Michael Best

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CARES Act Relief
COVID-19 Resource Center

Michael Best Q&A on Employment-Related Provisions Under the CARES Act

1. **Is an employer entitled to a delay in paying its payroll taxes?**

Yes, but the deferral is limited to the employer's portion of social security taxes.

Employers are responsible for paying Federal Insurance Contributions Act (FICA) taxes with respect to their employees. This includes the employer's share of social security (SS) taxes (6.2 percent up to the social security wage base) and its share of Medicare taxes (1.45 percent) for each employee's covered wages (separate from withheld amounts covering the employee's portion of each and separate from ordinary income tax withholding). An employer is generally required to deposit such amounts to the U.S. Treasury electronically on a set schedule - either semi-weekly (i.e., bi-weekly) or monthly (or on the next day when accumulations of such taxes exceed $100,000).

The CARES Act allows employers (and self-employed individuals) to defer paying the employer's portion of the SS tax (6.2 percent social security wage base) otherwise due. The employer must still withhold and pay the employee's portion of the SS tax (also 6.2 percent social security wage base), Medicare taxes, and incomes taxes. The SS tax deferral period began as of the date the CARES Act was signed into law (March 27, 2020) and continues through December 31, 2020.

The delayed SS tax amounts will ultimately have to be paid over to Treasury in two installments as follows:

- 50% on December 31, 2021, and
- 50% on December 31, 2022.

Employers who are granted a forgivable Small Business Act loan (known as the Paycheck Protection Program) under the

mechanism created by CARES Act (so that the Federal government effectively gave them cash—that they did not have to pay back—to fund as much as eight weeks of their payroll costs) are not eligible for this payroll tax deferral.

2. **Can pension plan contributions be delayed?**

For 2020, yes (with interest) for single-employer plans.

In the case of any minimum required contribution (as determined under Code Section 430(a)) that would be due during calendar year 2020 (including a quarterly payment), these contributions are now subject to a delayed due date of January 1, 2021. Any plan that uses the delayed payment date must pay interest for the period between the original due date for the contribution and the actual payment date. The applicable interest rate will be the effective rate of interest for the plan for the plan year which includes such payment date.

The intent of this provision is to allow company's access to more cash during 2020 AND to allow Congress additional time to consider any additional pension funding reform following the cessation of the COVID-19 crisis after its current recess.

3. **Does the pension contribution delay apply to multiemployer plans (union pension plans maintained for the benefit of employees of multiple employers)?**

No. The CARES Act does not provide any relief with respect to multiemployer plans. Additional relief or guidance may be forthcoming in the next wave of stimulus relief.

4. **With the market volatility experienced in Q1 2020, many pension plans are significantly less funded than at the end of 2019; will those plans be precluded from offering plant shut down benefits or lump sums (or taking some other de-risking action)?**

Maybe. However, the CARES Act provides some reprieve.

A plan sponsor may elect to treat the plan's adjusted funding target attainment percentage (AFTAP) for the last plan year ending before January 1, 2020 (the plan year ending December 31, 2019 for calendar year plans), as the AFTAP for plan years which include calendar year 2020.

Given the incredible market volatility experiences during the end of Q1 2020, relying on the prior year's AFTAP can allow participants more freedom with respect to their benefits (including to receive lump sums that might otherwise be limited based on a reduced funding position).

Code Section 436, which was also added by the Pension Protection Act in 2006, sets forth a series of limitations on the accrual and payment of benefits under an underfunded plan. The payments that are limited by section 436 include payments of unpredictable contingent event benefits and prohibited payments.

A benefit is an unpredictable contingent event benefit to the extent that it would not be paid but for certain circumstances, including a plant shutdown or similar event.

A prohibited payment means, in general, a payment for a month that exceeds the monthly amount paid under a straight life annuity (such as a lump sum or other accelerated distributions). Any payment for the

purchase of an irrevocable commitment from an insurer to pay benefits (as is done, for example, with a risk transfer / lift-out) is also a prohibited payment.

A plan's AFTAP for the plan year is used to determine whether the plan is underfunded for purposes of the limitations under section 436. Using the 2019 AFTAP in lieu of the 2020 AFTAP may offer may flexibility to plan sponsors for the remainder of 2020.

5. **We understand that employers with fewer than 500 employees must offer paid sick leave and expanded family and medical leave under the FFCRA at a rate set forth in FFCRA, does the CARES Act change those rules?**

No. The CARES Act does not contain significant new or changed standards as it relates to paid sick leave or expanded FMLA provisions; however, the CARES Act reemphasizes certain limitations clarifying that an employer shall not be required to pay more than:

- $200 per day and $10,000 in the aggregate for each employee on expanded FMLA leave; and
- $511 per day and $5,110 in the aggregate for paid sick leave; or
- $200 per day and $2,000 in the aggregate to care for a quarantined individual or child under the paid sick leave provision.

6. **How is a rehired employee treated for purposes of FFCRA paid leave?**

As a reminder, there is requirement to offer FFCRA expanded FMLA leave only to employees who have worked for the employer for at least 30 days (as opposed to 12 months for general FMLA purposes). The CARES Act provides that an employee who was laid off on or after March 1, 2020 and who worked at least 30 of the last 60 days before layoff would be able access to expanded FMLA upon rehire by the employer.

Employees are immediately eligible for the FFCRA paid sick leave (80 hours for full-time employee; 2 weeks of work for part-time employees), without regard to tenure with the employer. The CARES Act does not modify this rule.

7. **Does the CARES Act modify the tax credit rules that apply to the FFCRA paid sick leave and paid expanded FMLA leave provisions?**

Only to clarify that an employer subject to the FFCRA paid leave provides may receive an advance tax credit from Treasury instead of having to be reimbursed on the back end In other words, the CARES Act clarified what was published in guidance issued by the Treasury, IRS and DOL after the adoption of the FFCRA allowing employers to claim the credit in cash prior to the due date for the employer's payroll taxes by allowing an employer to retain amounts withheld from employees.

We expect more specific guidance on tax credit mechanics before April 30, 2020, the date by which employers are required to file their quarterly employment tax returns for the first quarter of 2020.

8. **Does the CARES Act delay other filing deadlines as it relates to employment taxes or benefits plans?**

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No; however, the CARES Act provides the Department of Labor with the authority to postpone certain ERISA filing deadlines for a period of up to one year in the case of a public health emergency, such as the COVID-19 outbreak.Prior to this change, ERISA permitted the postponement of certain otherwise-applicable deadlines in the event of presidentially declared disasters or terrorist or military actions.

**Disclaimer: The issues above are under further review, and guidance is not complete. Please continue to check back as we continue to update regularly.*

Related People

Carrie Byrnes
Partner
cebyrnes@michaelbest.com
T 312.596.5838

Martin Tierney
Partner
mptierney@michaelbest.com
T 414.223.2533