UNDERSTANDING THE CARES ACT

ON FRIDAY, MARCH 27, 2020, THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES ACT), A MASSIVE RELIEF BILL FOR THOSE SUFFERING AS A RESULT OF THE CORONAVIRUS PANDEMIC, WAS SIGNED INTO LAW. Besides the generalized financial relief afforded to individuals, as well as loans and other concessions for businesses, the bill includes the following provisions to help participants and employer sponsors of retirement plans.

CORONAVIRUS-RELATED DISTRIBUTIONS

The bill permits "coronavirus-related" distributions of up to $100,000 without being subject to the 10% penalty typically applied to distributions made prior to age 59 ½. The distributions must be made to a "qualified individual" who self certifies the following conditions:

- The participant has been diagnosed with COVID-19 (as confirmed by a CDC- approved test);
- The participant's spouse or dependent has been diagnosed with COVID-19; or
- The participant has suffered financially from the pandemic because:
  - The participant was laid off, furloughed, quarantined, or has had hours reduced;
  - The participant cannot work due to the lack of childcare because of the pandemic; or
  - The participant's own business has had to close or reduce hours.

The Act permits the Plan Administrator to rely on the participant's self-certification that he/she qualifies for the distribution. Distributions would also be available for beneficiaries of deceased participants and for alternate payees.

While the distribution is exempt from the 10% penalty tax, it is still subject to ordinary income tax. Affected participants may spread the taxes over a three-year period and may repay all or part of the distribution to the plan or any plan that can accept rollovers within the three-year period. Such repayment is treated as a tax-free rollover of the funds to the plan. Following procedures developed in connection with very similar relief for major hurricanes, participants who repay distributions can file an amended return to recover any tax paid on the distribution reported in earlier years.

The bill permits any "eligible retirement plan," including qualified plans, IRAs, 403(b) plans, and governmental 457(b) plans, to make a coronavirus-related distribution. The bill makes it clear that the provisions in Code sections 401(k), 403(b), and 457(b) that limit distributions will not be violated by coronavirus-related payments but provides no such relief for defined benefit or money purchase plans (which cannot make in-service distributions prior to age 59 ½).

The coronavirus-related distributions are not eligible rollover distributions meaning that they are not subject to the 20% mandatory withholding typically applied to such distributions. The rules provide for 10% withholding that can be waived by the participant. Keep in mind that taxes will ultimately be due within the three-year window unless the distribution is repaid as

permitted in the law. Participants must receive a notice that they can waive the withholding. Failure to provide that notice after the SECURE Act is subject to a $100 penalty per participant, up to a maximum of $50,000.

LOAN LIMIT INCREASES AND DELAYS IN REPAYMENT

The CARES Act modified the rules pertaining to participant loans by allowing loans up to 100% of a qualified individual's vested account or benefit, up to $100,000 (previously limited to 50% and $50,000, respectively). This provision covers loans made until September 23, 2020. In addition, any loan payment due on any outstanding loan between March 27, 2020 and December 31, 2020, is delayed up to one year. The five-year repayment period is also extended for one year. Interest accrues on the loan during the delay period. All service providers and plan sponsors should be vigilant to ensure that participant loans are not reported on Form 1099R as in default during this extended repayment period.

> *"Because of the uncertainty about how repayment of coronavirus-related distributions will be handled, and the tax impact of such repayment, it may be advisable for participants to take loans first."*
>
> ***— Ferenczy Benefits Law Center***

REQUIRED MINIMUM DISTRIBUTION REQUIREMENTS FOR 2020

Just a few months ago, the SECURE Act changed the age at which required minimum distributions (RMDs) began from age 70 ½ to age 72 for distributions required to be made after 12/31/2019. The CARES Act effectively does away with RMDs due in 2020 from defined contribution qualified plans, 403(b) plans, IRAs, and governmental 457(b) plans. This guidance should prevent affected participants from having to liquidate deflated investments during this period, permitting them time to recover value. The 2021 distributions will be based on account values at December 31, 2020. It follows that if the market is not fully recovered, RMDs at that time should be lower.

SINGLE EMPLOYER DB FUNDING DELAY

The due date for any required contributions to defined benefit plans (including quarterly contributions) during 2020 is extended to January 1, 2021. The minimum amount is increased by the plan's rate of interest for the interim period. Furthermore, the plan sponsor is permitted to consider the AFTAP for 2020 to be the same as it was for the last plan year ending before 2020.

DOL AUTHORITY TO POSTPONE DEADLINES

The CARES Act gives the Department of Labor authority under ERISA to delay deadlines due to public health emergencies. This will hopefully give rise to some extensions of Form 5500 filing deadlines.

REMEDIAL AMENDMENT PERIOD EXTENDED TO 2022

Plans that utilize the provisions offered under the CARES Act do not have to be amended until the end of the 2022 plan year (or such later date as the Secretary of the Treasury provides). Governmental plans will have until the end of the 2024 plan year. The amendment must be retroactively effective and detail the plan's operations in the interim. So, if amendments are not adopted immediately, it is important that good records are kept regarding the plan's changed operations until written amendments are completed.

OTHER CORONAVIRUS-RELATED ISSUES

SAFE HARBOR 401(K) PLAN SUSPENSION OR MODIFICATION

Safe harbor contributions, either matching or non-elective, can be suspended mid-year if one of two conditions apply:

- The plan provided a notice containing the "maybe not" language at least 30 days prior to the beginning of the plan year advising participants that the safe harbor contribution might be suspending during the year; or
- The plan sponsor is operating at an economic loss for the plan year.

If the employer sponsor wishes to suspend contributions, participants must be given a 30-day advance supplemental notice and the plan must pass ADP testing for that year. This only allows the suspension of safe harbor contributions 30 days after the notice is given.

HARDSHIPS

The regulations to section 401(k) were changed last year to permit safe harbor hardship distributions if there is a declared FEMA emergency that permits individual assistance. A review of the FEMA website indicates that not all states have been provided with the "individual assistance" eligibility. If your state has been given this individual assistance, then the plan can permit this type of hardship distribution. Normally, this would be part of the hardship amendment most document sponsors are providing. If there is not an individual assistance declaration, hardship distributions can still be made to 401(k) and 403(b) participants under the non-safe harbor rules and plans can be amended before the last day of the plan year to use those rules.

PARTIAL PLAN TERMINATION RULES

As a result of the lay-offs and temporary business closings associated with the pandemic, some plan sponsors may be subject to partial plan termination rules. A partial plan termination generally is deemed by the IRS to occur when 20% of total plan participants are terminated for reasons other than routine annual turnover. For example, a large fast food operation may experience annual turnover of 30% historically. This would not necessarily trigger a partial plan termination. However, if more than 20% of total plan participants are terminated due to the current state of emergency caused by the coronavirus, that presumably would trigger a partial plan termination. If a partial plan termination is deemed to have occurred, the plan must provide accelerated 100% vesting to the affected plan participants – that is, those who terminate employment.

Plan sponsors might ask about the status of the partial termination if the employer rehires the workers. The 20% test creates a presumption that a partial termination has taken place, but facts and circumstances can be used to show that a partial termination, in fact, has not occurred.

There is a great deal of information to digest from the CARES Act and there will surely be clarification and possible additional changes as Congress continues to find ways to help employers and stimulate the economy. We are available to help and answer questions so please feel free to contact us. ■

Article written in collaboration with Ferenczy Benefits Law Center

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Upcoming Compliance Deadlines for Calendar-Year Plans

The CARES Act gives the DOL the authority to delay deadlines due to public health emergencies. The dates below are in effect as of the date of this publication.

1st April 2020

Required Minimum Distributions – Regulations require that a participant must receive a required minimum distribution (RMD) by April 1st of the year following the year in which the participant attains age 70 ½ (changed to age 72 for 2020). **WAIVED per the CARES Act for 2020.**

15th

Excess Deferral Amounts – Salary deferral contributions in excess of the IRS-issued limits in any calendar year ($19,000 for 2019), must be returned to the participant (plus earnings) by April 15 of the year following the year in which the excess occurred. **Deadline currently NOT extended.**

Employer Contributions – Deadline for contributing employer contributions for amounts to be deducted on 2019 C corporation and sole proprietor returns (unless extended). **Deadline extended by the CARES Act to July 15, 2020.**

15th May 2020

Deadline to supply participants with the quarterly benefit/disclosure statement including plan fees and expenses charged to individual plan accounts during the first quarter. **Deadline currently NOT extended.**

30th June 2020

EACA ADP/ACP Corrective Testing – ADP/ACP refunds are due to highly compensated employees (HCEs) to avoid a 10% excise tax on the employer for plans that have elected to participate in an Eligible Automatic Enrollment Arrangement. **Deadline currently NOT extended.**

15th July 2020

Defined Benefit Contributions – Single employer DB plans were provided relief under the CARES Act for any required contributions (both quarterly and year-end contributions) during 2020. **Extended to January 1, 2021.**

28th

Summary of Material Modifications (SMM) – A SMM is due to participants no later than 210 days after the end of the plan year if a change or amendment was adopted in that year. **Deadline currently NOT extended.**

31st

Due date for calendar-year plans for the filing of **Form 5500**, **Form 5558**, **Form 5330**, and **Form 8955**. **Deadline currently NOT extended.**

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ASK THE EXPERTS

QUESTION: WHEN IS MY 2019 EMPLOYER CONTRIBUTION DUE TO BE FUNDED TO OUR PLAN?

ANSWER: For deduction purposes, the general deadline for all employer contributions for a plan year is the tax return deadline for the company including extensions. For most entity types, this would be either March 15th or April 15th of the following year. An extension could provide up to another 6 months beyond those dates.

No relief was given to tax returns due on March 15, 2020. If your tax return deadline was March 15, 2020, and you did not file an extension, your 2019 contributions were due to the plan by March 15, 2020. Otherwise, your deposit deadline for all 2019 employer contributions is your extended due date.

The IRS has provided relief for taxpayers (including business returns) due on April 15, 2020 to July 15, 2020. This also automatically extends the due date for contribution funding for such entities to July 15, 2020 with a normal company tax return deadline of April 15, 2020.

Unfortunately, no such relief has yet been provided for tax returns due on May 15, June 15, or any other date besides April 15. This includes tax returns currently on extension beyond April 15. The extension deadlines are still applicable, barring any further relief announced by the IRS.

QUESTION: WHAT OTHER WAYS IS THE CARES ACT HELPING BUSINESSES?

ANSWER: If you are a small business, you should talk to your accountant or banker about the CARES Act Payroll Protection Program. Under that program, you may be eligible to receive a very low interest loan from the government to help you fund your payroll (including taxes, health premiums, and retirement plan contributions) for a 2 ½ month period. In addition, if you meet other conditions, the entire loan may be forgiven. For small companies, this can be the difference between keeping doors open and not. The funds available for this are limited and the government has indicated that it will respond on a first come, first served basis. So, you should jump on this if you are interested.

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