
Employee Benefits Update

March 2020

The Impact of the COVID-19 Pandemic on Your Employee Benefit Plans: Part 3

Since our first two COVID-19 newsletters, summarizing the impact of the pandemic on your employee benefit plans ([Part 1](#) and [Part 2](#)), President Trump is expected to sign into law as early as today the massive economic stimulus and financial relief act, known as the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”). The CARES Act makes several significant, albeit temporary, changes affecting retirement plans and other employee benefit plans, as summarized below.

CHANGES IMPACTING RETIREMENT PLANS

Q1. Does the CARES Act change the retirement plan hardship withdrawals rules for employees who may be facing financial strain during the COVID-19 pandemic?

Yes. The CARES Act creates a new type of distribution from qualified retirement plans, known as a “coronavirus-related distribution”.

○ Individuals who can receive a coronavirus-related distribution:

A coronavirus-related distribution must be made to a qualifying individual who meets the following requirements:

- Who is themselves diagnosed with COVID-19;
- Who has a spouse or dependent diagnosed with COVID-19; or
- Who experiences adverse financial consequences because of being quarantined; 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 reducing hours of a business owned or operated by the individual due to COVID-19; or other factors as determined by the Treasury Secretary.

For this purpose, the CARES Act specifies that employers will be able to rely on an employee’s self-certification that they meet these requirements.

○ Amount of a coronavirus-related distribution:

Up to \$100,000 in a coronavirus-related distribution can be paid from tax-qualified retirement plans, such as 401(k) plans, 403(b) plans and 457(b) plans, per person, no later than December 31, 2020, although all plans maintained by an employer and

members of its controlled group will be aggregated for purposes of calculating this limit.

○ Favorable tax treatment of coronavirus-related distributions:

These special distributions have more favorable tax treatment than regular hardship or disaster-related distributions from 401(k) and 403(b) plans, because the CARES Act provides that these amounts qualify for the following tax relief:

- No 10% penalty tax (which is normally imposed on recipients under the age of 59 ½) will apply;
- The regular income tax on the distribution can be spread, ratably, over three years; and
- The distribution can be recontributed to the plan within three years—effectively being treated as a rollover—and the amounts recontributed in any given year will not “count” against that year’s IRS or plan limits on the amount that the employee can contribute to the plan.

○ How to implement a coronavirus-related distribution:

This new distribution right is optional (not mandatory) for employers, and will eventually require a formal written amendment to your plan terms by the end of the 2022 plan year (similar to the extended deadline for amending plans for the SECURE Act changes).

We expect this distribution feature will be a very popular option for employers to implement; in fact, at least one large recordkeeper (Fidelity) has announced that it will automatically implement coronavirus-related distributions for all of the plans using its pre-approved documents, unless an employer affirmatively opts out by March 31, 2020. Therefore, we recommend that you check with your recordkeeper about how it will support early adoption of this new distribution right.

Q2. Are there any special provisions in the CARES Act for participant loans from retirement plans during the COVID-19 pandemic?

Yes; the CARES Act makes changes that impact both new and existing plan loans.

○ New plan loans:

For new plan loans to qualifying individuals impacted by COVID-19 (as defined in Q1. above), which are made within 180 days after the CARES Act becomes law, the maximum amount of a plan loan has increased to the lesser of 100% of the present value of the participant’s account, or \$100,000 (reduced by the outstanding balance of other plan loans during the preceding one year period).

○ Existing plan loans:

Existing plan loans held by qualifying individuals impacted by COVID-19 (as defined in Q1. above) that have a due date between the date of enactment and the end of 2020 receive a one-year extension from the original due date, which means that plans will need to re-amortize the remaining loan payments accordingly.

Q3. Have the required minimum distribution rules changed for 2020?

Yes, but only for defined contribution plans, 457(b) plans and IRAs.

Because of the economic downturn and volatile markets due to the COVID-19 pandemic, required minimum distributions (RMDs) from defined contribution plans such as 401(a), 401(k) and 403(b) plans, as well as 457(b) plans and IRAs (but not defined benefit pension plans) do not need to be made for the 2020 calendar year. This includes 2020 RMDs for individuals receiving them, because they had reached age 70 ½ before 2019, and for individuals who would receive an RMD for the first time in 2020.

Q4. Do the same funding rules apply to defined benefit pension plans in 2020?

No; the CARES Act provides some financial relief to sponsors of defined benefit plans, as follows:

- Any ERISA-required minimum contributions to a single-employer defined benefit pension plan during 2020, including quarterly contributions, are delayed to January 1, 2021, at which time the delayed amounts will be due, plus interest.
- An employer may also elect use the 2019 plan year adjusted funding target attainment percentage (AFTAP) for the 2020 plan year. This may be helpful for plans with fiscal years that started after January 2020 and might have reported unusually low AFTAPs for 2020 otherwise, because of the dramatic decline in financial markets since the start of the year. By using the 2019 AFTAP, the plan may be able to avoid triggering funding-related benefit restrictions, such as limiting lump sum payments or restricting future benefit accruals.

TAX-FREE STUDENT LOAN REPAYMENTS

Q5. Can we offer any new student loan repayment benefits to employees?

Yes, but only for this year.

Between now and January 1, 2021, employers can provide a tax-free student loan repayment benefit, directly to their employees or their employees' lenders, for up to \$5,250, and this repayment will be excluded from the employee's income.

- Important note: If you already sponsor an educational assistance program for your employees, providing up to \$5,250 in tax-free benefits for tuition, fees and books, please note that the \$5,250 cap per individual includes both the new student loan repayment benefit as well as current educational assistance that you may otherwise already be providing.

CHANGES AFFECTING HEALTH PLANS

Q6. Does the CARES Act expand coverage of COVID-19 diagnostic testing and address pricing of these tests?

Yes. In our prior newsletters [[Part 1](#) and [Part 2](#)], we described how the Families First Coronavirus Relief Act (“FFCRA”) requires group health plans to provide COVID-19 diagnostic testing, without any cost to the plan participant.

In light of the much-publicized shortage of tests for the coronavirus, and the interest in using tests that are being developed by organizations other than the CDC, the CARES Act makes two changes related to COVID-19 testing:

- It expands the definition of covered diagnostic tests to include tests for which the developer has sought emergency approval from the FDA, that are developed or authorized by a State, or that are otherwise deemed appropriate by HHS.
- It dictates how much group health plans will need to pay medical providers for these tests, requiring the providers to publicly post their costs on their websites, and suggesting that the same level of coverage will apply both to in-network and out-of-network services.

Q7. Does my group health plan have to cover COVID-19 preventive services and vaccines?

Yes. Anticipating the fast pace at which vaccines and other preventive items are being developed to combat COVID-19, the CARES Act requires group health plans to provide, without any cost-sharing, qualifying coronavirus preventive services, including certain evidence-based items or services that have “A” or “B” recommendations from the U.S. Preventive Services Task Force, as well as vaccines that are approved by the CDC, within 15 days of when these items are approved. This is significantly faster than under current law, which requires group health plans to cover new preventive services under the Affordable Care Act during the first plan year that begins on or after one year from the approval’s or recommendation’s issue date.

Q8. Can my high deductible health plan cover telehealth and remote care services without cost sharing?

Yes. The CARES Act remedies a problem we identified in our second newsletter, and now provides that for plan years beginning on or before December 31, 2021, high deductible health plans can provide telemedicine or other remote care services before the deductible has been met, without impacting the qualifying status of those plans or jeopardizing the ability of employers (or employees) to contribute to employees’ health savings accounts (HSAs).

Q9. Have the rules for reimbursement of over-the-counter drugs and products from HSAs and medical flexible spending accounts changed?

Yes. Amounts paid after December 31, 2019 for over-the-counter drugs and menstrual products can be reimbursed as qualifying medical expenses, from both health savings and medical flexible spending accounts, even if the employee did not receive a prescription for such items.

EXECUTIVE COMPENSATION CHANGES

Q10. Does the CARES Act impose compensation limits on businesses receiving financial aid?

Yes. Businesses that qualify for loans, loan guarantees, and other investments to obtain liquidity, pursuant to some of the stimulus and financial aid measures provided under the CARES Act, will face caps on the compensation provided to their highly-compensated executives, for a restricted time period beginning on the date that they receive the loan, guarantee or investment until one year after that aid is no longer outstanding.

The limits are imposed on two tiers:

- For executives whose total compensation in 2019 exceeded \$425,000, their total compensation in any 12-month period during the restricted time period cannot exceed their 2019 pay; if they are terminated, their severance cannot exceed twice their total 2019 compensation.
- For executives whose total compensation in 2019 exceeded \$3,000,000, the total compensation paid in any 12-month period during the restricted time period cannot exceed the sum of (i) \$3,000,000, plus (ii) 50% of the excess over \$3,000,000 that the individual received in 2019.

PAYROLL TAX CHANGES

Q11. Does the CARES Act make additional changes to the payroll tax credits?

Yes. These changes are as follows.

- Advance funding of FFCRA payroll tax credits
 - The payroll tax credits for the new paid sick time and emergency family medical leave, provided under the FFCRA (and described in our earlier newsletter, found [here](#)) can be advanced to employers, but the government will need to develop forms and instructions first, in order to permit employers to utilize this.
 - In addition, the CARES Act waives any penalties that an employer might face if it fails to file payroll taxes on time, because it is anticipating the FFCRA credit.
- Additional payroll tax credit for employers financially impacted by COVID-19 shutdowns
 - Employers whose operations were fully or partially suspended due to a COVID-19 related shutdown order, or whose gross receipts declined by more than 50% when compared to the same quarter in the prior year, will be able to get a refundable payroll tax credit for 50% of wages paid by employers to employees during the COVID-19 crisis.
 - The credit is based on “qualified wages” paid to employees.

- For employers with greater than 100 full-time employees, “qualified wages” are wages paid to employees when they are not providing services due to the COVID-19 related circumstances described above.
- For eligible employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order.
- The credit is provided for the first \$10,000 of compensation, including health benefits paid to an eligible employee, for wages paid or incurred from March 13, 2020 through December 31, 2020.
- This credit must also take into account the FFCRA credit.

Q12. Does the CARES Act change the deadline for payment of the employer share of FICA taxes?

Yes. Employers can defer payment of the employer share of Social Security taxes (6.2%) that they would otherwise pay, for the period between the date of enactment and December 31, 2020. The deferred taxes can be paid over the next two years, paying half by December 31, 2021 and the other half by December 31, 2022.



We will continue to monitor the fast-moving developments and government guidance relating to the COVID-19 pandemic that impact your employee benefit plans. Please stay healthy, and contact any member of our Employee Benefits and Executive Compensation Group, below, should you have any questions.

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