



Employee Benefit Provisions in the Coronavirus Aid, Relief, and Economic Security Act ("CARES" Act)

April 8, 2020

CARES Act

Employee Benefit Provisions

- ◆ On March 27, 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”).
 - This historic \$2 trillion relief package received bipartisan support as part of a series of government actions to address the acute economic fallout from the coronavirus (COVID-19) pandemic.
 - Key provisions apply to health and welfare plans and retirement plans.

Key Provisions Affecting Retirement Plans

- ◆ Defined contribution plans may provide special withdrawal and loan rights to “qualified individuals” affected by COVID-19.
- ◆ Qualified individuals receive special tax treatment for distributions made in 2020.
- ◆ Defined contribution plans and IRAs may suspend age 70½ required minimum distributions (RMDs) for *all* participants.
- ◆ Limited relief for sponsors of defined benefit plans.

Similarity to Prior Legislation

- ◆ Many of the retirement plan provisions in the CARES Act closely resemble provisions of 2017 legislation covering individuals affected by hurricanes and wildfires.
- ◆ The RMD relief closely resembles similar relief provided in 2009 during the “Great Recession.”
- ◆ Until the IRS issues guidance under the CARES Act, it may be reasonable to rely on the IRS guidance under those prior laws.

Two Important Definitions

- ◆ “Qualified Individual”
- ◆ “Coronavirus-Related Distribution”

Who is a Qualified Individual?

- ◆ Any individual who:
 - is diagnosed with COVID-19;
 - has a spouse or tax dependent who is diagnosed with COVID-19; or
 - experiences adverse financial consequences as a result of:
 - being quarantined due to COVID-19;
 - being furloughed or laid off or having work hours reduced due to COVID-19;
 - being unable to work due to lack of child care due to COVID-19;
 - the closing or reduction in hours of a business owned or operated by the individual due to COVID-19; or
 - other circumstances specified by the Treasury Department.

Who is Missing from the List?

- ◆ Employees who have their pay, but not their hours, reduced.
- ◆ This would generally affect salaried employees, creating a disparity between hourly and salaried employees.
- ◆ Treasury can (and should) remedy this by using its discretion to add additional categories.
 - Should include employees whose salaries are being reduced as well those whose salaries are being automatically deferred by their employers (e.g., GM).

What is a Coronavirus-Related Distribution?

- ◆ *Any* distribution made to a *qualified individual* during 2020 from a qualified plan or an IRA.
 - \$100,000 maximum applies for all distributions to a single individual from all qualified plans and IRAs.
 - Includes distributions from 401(k) plans, 403(b) plans, governmental 457(b) plans, ESOPs and defined benefit plans but **not** distributions from 457(b) plans of tax-exempt entities.
- ◆ Includes distributions made pursuant to a new distribution right just for coronavirus-related distributions, but could (for some purposes) also include:
 - A distribution made to a terminated participant
 - An in-service distribution at age 59½
 - A traditional hardship distribution

Coronavirus-Related Distribution Opportunity

- ◆ Sponsors of 401(k), 403(b) and governmental 457(b) plans *may* allow participants who are not otherwise eligible to take coronavirus-related distributions through December 31, 2020.
 - These distributions are exceptions to the general restriction on in-service distributions from 401(k), 403(b) and governmental 457(b) plans before age 59½.
 - The participant must be a qualified individual, but the plan may rely on a participant's certification without requiring documentation.
 - The total amount distributed by all plans in a controlled group cannot exceed \$100,000.
 - Plans are responsible for tracking the limit, but some recordkeepers are indicating they may not be able to do this.

Isn't This Just a New Kind of Hardship Distribution?

- ◆ No. It may resemble a hardship distribution, but there are important differences:
 - The distribution does not have to be necessary to satisfy a specific need, but it is subject to the \$100,000 limit.
 - The documentation requirements do not apply.
 - The participant must certify that he or she is a qualified individual but need not represent that other financial resources are not available.
- ◆ Participants who are not qualified individuals may still take traditional hardship distributions allowed under the plan, but those distributions will not receive favorable tax treatment.

Coronavirus-Related Distributions – Tax Benefits

- ◆ The distribution is not subject to the 10% early withdrawal penalty that generally applies to distributions taken before age 59½.
- ◆ The plan is not required to withhold 20% in federal taxes.
- ◆ The employee may spread the taxes on the distribution equally over 3 years.
- ◆ The employee has 3 years from the date of the distribution to repay the distributed amount to an IRA or an employer plan as an “indirect” rollover.
 - Amounts that are repaid will not be subject to taxes until again distributed to the participant.
 - This right apparently does not apply to periodic payments over 10 years or more or the participant’s life expectancy or to traditional hardship distributions.

How Does the 3-Year Repayment Work?

- ◆ The participant has until 3 years from the date of the distribution to repay all or part of the distribution.
- ◆ Repayment may be to an IRA or a qualified plan.
 - Repayment may be in 1 or more contributions.
 - Does not have to be the plan that made the distribution.
 - Plans are not required to accept repayments.
- ◆ Amounts that are repaid will not be subject to taxes until again distributed to the participant.
 - Participants may need to file amended tax returns to obtain refunds of taxes paid before repayment.

Coronavirus-Related Distributions – Considerations for Plan Sponsors

- ◆ Adding a withdrawal right will help participants who have been furloughed or whose hours have been reduced (or who have otherwise been impacted), but consider:
 - The \$100,000 limit on combined withdrawals from the plan and all other plans in the controlled group may be difficult to administer.
 - For employees who have been terminated, this provision is not needed because they have full access to their funds.
 - Active employees may already have some access to funds through hardship withdrawals, although on a more limited basis than the new withdrawal provision.
 - Due to market volatility, it may be detrimental for employees to withdraw their funds at this time.

Increased Plan Loan Limits

- ◆ The maximum loan limits have been increased for loans issued between March 27, 2020 and September 23, 2020:
 - Maximum dollar limit is increased from \$50,000 to \$100,000.
 - Participants may borrow 100% of their vested account instead of being limited to 50%.
 - The participant must be a “qualified individual” but the plan may rely on a participant’s certification and no documentation is needed.

Increased Loan Limits - Considerations

- ◆ Provides an opportunity for active employees to access 401(k) funds on a tax-free basis, but repayment is required.
- ◆ Changes to existing plan-specific loan rules, such as a limit on the number of outstanding loans, may be necessary in order to allow participants to receive the benefit of these changes.
- ◆ Market volatility would impact the assets that are liquidated to fund loans.

Loan Payment Suspension

- ◆ Plan loan payments due from March 27, 2020 to December 31, 2020 may be suspended for 1 year from the due date.
- ◆ The maximum 5-year loan term is increased by 1 year to reflect the suspension.
- ◆ When payments resume, the loan payments must be increased for interest accrued during the suspension period.
- ◆ The participant must be a “qualified individual” but the plan may rely on a participant’s certification and no documentation is needed.

Loan Payment Suspension - Considerations

- ◆ The statute is not entirely clear, but it appears that both the increase in available loan amounts and the suspension of payments are optional.
- ◆ Suspending loan repayments may help employees weather the period of lower compensation, but the plan would need a system for participants to certify that they are qualified individuals before suspending payments.

Required Minimum Distributions

- ◆ For defined contribution plans and IRAs, required minimum distributions (RMDs) due in 2020 are suspended.
 - Applies to participants who reached age 70½ before 2020.
 - It appears that an RMD that has already been made during 2020, including the initial RMD due by April 1, will not be treated as an RMD for tax purposes and, if the recipient is a qualified individual, will qualify for favorable treatment as a coronavirus-related distribution.
 - Applies to distributions for beneficiaries of participants who died before 2020.
 - Defined benefit plan and nongovernmental 457(b) plans must continue to make RMDs in 2020.

Plan Sponsor Choices for RMDs

- ◆ Based on guidance from a similar law suspending RMDs for 2009 in response to the “Great Recession,” we expect the IRS will allow plan sponsors to do any of the following:
 - Make the distributions anyway, but they would not be treated as RMDs for tax and rollover purposes;
 - Allow each participant to choose whether to receive the payment or not (but again, if the distribution is paid, it will not be treated as an RMD for tax and rollover purposes); or
 - Not make distributions to any participants.

Implementing the CARES Act

- ◆ It appears that all of the retirement plan provisions are optional, but we expect most plan sponsors to implement some or all of these provisions.
- ◆ Implementing the CARES Act requires significant administrative changes to 401(k) plans and other defined contribution plans.
- ◆ Recordkeepers have acted quickly to make changes to their systems but are implementing the provisions in different ways and on different timetables.

Plan Amendment Deadline

- ◆ Plan sponsors may implement any of the provisions of the CARES Act immediately without first amending their plans.
- ◆ The deadline for adopting amendments for the CARES Act is the last day of the first plan year beginning in 2022 (or 2024 in the case of governmental plans).
- ◆ Note that amendments may be required sooner for other plan design changes, such as reducing contributions or accruals.

Provisions Affecting Defined Benefit Plans

- ◆ Required contributions to defined benefit plans that are due in calendar year 2020 may be delayed until January 1, 2021.
- ◆ A plan may treat the plan's adjusted funding target attainment percentage (AFTAP) for the last plan year ending before January 1, 2020, as the AFTAP for the plan year that begins in calendar year 2020.
 - Will primarily benefit fiscal year plans by allowing them to avoid a valuation based on declines in asset values during 2020.

Expanded Coverage for COVID-19 Testing

- ◆ As a reminder, the Families First Coronavirus Response Act (FFCRA) requires an employer-sponsored group health plan (including a grandfathered plan under the Affordable Care Act (ACA)) to provide coverage for COVID-19 diagnostic testing and services related to the diagnostic testing without any cost sharing (including deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements.

Testing Coverage Provisions

- ◆ The CARES Act expands the diagnostic testing that is required to be covered under the FFCRA to include tests that are not approved under the Federal Food, Drug, and Cosmetic Act.
- ◆ A plan must reimburse providers of the COVID-19 diagnostic testing and related services:
 - The negotiated rate in effect between the plan and the provider if such a rate is available before the public health emergency was declared; or
 - In an amount equal to the cash price for such service as listed by the provider on a public internet website, or
 - the plan can negotiate with the provider for less than such cash price.

Intended to avoid surprise medical bills but balance billing may still occur

Preventive Services Provisions

- ◆ Generally, a plan is not required to cover a newly recommended preventive care service until at least a year after it has been issued.
- ◆ The CARES Act requires a plan to cover a “qualifying coronavirus preventive service” within 15 business days after the date on which a new qualifying coronavirus preventive service recommendation is issued.
- ◆ It is uncertain whether this provision applies to a grandfathered plan under the ACA, which is generally not required to cover preventive care services.

Preventive Services Provisions

- ◆ A “qualifying coronavirus preventive service” means an item, service, or immunization that is intended to prevent or mitigate COVID-19 and that is:
 - an evidence-based item or service that has in effect a rating of “A” or “B” in the current recommendations of the United States Preventive Services Task Force; or
 - an immunization that has in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved.

Telehealth Changes

- ◆ CARES Act offers flexibility for patients to access COVID-19 screening or care while avoiding exposure to others.
- ◆ It includes temporary policy changes relating to telehealth services including increasing Medicare Telehealth Flexibility to allow Medicare beneficiaries to access telehealth, including in their home, from a broader range of providers.

Telehealth Changes

- ◆ The U.S. Drug Enforcement Administration (DEA) will permit physicians to prescribe controlled substances based on telehealth visits during the pandemic *but note state laws still apply.*
- ◆ Physicians don't have to use fancy technology, any two-way audio-visual device will do- such as Facetime, Skype, or Zoom. However, OCR, which enforces HIPAA, has stated that physicians should **not** use Facebook Live, Twitch, TikTok or other public facing communication services.
- ◆ OCR will use its enforcement discretion for physicians using telehealth during the crisis without fear of HIPAA penalties.

HSA and Health FSA Changes

- ◆ For plan years beginning on or before December 31, 2021, a health plan still qualifies as a high-deductible health plan for health savings account (HSA) if it covers costs associated with telehealth without requiring the participant to pay a deductible.
- ◆ After December 31, 2019, amounts paid for non-prescribed over-the-counter drugs, as well as menstrual care products will be treated as qualified medical expenses for purposes of HSAs, healthcare flexible spending accounts (Health FSA) and Archer Medical Savings Accounts (Archer MSA).

HIPAA Privacy Rule and COVID-19

- ◆ The Department of Health and Human Services (HHS) Office for Civil Rights (OCR) announced the release of a Notice of Enforcement Discretion in application of the Privacy Rule under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).
- ◆ HHS will not impose penalties for violations of certain provisions of the HIPAA Privacy Rule against health care providers or their business associates for the good faith uses and disclosures of protected health information (PHI) by business associates for public health and health oversight activities during the COVID-19 nationwide public health emergency.

HIPAA Privacy Rule and COVID-19

- ◆ The business associate must:
 - make a good faith use or disclosure of the covered entity's PHI for public health activities consistent with 45 CFR 164.512(b), or health oversight activities consistent with 45 CFR 164.512(d); and
 - inform the covered entity within ten calendar days after the use or disclosure occurs (or commences, with respect to uses or disclosures that will repeat over time).
- ◆ This enforcement discretion is effective immediately and will remain in effect until the Secretary of HHS declares that the public health emergency no longer exists, or upon the expiration date of the declared public health emergency, whichever occurs first.

Student Loans and CARES Act

- ◆ Payments on federal student loans — including direct loans, Perkins loans and Federal Family Education Loans owned by the U.S. Department of Education — are automatically suspended from March 13 through Sept. 30, 2020-interest will not accrue during that time.
- ◆ The CARES Act expands Code Section 127 to allow employers to reimburse employees up to \$5,250 for most student loan payments, which can be excluded from taxable income.
 - Effective from March 27 through Dec. 31, 2020.
 - Limit includes other qualified tuition reimbursements.



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