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Employee Benefits and Executive Compensation

Benefit Plan Relief in Response to COVID-19: CARES Act Impact on Retirement and Health Plans

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The **Coronavirus Aid, Relief and Economic Security Act** (CARES Act or the Act) (H.R. 748, Pub. Law 116-), the third phase of the federal government's response to the COVID-19 pandemic that provides an estimated $2 trillion stimulus package, was signed into law by the President on March 27, 2020. This alert summarizes the impact of the CARES Act on retirement and health plans.

Retirement and Health Plan Highlights

The CARES Act, among other things, provides for (i) certain retirement plan relief in 2020 and (ii) expanded group health plan coverage related to COVID-19.[1]

- **401(k) plan distributions and loans.** Certain individuals affected by COVID-19 are permitted, during 2020, to take distributions up to $100,000 and loans up to $100,000 from company-sponsored 401(k) plans.[2] The Act also temporarily waives required minimum distributions from such plans in 2020.

  These changes are optional and not automatic – plan sponsors will need to decide if they want to make these changes. Plan sponsors should also consult with their recordkeepers. We understand that some plan recordkeepers are sending "opt out" notices to plans and will otherwise implement these changes in a prescribed default manner.

- **Delay of minimum required contributions to pension plans.** Plan sponsors of qualified single employer defined benefit pension plans may delay minimum required contributions to such plans for 2020 until the beginning of next year.

- **Mandatory health plan coverage of certain COVID-19 expenses.** With respect to company group health plans, the CARES Act expands (i) the types of testing and preventive services that must be covered without cost sharing, (ii) access to telehealth for high-deductible health plans, and (iii) qualified medical expenses for account-based health plans.

- **DOL authority to delay certain ERISA filings.** Similar to what is currently allowed following a federally declared disaster, the CARES Act also authorizes the Department of Labor (DOL) to postpone certain ERISA filing deadlines for retirement and group health plans, up to one year, as a result of the public health emergency.

401(k) Plan Details

Who is a "qualified individual"?

A "qualified individual" is a participant:

(i) who has been diagnosed with COVID-19 by a CDC-approved test;

(ii) whose spouse or dependent has been diagnosed with COVID-19 by a CDC-approved test; or

(iii) who has experienced adverse financial consequences as a result of being quarantined, being furloughed or laid off or having hours reduced due to COVID-19, or being unable to work due to the lack of child care related to COVID-19.

Importantly, reflecting the breadth of the COVID-19 impact, the CARES Act does not limit qualified individuals to any specifically designated region (e.g., national disaster area, federally declared disaster area...). Additionally, the Act also authorizes the Secretary of Treasury to expand the list of factors that may result in adverse financial consequences beyond the above.

How will plan administrators determine who is a qualified individual?

With a sigh of relief by plan administrators, a plan administrator may rely on an employee's certification that the employee is a qualified individual. Similar to other situations where plan administrators can rely on participant certifications (e.g., hardship distributions), plan administrators will have to work with their counsel and service providers to develop the appropriate certification.

Why is it important to be a qualified individual?

The special relief provisions for coronavirus distributions and plan loans described below are only available to qualified individuals.

What is a "coronavirus distribution" and what is required to receive it?

The Act provides that 401(k) plans may allow qualified individuals to withdraw up to $100,000 from their plan account in 2020. This is what is referred to as a coronavirus distribution (otherwise referred to as a "coronavirus-related distribution" in the Act).

There are no age or service requirements needed for coronavirus distributions to qualified individuals from 401(k) plans under the Act. This generally differs from distribution limitations often seen under 401(k) plans which are required by law or company plan design. For example, due to Internal Revenue Code (the Code) requirements, 401(k) plans are not permitted to allow in-service distributions from 401(k) balances and certain other account balances prior to age 59½ (outside of hardship circumstances).

Plan sponsors wishing to offer coronavirus distributions to qualified individuals will have to give thought to which plan sources (e.g., 401(k) or Roth accounts, matching contribution accounts, company contribution accounts…) they wish such distributions to come from.

Is there any specific tax relief for qualified individuals receiving coronavirus distributions?

Yes. Most importantly, coronavirus distributions will not incur the 10% early withdrawal penalty that would normally apply to non-rollover distributions from 401(k) plans made prior to age 59½. Additionally, coronavirus distributions will be exempt from the mandatory 20% tax withholding normally applicable.

These coronavirus distributions may be repaid to a plan over the three-year period after distribution, and the repayment will be treated as an eligible transfer or rollover to such plan. Amounts can be repaid to any eligible retirement plan to which a rollover contribution is permitted to be made, and repayment can be made with a single contribution or multiple contributions.

Amounts not repaid will be included in the qualified individual's taxable income. Unless otherwise elected by the qualified individual, taxation will be spread out ratably over a three-year period starting with the taxable year in which the distribution is taken.

We anticipate the Internal Revenue Service (IRS) will come out with guidance to address the coronavirus distributions – for example, the implications when a qualified individual makes a full

repayment in year three after reflecting portions of the distribution as taxable income in the first two years.

What special plan loan provisions are provided to qualified individuals?

For qualified individuals, the Act temporarily allows for increased 401(k) plan loan limits up to $100,000 for a six month period after enactment (subject to the account having sufficient funds, as discussed below).

Specifically, the maximum loan provision under the Code is increased to the lesser of (i) $100,000 or (ii) the greater of 100% of the present value of the participant's vested account balance or $10,000. As a practical matter, plans may need to limit the maximum loan amount to 50% of the participant's vested account balance due to the requirements under Employee Retirement Income Security Act of 1974 (ERISA) prohibiting the use of more than 50% of the individual's account balance as security for the loan. Following certain events in the past, the DOL has advised that it will not enforce this requirement, but no such announcement has been made yet for COVID-19.

As before, any outstanding plan loan(s) should reduce the maximum limit.

Without this temporary relief offered by the Act, loans normally cannot exceed the lesser of (i) $50,000 or (ii) the greater of 50% of the participant's vested account balance or $10,000.

Is there any loan repayment relief to qualified individuals with plan loans?

Yes, for qualified individuals, the Act allows for a one-year extension on the deadline of any 401(k) plan loan repayment due during the remainder of 2020. After the one-year relief period ends, subsequent loan repayments must be adjusted for the delayed repayment and any accrued interest.

Additionally, the normal five-year loan limit to such plan loans would disregard the one-year extension. Therefore, it seems that after the one-year extension, loan payments must be re-amortized over an extended term of the loan. We expect regulatory guidance will be issued by the IRS regarding administering extended loans.

Previously, if a participant missed a required loan payment in 2020, the loan would be in default shortly thereafter (i.e., no later than after the end of the quarter following the quarter in which the payment was missed) and the defaulted loan would be considered a deemed distribution.

Does the Act impact minimum required distributions that must be made by 401(k) plans in 2020?

Yes. Similar to the 2009 waiver on required minimum distributions (RMDs) that was provided as a result of the 2008 financial recession, the Act allows a waiver of 2020 RMDs from a 401(k) plan. This waiver includes 2019 RMDs that could otherwise be payable in 2020 (i.e., where the participant's required beginning date is April 1, 2020).

Amounts distributed in 2020 that would otherwise have been treated as RMDs are eligible for rollover. However, the plan is not required to treat the amounts as an eligible rollover distribution nor issue a rollover notice.

It is expected that the IRS will issue guidance for the RMD relief similar to what was issued in 2009. For example, the 2009 guidance addressed RMDs that had already been paid which would have otherwise been subject to the relief. In that instance, the IRS provided additional time for participants to rollover such RMDs.

If a 401(k) plan provides for this required minimum distribution waiver in 2020, are only qualified individuals eligible for this relief?

No. Such required minimum distribution waiver relief would be available to all plan participants, not just qualified individuals.

Are 401(k) plans required to provide the above relief regarding coronavirus distributions, plan loans and 2020 required minimum distributions?

No, these provisions should be optional for plan sponsors. Absent regulatory guidance to the contrary, this would be consistent with similar prior relief. Plan sponsors will want to determine the appropriateness of these relief items for their 401(k) plan. We recommend that plan sponsors consult with counsel and their service providers.

However, plan sponsors should be mindful of the information communicated by their recordkeepers. Given the likely inclusion by most plans, some recordkeepers are automatically implementing certain of these changes unless a plan sponsor opts out.

As a reminder, the decision to offer these items is a plan design decision and such a decision falls within the plan settlor function and is not a fiduciary decision. The decision should be made by the applicable person or committee that the plan sponsor designated with responsibility for plan settlor functions (i.e., plan design or amendment decisions).

When would 401(k) plans need to be amended to reflect any desired relief items?

Any required conforming plan amendments must be adopted by the end of the 2022 plan year, and the plan must be operated as if the amendment is in effect starting on the CARES Act's enactment date. The Act specifies that a retroactive amendment will not violate the anti-cutback provisions of Code Section 411(d)(6) or ERISA Section 204(g).

Defined Benefit Pension Plans

Does the CARES Act offer any funding relief to defined benefit pension plans?

Yes, plan sponsors may delay minimum required contributions to their qualified single employer pension plans, including quarterly contributions. For any contribution that would be due in 2020, the due date will be January 1, 2021. However, any delayed contributions will be due *with* interest.

Does the CARES Act offer any other funding relief to defined benefit pension plans such as PBGC premium reductions or limits?

No. While lawmakers considered other pension funding relief measures (e.g., extended interest rate relief), those items did not make it into the CARES Act. It remains to be seen whether such measures will make it into future legislation.

Does the CARES Act provide any relief with respect to benefits restrictions?

Yes, for purposes of determining a pension plan's funded status under Code Section 436, plan sponsors may elect to use the plan's adjusted funding target attainment funding percentage for the last plan year ending before January 1, 2020, as the plan's adjusted funding target attainment funding percentage for plan years that include 2020.

In short, for a plan with a calendar year for a plan year, the plan can use their 2019 funded status to determine whether the Code Section 436 benefit restrictions apply for 2020. In essence, this provision allows plan sponsors to minimize Code Section 436 restrictions on future benefit accruals and lump sum distributions that may result from a market decline linked to COVID-19.

Group Health Plans

Are group health plans obligated to cover testing for COVID-19?

Yes. The Families First Act requires group health plans to cover diagnostic testing for COVID-19 without cost sharing, effective as of March 18, 2020.

Does the CARES Act expand coverage for COVID-19 testing? What about other services?

Yes. The CARES Act amends the Families First Act by expanding the types of covered diagnostic tests, including COVID-19 tests that may not yet be approved by the US Food and Drug Administration. This appears to be effective as of March 27, 2020, but we expect guidance on whether plans will be required to cover such diagnostic tests retroactive to March 18th.

The Act also mandates that group health plans reimburse, without cost-sharing or prior authorization requirements, *any qualifying coronavirus preventive service*.

What is a "qualifying coronavirus preventive service"?

A "qualifying coronavirus preventive service" includes an item, service or immunization intended to prevent or mitigate coronavirus that is an (i) evidence-based item or service having an "A" or "B" rating from the US Preventive Services Task Force, or (ii) immunization that has a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.

Such preventive services must be covered starting 15 business days (instead of the usual one year) after the recommendation is made by the applicable agency.

What rates must health plans pay providers to cover COVID-19 testing?

If a plan has a negotiated rate with a provider, the negotiated rate must be paid for the testing.

If a plan does not have a negotiated rate with a provider, the plan must reimburse the provider's cash price as listed on its website or negotiate a lower rate.

This change appears to be effective as of March 27, 2020, and we expect further guidance on whether the cash price applies only to the test or to other related services.

Can telehealth services be covered under a high deductible health plan (HDHP) without cost sharing?

For plan years beginning on or before December 31, 2021, an HDHP, including one with a health savings account (HSA), is allowed to cover telehealth or other remote care services without charging a deductible, regardless of whether the telehealth services relate to COVID-19.

Can HSAs, health reimbursement accounts, Archer medical savings accounts and flexible spending accounts (collectively referred to as "account-based health plans") now cover over-the-counter medical products?

Yes. For expenses incurred after 2019, the Act allows funds in account-based health plans to be used to cover over-the-counter medical products (including menstrual products) without a prescription.

This effectively eliminates the restriction imposed by the Affordable Care Act.

Employers sponsoring an account-based health plan will likely need to amend their plans to make this change.

The Employee Benefits and Executive Compensation Practice is monitoring regulatory and legislative guidance and happy to work through the nuances of the guidance issued so far. The below professionals are available to discuss these fast emerging and changing actions.

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[1] "COVID-19" is short for the virus SARS-CoV-2 and the disease it results in, coronavirus disease 2019.

[2] In general, this alert refers to the generic term "401(k) plans" which for our purposes includes plans providing for employee contributions (e.g., 401(k) deferrals, after-tax deferrals, Roth 401(k) contributions) and employer contributions (e.g., company matching contributions). However, the retirement plan provisions may also be applicable to other eligible defined contribution retirement plans (e.g., 403(b) plans, qualified profit sharing plans,…).

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

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