Employee Benefit Plan Changes Under CARES Act

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The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), a sweeping third-wave relief package in response to the COVID-19 pandemic, became law March 27. To read the full overview of the bill, click here.

The CARES Act has some provisions offering flexibility to employees with benefit plans during the COVID-19 crisis. Here is a list of new provisions, and, for each change, a link to our article with more details:

- **Retirement Plan Withdrawals**
  Defined contribution retirement plans may allow distributions of up to $100,000 before the end of 2020. These distributions will not be subject to the normal 10% early withdrawal penalty. Income taxes will be due over three years instead of all in 2020, and participants will have the option to return funds to a retirement account in that same three-year period, in order to lower or eliminate the related income taxes.
- **Expanded Retirement Plan Participant Loans**
  Retirement plans may allow new, larger loans during 2020 (up to $100,000, rather than the $50,000 prior cap), and allow extended payment periods for existing loans.
- **Required Minimum Distributions Not Required in 2020**
  Because many individuals required to take minimum distributions from their retirement plans or IRAs will not want to have to sell investments at the current market-deflated prices, the CARES Act allows individuals to avoid taking a required minimum distribution (RMD) in 2020.
- **Single-Employer Defined Benefit Plan Funding Relief**
  To give plan sponsors greater flexibility to deploy their cash where it is needed during these difficult times, single employer defined benefit plans' minimum funding amounts for 2020 can be deferred and paid (with interest) in 2021.
- **Expanded Health Plan Coverage of COVID-19 Testing and Preventive Services**

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The CARES Act expands the required coverage of more types of COVID-19 testing and gives federal agencies the ability to add related services and costs to the list of preventive services health plans must cover.

- **Telehealth and Over-the-Counter Drug Payments**
  On a temporary basis, the CARES Act permits qualifying high deductible health plans to cover telehealth and other remote care services before participants have met their deductibles. It has also permanently removed the requirement that participants have a doctor's prescription in order to be reimbursed from health savings or flex accounts for over-the-counter drugs.
- **Employer Tax-Free Payment of Student Loan Debt**
  Through the end of 2020, employers can assist employees with their student loan debt on a tax-free basis.

Retirement Plan Withdrawals

The CARES Act allows participants to take "coronavirus-related distributions" of up to $100,000, without regard to the 10% early withdrawal penalty, from an eligible retirement plan between January 1, 2020 and December 31, 2020. The types of plans allowed to make these withdrawals include employer-sponsored 401(k), profit sharing or other defined contribution plans (other than money purchase pensions), as well as government 457(b) plans, and tax exempt entity 403(b) plans. Individual Retirement Accounts can also be tapped for coronavirus distributions.

A participant can take a coronavirus-related distribution if:

- the participant tests positive for the virus (by a test approved by the CDC),
- the participant's spouse or dependent (as defined in Code Section 152) tests positive for the virus, or
- the participant experiences adverse financial consequences as a result of
  - being quarantined, furloughed, laid off or having their work hours reduced due to the coronavirus,

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- being unable to work due to lack of childcare as a result of the virus, or
- being unable to work due to the closing or reduction in hours of the participant's own business as a result of the virus.

- Other circumstances that the Secretary of the Treasury may later include.

No documentation or proof that a participant meets these criteria needs to be collected–an employee's certification that they satisfy one or more of the above conditions to take a distribution is sufficient. The distribution is also not limited to an amount they can prove will meet an immediate or specific financial need, unlike the hardship withdrawals many plans already allow.

Employers are not required to allow for these withdrawals, but most will want to do so as soon as plan vendors can gear up to process them. If allowed, a plan amendment will be required, but employers can implement withdrawals immediately and have until the end of 2022 (later deadline for governmental plans) to get the amendment in place.

A participant is limited to no more than $100,000 in coronavirus-related distributions, and this cap applies across all of an employer's plans, so employers that maintain multiple eligible plans will either want to limit coronavirus-related distributions to just one plan, or be prepared to monitor each participant's combined-plan distributions to ensure that the limit is not exceeded.

Participants who take coronavirus-related distributions must take them as income and pay income tax on the amounts ratably over a three-taxable-year period beginning with 2020. The regular 20% withholding rule does not apply, but 10% withholding is required unless the participant opts out or elects a different withholding level. Notice of this withholding and their right to opt out is required prior to making payment.

Participants have an option to avoid income taxes on these distributions as well. If they choose to re-contribute some or all of the amount withdrawn (without earnings or interest) to the same or

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another plan during the three-year period after taking the withdrawal, the income-taxable amount will be reduced. These repayments will be treated like rollovers—not subject to any annual contribution limits in the year they are made. Participants will have the option to return funds to a retirement account in that same three-year period, to reduce or eliminate the related income taxes.

Expanded Retirement Plan Participant Loans

A plan participant who meets one of the requirements described in our prior article for a special coronavirus retirement plan distribution (a "coronavirus-eligible participant") may also be eligible for expanded retirement plan loan options.

New plan loans made to coronavirus-eligible participants in the 180-day period between March 27, 2020 and September 23, 2020, may be for a higher amount than previously allowed—up to 100% of the participant's plan balance, or $100,000. (Normally, the loan limit is 50% of the participant's available account balance or $50,000.) Like prior loans, the amount available will be reduced by any other loan balance outstanding in the last 12 months. Also, because the CARES Act doesn't change the existing rules that require a plan loan to be adequately secured, plan sponsors may wish to limit the available loan to less than 100% of an account balance. Sponsors may also wish to continue to impose other limits (minimum loan amounts, loans from only some plan contribution sources, limit on number of loans outstanding, etc.) that have historically applied to their plan's loan program.

The CARES Act does not require a plan to allow plan loans; but a plan sponsor may adopt a plan loan program now for this special purpose and would have until the end of 2022 to amend the plan to conform to operations in making coronavirus-eligible participant loans this year.

In addition to allowing larger new loans, the CARES Act changes some terms for existing plan loans. Loan payments due between March 27, 2020 and December 31, 2020, if not made, need not result taxable income due to loan default. Rather, the loan can be re-amortized beginning next year, adding one year to the term of

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the loan (even if that takes the loan to a total term beyond the normal five-year term limit on non-residence plan loans). Interest will continue to accrue on the delayed payments until the payment is actually made.

Some things are not yet clear about this loan relief. For example, it is not clear if employer plans must extend existing loan payment terms and provide for re-amortization next year, or if these changes are optional.

Loans tend to be one of the most challenging aspects of retirement plan administration, and are prone to operational errors. Temporary relief, while welcome to those who are coronavirus-eligible, will complicate plan administration and may be too short-lived to be of practical help. And, questions about how the loan rules work may result in employers expanding coronavirus eligible participant withdrawals well before new loan provisions can be adopted.

Required Minimum Distributions NOT Required in 2020

Because many individuals required to take minimum distributions from retirement plans or IRAs will not want to have to sell investments at the current market-deflated price, the CARES Act allows individuals to avoid taking a required minimum distribution (RMD) in 2020. This relief applies to employer-sponsored defined contribution plans as well as Individual Retirement Accounts. If not already paid, this temporary waiver of the RMD requirement also applies to an RMD first required in 2020 because the individual left employment or reached age 70½ in 2019 and would otherwise have had to take their first RMD by April 1, 2020. In addition, the five-year period by which certain account balances must be distributed after the death of the participant will be extended by one year such that 2020 will be disregarded.

Any distribution an individual receives in 2020 that would have been an RMD if not for these temporary rules is not an "eligible rollover distribution," which means that such distribution cannot be rolled over to another qualified employer retirement plan or IRA.

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Qualified employer retirement plans must be amended to reflect these RMD rules by the last day of the 2022 plan year (2024 plan year for governmental plans).

Single-Employer Defined Benefit Plan Funding Relief

The CARES Act provides funding relief to sponsors of single-employer defined benefit plans. Plan sponsors can delay any required minimum contributions that would otherwise be due during calendar year 2020 until January 1, 2021, at which time the required contributions will be due along with interest at the plan's interest rate. This will allow plan sponsors greater flexibility to deploy their cash where it is needed during these difficult times.

Additionally, for purposes of Code Section 436's rules that restrict lump sums and other accelerated forms of benefit payments if a plan is below certain funding thresholds, a plan sponsor may elect to use the 2019 plan year's adjusted funding target attainment percentage (AFTAP) as the AFTAP for plan years that include 2020.

Expanded Health Plan Coverage of COVID-19 Testing and Preventive Services

The Families First Coronavirus Response Act (FFCRA), passed on March 18, 2020, provided that group health plans (including grandfathered plans) and health insurance issuers provide coverage without cost-sharing, pre-authorization requirements, or other medical management techniques for certain types of testing for COVID-19 approved by the Food and Drug Administration (FDA), along with health care items and services necessary for the tests. The CARES Act amends the FFCRA to add additional categories of COVID-19 testing that must be included, other than just those approved by the FDA, including tests (i) where a developer has requested an emergency use authorization, (ii) that have been developed in and authorized by a state that has notified the Secretary of the Department of Health and Human Services (HHS) of its intent to review tests, and (iii) that the HHS Secretary determines appropriate in future guidance.

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The CARES Act also requires group health plans and health insurance issuers to reimburse a provider of the testing described above as if the rate was negotiated with the provider before the public health emergency was declared. If the plan or issuer does not have (or obtain) a negotiated rate with the provider, the plan or issuer must reimburse the provider at the cash price for such service as listed by the provider on a public website. All test providers are required to have such a website.

The current rule under the Affordable Care Act generally allows plans to delay required coverage for newly-added preventive services for 12 months or more; the CARES Act provides an accelerated effective date of 15 days after the date upon which a recommendation is made related to the qualifying coronavirus preventive service. So, group health plans and health insurance issuers will now be required to cover (without cost-sharing) any "qualifying coronavirus preventive service" as preventive care. The Centers for Disease Control and U.S. Preventive Services Task Force (USPSTF) will have authority to determine what constitutes a "qualifying coronavirus preventive service."

Telehealth and Over-the-Counter Drug Payments

In order to be eligible to make contribution to a Health Savings Account (HSA) for any month, an individual must be covered by a qualifying high deductible health plan (HDHP) and have no other health plan coverage in effect for the month (except for certain limited exceptions). On a temporary basis, the CARES Act permits qualifying HDHPs to cover telehealth and other remote care services before participants have met their deductible. This is an expansion of the IRS guidance earlier this month that was limited to HDHP coverage of telehealth only for services related to testing for and treatment of COVID-19. In addition, coverage for telehealth and other remote care services can be provided to an individual outside of an HDHP without impacting HSA eligibility. These changes are in effect immediately and through the end of plan years beginning on or before December 31, 2020.

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Reimbursement of Over-the-Counter (OTC) Medication Without a Prescription

The CARES Act has removed the requirement that OTC medication can only be reimbursed from an HSA, Archer MSA, health flexible spending account, or health reimbursement account if the medication has been prescribed by a physician. In addition, for purposes of these accounts, menstrual care products are now added to the types of medical supplies or products that can be paid for or reimbursed from such accounts. These changes are permanent.

Action Item: Group health plans (and participant summaries) are going to need amendment to deal with the added coverage for diagnostic tests and preventive care, telemedicine and OTC changes.

Employers Tax-Free Payment of Student Loan Debt

Student loan debt has reached a staggering $1.6 trillion in 2020. To provide employers the ability to help their employees repay their student loan debt, the CARES Act allows an employer to make non-taxable payments between March 27, 2020 and December 31, 2020 of up to $5,250 to or on behalf of an employee on qualified education loans the employee previously incurred. This new rule is subject to prior rules for maintaining an employer educational assistance plan under Code Section 127, so there must be a written plan document, and the program must be available (and communicated) to a nondiscriminatory group, and an employer cannot give the employee a choice between this benefit and other taxable amounts. Employees cannot receive other tax benefits on amounts an employer pays, so employees cannot also deduct student loan interest.

For more information, please contact Amy Crotty, Carl Lammers or any attorney in Frost Brown Todd's Employee Benefits Practice Group or the Private Equity Industry Team.

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To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a Coronavirus Response Team. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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