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ACT NOW ADVISORY

The CARES Act: What Employers Need to Know (Part II): Impact on Certain Retirement and Group Health Plans, and Executive Compensation

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In Part I of our *Act Now* Advisory on the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act" or "Act"), we addressed numerous aspects of the Act, including provisions on (i) paid sick and family leave; (ii) the 50-percent tax credit for qualified wages paid during the coronavirus ("COVID-19") crisis; (iii) short-term, enhanced unemployment benefits for affected workers; and (iv) loans for qualified small and midsize businesses. In Part II, we discuss the sections of the Act that impact the design and administration of tax-qualified retirement plans, group health plans and related matters, and executive compensation under one of the Act's loan programs.

Tax-Qualified Retirement Plans

COVID-19-Related Distributions

Section 2202 of the CARES Act establishes a new type of distribution, referred to as a "coronavirus-related distribution," which is any distribution from an eligible defined contribution plan made to an individual on or after January 1, 2020, and before December 31, 2020, who:

1) is diagnosed with the virus SARS-CoV-2 or with COVID-19 by a test approved by the Centers for Disease Control and Prevention ("CDC"); or

2) has a spouse or dependent diagnosed with such virus or disease; or

3) experiences adverse financial consequences due to such virus or disease because the individual is quarantined, furloughed, laid off, working a reduced schedule, or unable to work due to a lack of childcare resulting from the closing or reduction in hours of a business owned or operated by the individual.

An individual who satisfies one of the criteria listed above is a "qualified individual." While not entirely clear, the January 1, 2020, effective date suggests that distributions made prior to enactment of the CARES Act to a qualified individual may qualify as COVID-19-related distributions.

Employers and individuals are likely to welcome the COVID-19-related distribution because it eliminates the need to rely on the financial hardship safe harbor for FEMA-declared major disasters for in-service distributions. Since the financial hardship safe harbor is only available to eligible individuals whose principal place of work or residence is in the disaster zone, it is limited to individuals who work or live in a state that President Trump has declared to be a major disaster. (More information on the financial hardship safe harbor is here.)

While the Act imposes an aggregate limit of $100,000 on the amount of COVID-19-related distributions that an individual may receive during a plan year from all plans in the employer's controlled group, this distribution provides the following advantages over a traditional hardship distribution:

- waives the additional 10-percent tax on early withdrawals;
- permits an individual to repay the distribution during the following three-year period by making a contribution to an eligible retirement plan in which the individual participates and which accepts rollover contributions; and
- permits an individual to elect to include the distribution in income pro rata over three years.

If an individual elects to repay a COVID-19-related distribution as described above, the contribution will not be subject to the annual limit on retirement plan contributions. Rather, the individual will be treated as having received the distribution in an eligible rollover distribution and as having transferred the amount to the eligible retirement plan in a direct trustee-to-trustee transfer within 60 days of the distribution. Hopefully, the Internal Revenue Service will issue additional guidance regarding the operation of this repayment provision.

Plan Loans

From the date of enactment (March 27, 2020) through the following 180-day period (September 23, 2020), the Act increases the maximum loan that a plan may make available to a qualified individual to the lesser of $100,000 and 100 percent (rather than the current limit of 50 percent) of the qualified individual's vested account balance). If the due date for a loan repayment occurs between the date of the enactment of the Act and December 31, 2020, that due date will be delayed for one year and subsequent repayments will be adjusted to reflect the delay and interest accrued during the delay. Additionally, the one-year delay is disregarded when determining the five-year maximum period and term of the loan.

Plan Amendments for COVID-19-Related Distributions and Plan Loans

The deadline for adopting plan amendments to implement the provisions of the Act (or subsequent regulations) related to COVID-19-related distributions or plan loans is the last day of the first plan year beginning on or after January 1, 2022. However, this

deadline is contingent on the plan operating in accordance with the amendment as of the applicable effective date.

Minimum Required Distributions

Section 2203 of the CARES Act waives minimum required distributions for 2020 for defined contribution plans. Additionally, this waiver applies to distributions that must be made in 2020 because the required beginning date occurs in 2020 and the distribution was not made prior to January 1, 2020. For example, if an individual who turned age 70.5 in 2019 did not take the required minimum distribution in 2019, that individual would otherwise have to take the distribution by the April 1, 2020, required beginning date.[1] However, under the CARES Act, that distribution is waived. If an individual receives a distribution in 2020 that would otherwise have been a required minimum distribution, the individual may be able to roll over that distribution to an eligible retirement plan.

Single Employer Plan Minimum Required Contributions

Section 3608 of the Act provides that any minimum required contributions to single employer defined benefit plans under Internal Revenue Code ("Code") Section 430(j), including quarterly contributions that would otherwise be due in 2020, are now due on January 1, 2021. The amount of each such contribution will be increased by the amount of increase accruing from the original payment date to the actual date of payment.

Department of Labor Authority

Section 3607 of the Act expands the scope of Section 518 of the Employee Retirement Income Security Act of 1974 ("ERISA") by permitting the Secretary of Labor to postpone any deadline related to plan administration for up to one year due to a public health emergency, such as the COVID-19 pandemic. Prior to the CARES Act, that authority was limited to plans affected by a presidentially declared disaster, such as hurricanes, or a terroristic or military action.

Provisions Applicable to Group Health Plans and Other Plans

Coverage and Pricing of COVID-19 Diagnostic Testing

Effective March 18, 2020, through the end of the national state of emergency, the CARES Act amends the Families First Coronavirus Response Act ("FFCRA"), which imposes a national, blanket coverage mandate for in vitro diagnostic products for the detection of SARS-CoV-2, which are approved, cleared, or authorized under the federal Food, Drug, and Cosmetic Act ("FDCA"). The coverage provided by the FFCRA is without participant cost-sharing requirements (including deductibles, copayments, and coinsurance), prior authorization, or other medical management requirements.

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[1] See Section 114(d) of the Setting Every Community Up for Retirement Enhancement Act of 2019 (the "SECURE Act") changing the age at which required minimum distributions must begin from age 70.5 to 72, effective for individuals turning age 70.5 after December 31, 2019. The SECURE Act can be found at https://www.congress.gov/bill/116th-congress/house-bill/1994/text.

Section 3201 of the CARES Act amends the FFCRA to expand the type of tests that must be covered to include tests for which the developer has requested "emergency use authorization" under the FDCA, and tests authorized and used by a state to diagnose patients. Employers will need to work with their insurers and third-party administrators to amend plans and to comply with the coverage mandate.

The mandate specifically includes the cost of provider office visits via telehealth, as well as in-person provider visits, urgent care center visits, and emergency room visits to receive testing. With limited exceptions, the mandate applies to all group health plans.

Rapid Coverage of Preventive Services and Vaccines for COVID-19

Section 3203 of the CARES Act requires group health plans (including self-funded plans) and health insurance issuers offering group or individual health insurance to cover, without cost-sharing, any qualifying coronavirus preventive service. A "qualifying coronavirus preventive service'' means an item, service, or immunization that is intended to prevent or mitigate COVID-19 and that meets certain other requirements. The term ''specified date,'' as used in this section, means the date that is 15 business days after the date on which a recommendation is made by the U.S. Preventive Services Task Force or the CDC relating to the qualifying coronavirus preventive service (rather than the typical period of the first plan year following the one-year anniversary of the recommendation).

Telehealth and High-Deductible Health Plans

Section 3701 of the CARES Act picks up where IRS Notice 2020-15 left off on providing COVID-19 relief for high-deductible health plans ("HDHPs") by permitting (for plan years beginning on or before December 31, 2021) such plans to provide coverage with no deductible for telehealth services, without jeopardizing a participant's eligibility to contribute to a health savings account ("HSA"). An HDHP is a health plan that satisfies the requirements of Section 223 of the Code for employers offering HSAs. Code Section 223 imposes strict requirements on HDHPs with respect to minimum deductibles and maximum out-of-pocket expenses. These limitations were one of the biggest hurdles facing employers in waiving copays or cost sharing for telehealth services under their HSA-HDHP arrangements. Notably, Section 3701 does not limit the use of telehealth services to the testing for, or treatment of, COVID-19.

Reimbursement for Over-the-Counter Medical Products

The Act permits reimbursements, without a prescription, from HSAs, health reimbursement accounts ("HRAs"), and health care flexible spending accounts ("FSAs") for over-the-counter drugs and menstrual care products. Section 3702 repeals the requirement in effect since the enactment of the Affordable Care Act that limited reimbursement to prescription medicines or drugs**.** While Section 3702 defines "menstrual care products," the section does not use the term "over-the-counter drug," and, therefore, does not expressly define the types of products that constitute over-the-counter drugs. All expenses incurred after December 31, 2019, qualify, and these provisions have no expiration date.

Certain Executive Compensation Arrangements

If an eligible business receives a loan under Title IV of the CARES Act,[2] the compensation paid to its executives will be restricted during the period beginning on the date on which the loan agreement is executed and ending one year after the date on which the loan or loan guarantee is no longer outstanding ("Loan Period"). An ''eligible business'' is an air carrier, or a U.S. business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under other provisions of the CARES Act. The Act does not specify the criteria for determining whether a business has received adequate relief.

Section 4004 of the Act requires the loan agreement to provide that:

- no officer or employee of the eligible business whose total compensation exceeded $425,000 in calendar year 2019 will receive:
    - total compensation that exceeds, during any 12 consecutive months of the Loan Period, the total compensation received by the officer or employee in calendar year 2019, or
    - severance pay or other benefits on termination of employment that exceeds twice the total compensation received by the officer or employee in calendar year 2019; and
- no officer or employee of the eligible business whose total compensation exceeded $3,000,000 in calendar year 2019 will receive, during any 12 consecutive months of the Loan Period, total compensation in excess of the sum of (i) $3,000,000, and (ii) 50 percent of the excess over $3,000,000 of the total compensation received by the officer or employee in 2019.

Under Section 4004, total compensation includes salary, bonuses, awards of stock, and other financial benefits provided by an eligible business to an officer or employee.

What Employers Should Do Now

Given the financial impact to the COVID-19 pandemic on employees, plan sponsors should consider acting as swiftly as practicable to implement those provisions of the Act with the most immediate impact on employees. For example, plan sponsors should:

- determine if their plans will be amended to permit COVID-19-related distributions and the new plan loan provisions, and, if so, contact the plan record keepers to begin the implementation process;
- work with the plan record keepers to identify any distributions that were taken as required minimum distributions, which may now be treated as eligible rollover distributions;

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[2] See Title IV of the Act, titled "Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy."

- work with their third-party administrators or insurers and cafeteria plan providers, as well as legal counsel, to amend applicable plans and implement the provisions of the CARES Act relating to mandated coverage for COVID-19 diagnostic testing, reimbursement for preventive services, telehealth services, and reimbursements from HSAs, HRAs, and FSAs for over-the-counter products; and

- communicate the relevant provisions of the Act to employees so that they can begin to take advantage of the benefits provided by the Act.

In making a determination whether to seek a loan under Title IV of the Act, otherwise-eligible businesses should assess how the restrictions on executive compensation—along with the numerous other conditions imposed on borrowers—will impact their operations.

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