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The CARES Act Provides Benefits Relief to Participants

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On March 27, 2020, the federal government enacted the Coronavirus Aid, Relief and Economic Security Act ("CARES Act"), providing the economy with trillions of dollars of relief and support. The CARES Act is far reaching and is intended to prop and boost nearly every segment of the economy from businesses and governments to individuals. With respect to employer-sponsored benefits, the CARES Act provides additional opportunities for participants to access desperately needed funds, to preserve and re-prioritize as much of their funds as they can, and to obtain needed medical services and supplies in a tax-advantaged manner. This Alert will provide an overview of the means available to plan sponsors to make these opportunities possible under the CARES Act based on its plain meaning and principles of statutory interpretation. Additional regulatory guidance and clarification is expected and will be discussed in further alerts as the benefits landscape evolves.[1]

Retirement Plan Relief

1. Participant Access

Prior to the CARES Act, the qualified plan rules generally permitted participants to access their retirement funds at termination of employment, at retirement, at age 59.5, upon hardship, or upon other stated in-service conditions. The rules governing this access are technical and complicated. Access depends on the types of retirement plans involved and the types of funds at issue (e.g., defined benefit, defined contribution, before-tax, after-tax, safe harbor, etc.). Additionally, the scope of an emergency or disaster declaration could affect the availability of funds. While these rules provide various options for accessing retirement funds, they could be limiting as well.

The CARES Act enhances access to retirement funds for individuals affected by the pandemic by streamlining the rules, bypassing technical limitations, and providing incentives for restoring retirement savings. The primary mechanisms providing enhanced access are a (A) new

permissive distribution option for "Qualified Individuals" and (B) new loan features for "Qualified Individuals." Qualified Individuals are generally those:

- who are diagnosed with COVID-19 by a test approved by the CDC;
- whose spouse or dependent is diagnosed with COVID-19 by such a test;
- who experiences adverse financial consequences as a result of being quarantined, furloughed, or laid off, having work hours reduced, being unable to work due to lack of childcare due to COVID-19, or closing or reducing hours of a business owned or operated by the individual due to COVID-19; or
- who meet other factors as determined by the Treasury Secretary.

A. New Distribution. The CARES Act permits COVID-19-related distributions of up to $100,000 in the aggregate from all qualified retirement plans in a controlled group or an IRA during the period from January 1, 2020 through December 31, 2020 to Qualified Individuals. This distribution would not be subject to the 10% early distribution penalty or 20% withholding. To help offset leakage, the distribution could be returned to a plan or an IRA (in one or more installments) during a 3-year period following the distribution—in effect treating this as a rollover. Any income resulting from such a distribution will be included ratably over a 3-year period unless the individual elects otherwise. Plan administrators could rely on an individual's certification that they meet the definition of a Qualified Individual.

Because the CARES Act is silent on other details, in theory, plan sponsors have flexibility in designing the other features of the distribution such as the availability of funds based on vested status, types of funds (employer vs employee), sources (before-tax, after-tax, matching, safe harbor, profit-sharing, etc.), depletion order, etc. However, the reality may be that large recordkeepers will have to develop set, broad-based design requirements and ask plan sponsors to decide rather quickly if they accept the design requirements "as is" in order to balance accommodating as many plans as possible and the urgency of the situation. From past observation, many recordkeepers have had trouble administering the 6-month suspension on contributions from all controlled-group plans following a safe harbor hardship withdrawal, so careful attention and coordination of the $100,000 limit is needed if this new distribution is offered among various plans within the controlled group that have different recordkeepers.

B. New Loan Features. The CARES Act's new loan provisions double the current retirement plan loan limits to the lesser of $100,000 or 100% of the Qualified Individual's vested account balance in the plan during the period that is 180 days from the date of the enactment of the CARES Act. The new provisions also delay for one year Qualified Individual's loan repayments due in 2020 after March 27, 2020. Thereafter, payments must be adjusted to account for the delay and any interest accruals. The one-year payment delay will also be disregarded from the loan period.

As we have stated in prior alerts, loan administration can be the bane of many plan administrators as errors are inevitable. The CARES Act's loan provisions are expected to cause similar challenges. Careful attention will need to be given to modifying loan notes and policies and their administration. Further regulatory guidance with these new provisions and on relief for loan defaults during this period would be welcome.

2. Suspension in Required Minimum Distributions from Defined Contribution Plans

The CARES Act requires the suspension of required minimum distributions ("RMD") from defined contribution plans for 2020. This is significant and reflects a solid understanding of the RMD rules within the CARES Act—2020 RMDs are based on balances as of December 31, 2019 (when our markets were in a far better position) and proceeding with 2020 RMDs would have locked in investment losses. From an RMD perspective, 2020 is an interesting year as it is the transition year between the old age 70.5 required beginning date ("RBD") regime and the SECURE Act's age 72 RBD regime. For 2020 it was possible to see 2019 RMDs that were not paid in 2019 being paid in 2020 by April 1, 2020 and 2020 RMDs being paid at the end of 2020 (with the 2020 deadline of April 1, 2021). The CARES Act essentially halts all further defined contribution plan 2020 RMDs under any regime.

In any case, any RMDs that were paid in 2020 will likely need to be reclassified and will not be treated as eligible rollover distributions. The CARES Act does not change a person's RBD for determining future payments and is disregarded for purposes of determining IRC Section 401(a)(9)'s 5-year rule—this would extend the period to 6 years for payments under that rule. Because of the similarities to the 2009 RMD suspension, it is our expectation that the IRS will issue further rollover guidance and exceptions similar to that in Notice 2009-9 and 2009-82.

The CARES Act provides no relief for defined-benefit-plan RMDs.

3. Delay in Minimum Required Contributions under a Single Employer Pension Plan

Under the CARES Act plan sponsors may delay any 2020 required contribution due from a single employer pension plan to January 1, 2021. The amount of each delayed minimum required contribution must include interest based on the plan's effective rate. In addition, the CARES Act provides that a plan's status for benefit restrictions as of December 31, 2019 will apply throughout 2020. To facilitate this, a plan sponsor may elect to treat the plan's adjusted funding target attainment percentage for the last plan year ending before January 1, 2020, as the adjusted funding target attainment percentage for plan years including calendar year 2020.

Pension plan sponsors should consult with their actuaries to determine the impact of the CARES Act and if any other funding levels or requirements are impacted (e.g., Top 25, PBGC premiums, etc.).

4. DOL May Extend Deadlines

The CARES Act amends ERISA to give the Department of Labor the ability to extend certain retirement and health plan deadlines in the event of a health emergency.

Health and Welfare Relief

With respect to health & welfare, the CARES Act encourages social distancing by treating in-person doctor and ER visits as a last resort and enabling individuals to identify, prevent and treat COVID-19 through their health insurance. The CARES Act also remarries the concepts of over-the-counter drugs and pre-tax payment in a move that prioritizes self-care over revenue generation to help fund the ACA. In short, and as further described below, the CARES Act empowers individuals to take care of themselves and their families.

1. Telehealth

The CARES Act adds clarity to the relatively new and evolving area of telehealth. In short, the CARES Act permits first dollar coverage for telehealth and other remote services under a high deductible health plan (“HDHP”). This permits telehealth coverage under an HDHP prior to any deductible being met. Prior to the CARES Act, the HDHP rules prohibited health coverage until certain deductible minimums were met. The exceptions to the HDHP rules created by the CARES Act are consistent with recent IRS guidance on COVID-19 testing and continue until at least December 31, 2021 (later for non-calendar year plans). Plan amendments or SMMs may be required to reflect the new rules.

2. Over-the-Counter Drugs and Health FSA, HRAs, and HSAs

In a return to the treatment of over-the-counter drugs prior to the Affordable Care Act, the CARES Act requires health FSAs, HRAs, and HSAs to once again reimburse over-the-counter drugs without a prescription effective January 1, 2020. Additionally, menstrual products will be included in this coverage.

3. COVID-19 Preventive Care and Testing Coverage

The CARES Act requires health plans to cover approved coronavirus preventive medicines (i.e., vaccines). This is required 15 days after the date a qualified recommendation is made by the U.S. Preventive Services Task Force. Additionally, the CARES Act requires health plans to reimburse providers specific amounts for the required COVID-19 tests that were provided in the Families First Coronavirus Response Act.

4. Educational Assistance Programs and Student Loans

The CARES Act expands IRC Section 127 from March 27, 2020 through December 31, 2020 to allow employers to reimburse employees up to $5,250 for most student loan payments. The $5,250 would be tax-free to the employee. Under the CARES Act and IRC Section 127, employers can deduct up to $5,250 per year for each employee that qualifies for and elects to use the employer’s qualified educational assistance plan for pre-Cares Act educational benefits and the new loan repayments. In addition to providing relief to employees, the CARES Act helps employees struggling with student loans start saving for retirement or other needs.

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The CARES Act makes significant changes to the retirement and health and welfare plan rules that will relieve some of the economic and health issues we face. Clearly, regulatory guidance to implement the CARES Act is needed and welcome. In the meantime, we recommend that you begin immediate discussions with your service providers, insurers, and counsel to determine what they can accommodate administratively so you can determine (1) whether to implement any of the permissive features of the CARES Act and (2) whether any interim and custom communications, forms and manual interventions are needed to proceed with the required and chosen permissive features of the CARES Act. Eventually, plan sponsors will likely need to amend all plans to account for the CARES Act within the deadlines it establishes.

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[1] The CARES Act also contains benefits and compensation restrictions and protections that apply to certain employers that avail themselves of federal loans and loan guarantees (except the Paycheck Protection Program). These topics are outside the scope of this alert.

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