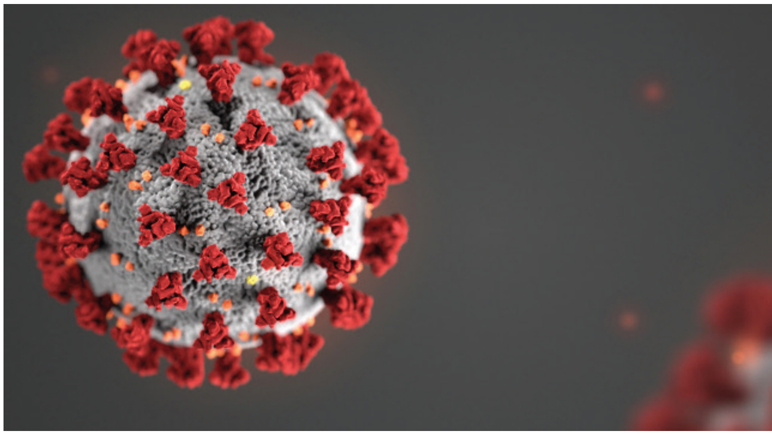
ERISA Corner

SPECIAL BULLETIN

The CARES Act

(Coronavirus Relief)

Amidst social distancing, business disruptions, rising unemployment rates and dramatic market swings, the recently passed Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") contains some assistance for retirement plans and participants.



Distributions

(SECTION 2202(A))

The CARES Act will allow Eligible Participants to take a coronavirus-related distribution from a tax-qualified retirement plan totaling up to $100,000 (from all plans maintained by the employer, and any member of any controlled group which includes the employer) after January 1, 2020, and on or before December 31, 2020.

Some of the benefits of the distribution:

- Not subject to the 10% early withdrawal penalty for participants under age 59½;
- Amount of distribution may be repaid by the participant, in one or more repayments[1], at any time during a three-year period beginning on the day after the date the distribution was received; and
- The participant may elect to pay any income taxes related to the distribution evenly over the next three years, beginning with the tax year of the distribution.

Eligible Participants include any individual:

- Diagnosed with coronavirus by a test approved by the Centers for Disease Control and Prevention (the "CDC");
- Whose spouse or dependent is diagnosed with coronavirus by a test approved by the CDC; or
- Who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to coronavirus, being unable to work due to lack of child care due to coronavirus, or closing or reducing hours of a business owned or operated by the individual due to coronavirus.

Plan sponsors may rely on a participant's certification that he or she satisfies the above conditions to be an Eligible Participant.

Participant Loans

(SECTION 2202(B))

In addition, the CARES Act will allow Eligible Participants to take a coronavirus-related loan of up to the lesser of $100,000 or 100% of the participant's vested account balance beginning on March 27, 2020 (the date the CARES Act was enacted) and ending 180 days later. Loan repayments will not be required to begin until one year following the date of the loan.

If the participant already has an outstanding loan as of March 27, 2020, then loan repayments for that loan due between March 27, 2020 and December 31, 2020 may be suspended for one year[2].

In both instances, while loan repayments are delayed, interest will accrue on such new and outstanding loans. In addition, the maximum five-year period associated with both new and outstanding loans will be extended by the one-year suspension period.

Eligible Participants are defined above *(see **Distributions**)*. Plan sponsors may rely on a participant's certification that he or she satisfies the conditions to be an Eligible Participant.

Suspension of Required Minimum Distributions ("RMDs")

(SECTION 2203)

The CARES Act waives RMDs required to be made from defined contribution plans (including 401(k), 403(b) and 457(b) plans) during the 2020 calendar year, allowing participants to keep money in their retirement plans. Note, if a participant's first RMD is due on or before April 1, 2020, and such distribution was not processed prior to January 1, 2020, then the participant may waive both the first RMD, due on or before April 1, 2020, and the second RMD, due on or before December 31, 2020, under the CARES Act.

Single-Employer Defined Benefit Plan Funding Rules

(SECTION 3608)

The CARES Act provides single employer defined benefit plans with relief by delaying any minimum funding (including quarterly contributions) due to the plan during the 2020 calendar year, to January 1, 2021. The amount of each such minimum required contribution is increased by interest for the period following the original due date. In addition, the plan sponsor may elect to apply the plan's status for benefit restrictions (the "AFTAP" status) as of the plan year ending prior to January 1, 2020 as the AFTAP for the plan years which include the 2020 calendar year.

Expansion of Department of Labor ("DOL") Authority to Postpone Certain Deadlines

(SECTION 3607)

The CARES Act provides the DOL with expanded authority to extend certain deadlines under the Employee Retirement Income Security Act of 1974 ("ERISA") in the event of a "public health emergency declared by the Secretary of Health and Human Services."

Amendment Timing for the CARES Act

(SECTIONS 2202 AND 2203)

The CARES Act permits retirement plans to adopt the distribution and loan provisions immediately, even if the plan does not currently allow for such distributions or loans. However, a plan must be amended to allow for such provisions. Amendments relating to the CARES Act must be adopted no later than the last day of the plan year beginning on or after January 1, 2022 (or January 1, 2024, in the case of a governmental plan), or such later date as the Secretary of the Treasury may prescribe.

OTHER CONSIDERATIONS NOT INCLUDED IN THE CARES ACT

Although the topics below were not included in the CARES Act discussed above, they remain options for plan sponsors concerned about how to handle the business impact of the coronavirus as it relates to retirement plans.

Suspend Employer Contributions to Defined Contribution Plans

An employer sponsoring a defined contribution plan with a safe harbor provision may reduce or suspend the safe harbor contributions if the employer is operating at an economic loss[3] for the plan year. Note, reducing or stopping safe harbor contributions requires a 30-day notice to participants and safe harbor contributions must continue through the notice period. It is important to understand that plans that reduce or stop safe harbor contributions mid-year must satisfy applicable nondiscrimination testing (including ADP/ACP testing and top-heavy testing) for the plan year. Therefore, owners and their highly compensated employees ("HCEs") should consider the impact of this change, as it could result in refunds due to failed nondiscrimination testing results. Further, if the plan is top-heavy, a top-heavy minimum contribution may be required for the plan year if any key employee has contributed to the plan during the plan year.

An employer sponsoring a defined contribution plan with discretionary contributions may reduce or suspend these contributions at any time. A notice to plan participants is not required, but we recommend the employer communicate the reduction or suspension to plan participants in order to keep them informed regarding their retirement plan benefits.

Plan Terminations

Plans sponsors should consider plan terminations with caution, as plan sponsors intending to start a new plan in the future should be aware of the successor plan rule. A successor plan is any defined contribution plan maintained by the employer during a period that begins on the date of termination and ends 12 months after assets have been fully distributed from the plan. If there is a successor plan, the plan termination of the prior plan is not a distributable event for employee deferrals (and safe harbor contributions, if applicable). Therefore, if a new 401(k) plan is started within 12 months of the terminated plan's liquidation date, the distributed 401(k) assets (and safe harbor, if applicable) will be treated an operational failure under the terminated plan. As such, if the plan sponsor intends to open a new plan once the economy recovers, the plan sponsor should consider suspending employer contributions to the plan rather than a plan termination to avoid any successor plan rules.

Earlier Distribution Options in Defined Benefit Plans

Since the passage of the SECURE Act, a defined benefit plan may permit participants the option to commence benefits as early as age 59 ½ while still working. In addition, for terminated vested participants, plan sponsors could consider allowing benefits to commence at ages younger than the plan's current retirement age. Plan sponsors looking to open up access to plan benefits for participants affected by coronavirus could consider amending their pension plans to allow active participants who are at least age 59 ½ and terminated participants to commence their pension benefits earlier.

Limit Mid-Year Distributions from Pooled Accounts

Given the dramatic economic swings, plan sponsors should consider limiting distributions from plans with pooled accounts to 60% or 80% of the participant's prior year account balance. Alternatively, a plan sponsor may consider an interim valuation be performed prior to processing any distributions from plans with pooled accounts. If an interim valuation is not currently allowed under the plan, the plan sponsor could amend the plan accordingly. As a fiduciary to the plan, the plan administrator and trustee(s) are required to operate the plan in the best interest of the participants and beneficiaries. A distribution to a participant at 100% of their prior year's account balance could be detrimental to the participants remaining in the plan.

1 These repayment contributions are not considered contributions for qualified plan limitation purposes (i.e., 402(g) or 415 limits).

2 At this time there is no guidance on the delayed loan repayment provision, but likely recordkeepers and third-party administrators will be required to reamortize the loans upon the one-year delay anniversary.

3 Operating at an economic loss generally requires that the employer show that its expenses exceed income for the year using generally accepted accounting principles. At this time, the IRS and DOL have not liberalized this rule, but additional guidance may be forthcoming for defined contribution funding relief.

Brooke Cozort is an ERISA Attorney with significant experience working on ERISA matters and qualified plans. She provides guidance on plan design considerations, operational compliance, fiduciary responsibilities, legislative and regulatory changes, and industry trends.

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