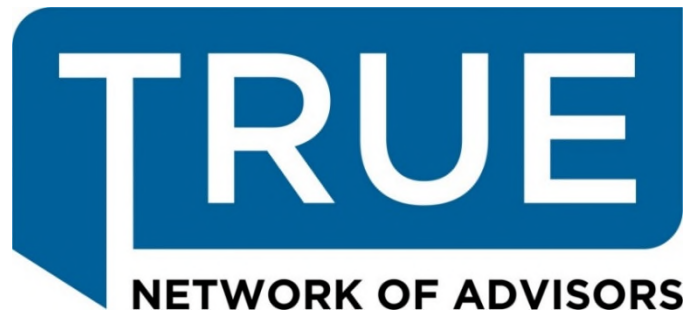


ERISA Plan Asset Principles and MLR Rebates



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Plan Assets

- ▼ DOL enforcement priority
- ▼ *Ordinary notions of property rights*
- ▼ Participant Contributions
- ▼ MLR Rebates and similar rebates



Plan Assets

- ▼ **Exclusive Benefit Rule**
 - ▼ Plan assets may only be used for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan
- ▼ **Plan Document provisions**
- ▼ **Reasonable Plan Administrative Expenses**
 - ▼ Settlor vs. Plan expenses
 - ▼ Plan Expense Reimbursement Policy
- ▼ **Prohibited Transactions**
- ▼ **Fiduciary Decisions**

Trust Requirements & Exemptions

- ▼ **Funded vs. Unfunded vs. Fully-Insured**
 - ▼ **General Assets**
 - ▼ **Trusts**
- ▼ **DOL Non-enforcement Policy (TR 92-01)**
 - ▼ **Employee contributions made through a cafeteria plan**
 - ▼ **Forwarded directly to carrier within three months (fully-insured)**
 - ▼ **Benefits paid directly from general assets (self-funded)**

Form 5500 Requirements

Required to File	Not Required
Small, <u>FUNDED</u> plans	Small <u>UNFUNDED</u> plans
ALL large plans with more than 100 participants as of the start of the plan year, including fully-insured, funded, and unfunded plans	Small fully-insured plans

- ▼ Questions to ask:
 - ▼ How many participants?
 - ▼ If self-funded, are benefits paid out of general business assets or is there a separate fund?
- ▼ Must file by the end of the seventh month following the end of the plan year (e.g., July 31 for calendar year plans)
- ▼ How many plans and 5500s?
- ▼ DFVCP

Form 5500 Requirements

Required to File

ALL FUNDED Plans
(regardless of size)

ALL LARGE Plans
(more than 100 participants as of the start of the
plan year)

Plan Rebates – Considerations

- ▼ Some or all may be plan assets
 - ▼ **Entirely Employer-Paid:** None of the credit/rebate is a plan asset. The employer may use the credit/rebate for corporate purposes.
 - ▼ **Entirely Employee-Paid:** The entire credit/rebate is a plan asset.
 - ▼ **Employer and Employees Each Pay a Share of the Premium:** The portion of the credit/rebate attributable to employee contributions (including COBRA participants, whether or not they are or were employees) is a plan asset
- ▼ DOL's *preferred* method is direct distribution to plan participants; however, employers should consider all factors in making decisions
 - ▼ For example, if distributing payments to participants is not cost-effective (e.g., payments to participants are of *de minimis* amounts, or would give rise to tax consequences to participants or the plan)
- ▼ Still must use plan assets for only permissible plan purposes
 - ▼ Apply the rebate toward future participant premium payments or toward benefit enhancements
 - ▼ Plan administrative expenses?

Plan Rebates – Considerations

▼ Trust requirements for rebates?

- ▼ *In any case, employers that sponsor group health plans that use insurance policies to provide benefits would be prohibited by ERISA section 403(c)(1) from receiving a rebate amount greater than the total amount of premiums and other plan expenses paid by the employer. To the extent that an employer's portion of the rebate exceeds the amount of such employer's total amount of premiums and other plan expenses paid, that excess amount must be held in trust for the exclusive benefit of participants and beneficiaries.*

Plan Rebates – Considerations

- ▼ Determine portion that must be treated as plan assets
- ▼ Determine plan or plans to which the rebate relates
- ▼ Review the terms of the plan or plans and related policies regarding premium rebate/credit distribution
- ▼ Determine the participants to which the rebate relates
- ▼ Evaluate potential distribution methods and costs, administrative burden, tax implications, etc.
- ▼ Follow three months rule
- ▼ Document decision making
 - ▼ Remember: plan asset decisions are fiduciary decisions

ACA Reporting Update

- ▼ Deadline extended for providing employee statements (1095-B & 1095-C) from January 31, 2021 to March 2, 2021
- ▼ Filing deadline **NOT extended**
- ▼ Good Faith Transition Relief Extended
 - ▼ Likely to be the final year

ACA Reporting

2021 ACA Reporting Deadlines

To IRS

Paper Filers

February 28, 2021

Electronic Filers

March 31, 2021

To Employees

March 2, 2021

The FFCRA Goes to Court

- ▼ *State of New York v. DOL* (SDNY)
- ▼ On August 3, 2020, the federal district court for the Southern District of New York ruled in favor of the State of New York's challenge against DOL regulations implementing the FFCRA
 - ▼ Court said DOL “jumped the rail” when it issued FFCRA regulations
- ▼ DOL considers the effect of the court’s opinion as vacating the provisions nationwide, not just as to the parties in the case
- ▼ **DOL issued revised regulations**

The FFCRA Goes to Court

Invalidated by the Court	DOL's Reaction in New Regulations
Work availability requirement	Reaffirmed that leave can only be taken if the employee has work available from which to take leave
<i>Health care provider</i> definition	Narrowed definition to only include employees who are health care providers under the FMLA and those providing diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care
Requirement of employer consent to intermittent leave	Employees must still obtain employer's approval to take leave on an intermittent basis.
Requirement that employees provide notice of leave prior to taking leave	Clarified that employees must give their employer information to support their need for leave <i>as soon as practicable</i> Corrected an inconsistency regarding when an employee may be required to give notice for EPSL vs EFMLA

State of New York v. DOL (SDNY, August 2020)

Work Availability Requirement

- ▼ Original DOL rule: Employees were not eligible for FFCRA leave when the employer had no work for them, including furloughed employees
- ▼ SDNY ruling: Not consistent with statutory language
- ▼ **DOL says:**
 - ▼ DOL maintained that an employee may take FFCRA paid leave (EPSL and EFMLA) only if the employee has work from which to take leave and the FFCRA-qualifying reason is a “**but-for-cause**” of the employee’s inability to work
 - ▼ DOL said its interpretation of “leave” for FFCRA purposes is consistent with its long-standing interpretation of “leave” as used in the FMLA

State of New York v. DOL (SDNY, August 2020)

Health Care Provider Exemption

- ▼ **DOL rule:** DOL interpreted this broadly to apply on an employer level and expanded it to include vendors of the health care provider employer and virtually any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical supplies
- ▼ **SDNY ruling:** Definition is too broad because it goes beyond the FMLA-based definition referenced in the FFCRA and includes employees whose roles bear limited nexus to the provision of healthcare services

State of New York v. DOL (SDNY, August 2020)

Health Care Provider Exemption

▼ DOL says:

- ▼ Narrowed the exclusion to only include those individuals capable of providing health care services, which include **diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care**, or otherwise meet the definition of the term found in the FMLA
- ▼ FMLA definition includes “doctors of medicine or osteopathy” authorized to practice in their state or other medical professionals such as podiatrists, dentists, clinical psychologists, optometrists, many chiropractors, nurse practitioners, nurse midwives, clinical social workers, physician assistants, and other similar professionals

State of New York v. DOL (SDNY, August 2020)

Health Care Provider Exemption

- ▼ New rule would also allow exclusion for nurses, nurse assistants, medical technicians, and laboratory technicians who process test results
- ▼ Employers may also elect to exempt employees who perform the following types of services:
 - ▼ **Diagnostic services** including, for example, taking or processing samples, performing or assisting in the performance of x-rays or other diagnostic tests or procedures, and interpreting
 - ▼ **Preventive services** including, for example, screenings, check-ups, and counseling to prevent illnesses, disease, or other health problems
 - ▼ **Treatment services** including, for example, performing surgery or other invasive or physical interventions, administering or providing prescribed medication, and providing or assisting in breathing treatments
 - ▼ **Other integrated and necessary services that, if not provided, would adversely affect the patient's care** includes, for example, employees who perform bathing, dressing, hand feeding, taking vital signs, setting up medical equipment for procedures, and transporting patients and samples

State of New York v. DOL (SDNY, August 2020)

Health Care Provider Exemption

- ▼ Revised rule also provides examples of employees who **may not be excluded**:
 - ▼ IT professionals, building maintenance staff, human resources personnel, cooks, food service workers, records managers, consultants, and billers
- ▼ The revised rule states that while the services provided by these employees may be related to patient care, they are too attenuated to be integrated and necessary components of patient care

State of New York v. DOL (SDNY, August 2020)

Intermittent Leave

- ▼ **DOL Rule:** Permits employees to take leave intermittently only if the employer and the employee agree
- ▼ **SDNY ruling:** DOL failed to explain why employer consent is required, so employer consent is invalid
- ▼ **DOL says:**
 - ▼ Congress granted DOL broad regulatory authority to effectuate the purposes EPSL and EFMLA
 - ▼ Requiring employees to obtain employer consent for intermittent leave is consistent with longstanding FMLA principles

State of New York v. DOL (SDNY, August 2020)

Intermittent Leave

Intermittent Leave Not Available

- Employee subject to government quarantine or isolation order related to COVID-19
- Employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19
- Employee is experiencing symptoms of COVID-19 and is taking leave to obtain a medical diagnosis
- Employee is taking care of an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19
- or is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services

Intermittent Leave Available

- Employee who is caring for the employee's child if the child's school or place of care has been closed or the child care provider of such child is unavailable due to COVID-19-related reasons

State of New York v. DOL (SDNY, August 2020)

Employee Advance Documentation Requirement

- ▼ **DOL rule:** Prior to taking leave, employee must provide documentation indicating the reason for leave, the leave duration, and the authority for the order qualifying them for leave
- ▼ **SDNY ruling:** The requirement to furnish documentation before taking leave is invalid. The statute allows employees to provide "such notice as is practicable"

State of New York v. DOL (SDNY, August 2020)

Employee Advance Documentation Requirement

▼ **DOL says:**

- ▼ Documentation need not be provided prior to taking leave under FFCRA, but should be provided “as soon as practicable”
- ▼ Notice for EPSL may be required **only after** (or on) the first day of leave taken
- ▼ “As soon as practicable” Notice for EFMLA may be before the first day leave begins if the need for EFMLA is foreseeable
- ▼ In most cases, “as soon as practicable” for EFMLA will likely be when the employee provides notice for EPSL

State of New York v. DOL (SDNY, August 2020)

What Now?

- ▼ DOL's revised regulations now in effect (as of September 16, 2020)
 - ▼ New rules could be challenged in new lawsuit or as part of the current lawsuit
- ▼ Evaluate impact of ruling and revised regulations on your FFCRA administration
- ▼ Health care provider employers should evaluate whether excluded employees may still be excluded under narrower definition
 - ▼ Individualized determination of whether the employee provides **services that are integrated with and necessary to the provision of patient care**
- ▼ Evaluate notice and documentation procedures
 - ▼ Reasonable documentation and notice requirements may still apply, but generally not as an advanced/precondition for the requested leave



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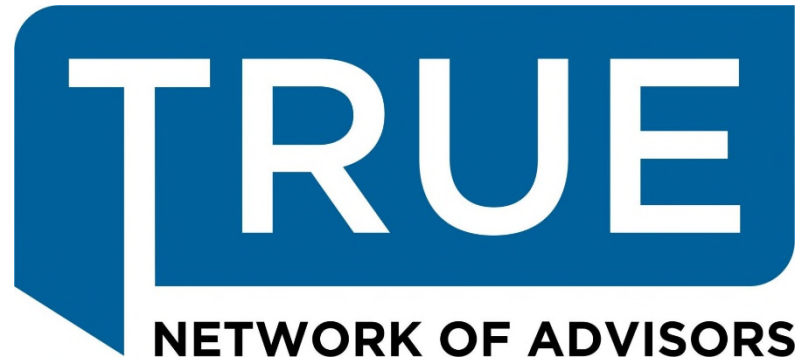


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