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CARES Act: Employee Benefits Provisions, DOL Guidance, Relief for Sponsors of Certain Plans and Pensions

WEDNESDAY, JUNE 17, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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CARES Act

Impact on Health and Welfare Plans



June 17, 2020

Topics

- COVID-19 testing coverage mandate
- SBC enforcement relief
- Essential health benefits under ACA
- HSAs and High Deductible Health Plans (HDHPs)
- OTC/Rx changes for savings accounts
- Employee Assistance Programs (EAPs)
- On-site medical clinics
- Cafeteria (§125) plan changes
- Extended deadlines
- Furloughs, layoffs and reductions in hours
- Rehiring

COVID-19 testing coverage mandate



- Plans and issuers must cover FDA approved diagnostic tests
- Without cost-sharing (deductibles, co-pays, coinsurance), preauthorization or other medical management requirements related to **testing** of COVID-19
- Testing mandate applied “as if” included in ERISA, the IRC and Public Health Service Act
- Both insured and self-insured plans are subject to the FFCRA/CARES Act testing coverage mandate

SBC Enforcement Relief



- Generally, 60-day advance notice to participants required for changes to health plans affecting the content of a Summary of Benefits and Coverage (SBC) other than with renewal (i.e., new SBC must be distributed)
- April 2020 nonenforcement guidance from U.S. DOL, HHS and the Treasury
 - Still must provide notice of changes as soon as reasonably practicable
 - Employers should coordinate with issuers of their policies

COVID-19 and ACA Essential Health Benefits



- March 2020 HHS FAQ guidance confirmed that coverage for the diagnosis **and** treatment of COVID-19 are essential health benefits (EHBs) under the ACA
- Under ACA, EHBs must be covered by non-grandfathered small market group health plans
- ACA prohibitions on annual and lifetime dollar limits of EHB coverage (insured and self-insured plans)

HSAs and High Deductible Health Plans (HDHPs)- Telehealth

- HDHP/HSA deductible exemption for **telehealth** services **generally** (not just COVID-19 related services)
 - CARES Act amendment to IRC §223
 - Effective 3/27/20, for plan years beginning before 12/31/21
 - Mid-year telehealth changes permitted by HHS FAQ guidance (*not just COVID-related services*) for small group and individual markets
 - Remember that HDHP deductible exemptions for 2020 and 2021 are permitted– not required– by the CARES Act (i.e., timely sponsor amendments still required)

HSA and High Deductible Health Plans (HDHPs)- COVID-19



- IRS Notice 2020-15
- Plan that otherwise satisfies the high deductible health plan (HDHP) requirements will not fail to be an HDHP merely because the plan covers ***testing for and treatment of COVID-19*** without imposing a deductible, or a reduced deductible below the ordinary minimum for HDHPs

Over-The-Counter/Rx Changes



Effective 1/1/2020, the CARES Act amended the definition of qualified medical expenses to permit tax-free distributions and reimbursements from HSAs, Archer MSAs, health FSAs and HRAs, without a prescription, for:

1. Over-the-counter (OTC) drugs; and
2. Menstrual care products¹

In other words, otherwise eligible OTC drugs beyond insulin (previously qualified) no longer need to be prescribed, as previously required under the ACA

- Permanent change, not limited to COVID-19 care

Employee Assistance Programs (EAPs)



- Normally, EAPs may not provide benefits that are “significant” in the nature of medical care
- Coverage of “significant” medical care would jeopardize an EAP’s “excepted benefits” status and subject it to group health plan market rules under ACA and HIPAA
- EAP benefits for the diagnosis and testing for COVID-19 will not be deemed to provide “significant” benefits for purposes of these exemptions during COVID-19 related emergency declarations²

² Q&A #11, April 11, 2020 FAQ Guidance from U.S. DOL, HHS and Treasury (<https://www.cms.gov/files/document/FFCRA-Part-42-FAQs.pdf>)

On-Site Medical Clinics



- Coverage for on-site medical clinics is an excepted benefit generally³
- April 11, 2020 FAQs from the Departments reaffirm the exemption for on-site medical clinics with respect to COVID-19 diagnosis and testing

Cafeteria Plan (§125) Mid-Year Election Changes



- IRS Notice 2020-29
- Mid-year election changes: Temporarily permitted during calendar year 2020
- Temporary mid-year changes allowed for:
 - Employer-sponsored health coverage subject to Section 125
 - Health FSAs
 - Dependent care assistance programs

Cafeteria Plan (§125) Carryover Amounts



- IRS Notice 2020-33
- Change to cap on unused amounts that may be carried over to the next plan year
- Increases the \$500 maximum carryover to 20% of the maximum salary reduction under Section 125(i), as indexed
- \$550 in 2020 (20% of \$2,750)
- Amendment deadline: 12/31/2021, for plan changes retroactive to 1/1/2020

Cafeteria Plan (§125) Extended Claims Periods



- IRS Notice 2020-29
- Temporary relief to “use-it-or-lose-it” rules for health FSA and dependent care expenses incurred in 2020
- For unused amounts remaining in a participant’s health FSA account or dependent care account at the end of:
 - A grace period ending in 2020; or
 - A plan year ending in 2020
- Health FSA/dependent care expenses **incurred** through 12/31/2020 may be covered under either scenario (grace period or carryover plan)

Cafeteria Plan (§125) Extended Claims Periods



- Examples
 - (1) Plan with a grace period
 - (2) Plan with a carryover
- Two key conditions:
 - (1) unused amounts as of the end of a grace period ending in 2020, **or** at end of a plan year ending in 2020 (for carryover plans); and
 - (2) expense incurred through 12/31/2020
- Plan amendments due by 12/31/2021

Health and Welfare Considerations

Other Extended Deadlines



- Form 5500– 7/15/2020
- Under 5/4/2020 notification of relief from U.S. DOL and IRS, stay of certain benefit plan deadlines during the COVID-19 “Outbreak Period”
 - Period from 3/1/2020 until 60 days after announced end to the declared national emergency, or other announced date

Health and Welfare Considerations Deadlines Extended during Outbreak Period

(5/4/2020 DOL/IRS Notice)



- Special enrollment for qualifying events
- COBRA elections, notices and premium payment
- ERISA claims and appeals

Health and Welfare Considerations

Furloughs, Layoffs, Reductions in Hours



- Employee eligibility for health and other welfare benefit plans (group LTD, STD, life, dependent care, AD&D)
- Shared responsibility requirements for applicable large employers and ALE Members (ALEs)
- ALEs need to make a month-by-month assessment for annual information reporting to IRS (Form 1095-C)
- COBRA reduction-in-hours qualifying event

Health and Welfare Considerations

Rehiring!



- As with adverse actions, review eligibility for health and other welfare benefits under terms of plans and policies
- Waiting periods under ACA
- Telework

CARES Act Health and Welfare Plans



Questions?

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Impact of CARES Act on Retirement Plans (including Pension Plans)

June 17, 2020

Lisette Sell, San Francisco

CARES Act – Impact on Retirement Plans

TOPICS

- Coronavirus Related Distributions
- 401(k) Loan Expansion and Repayment Relief
- Waiver of Required Minimum Distributions
- Pension Plan Relief
- Considerations for Plan Sponsors
- Critical Issues & Guidance for Plan Fiduciaries
- Best Practices & Next Steps for Employers & Administrators

New Optional Type of In-Service Distribution from Qualified Plans and IRAs

“Coronavirus Related Distribution” (CRD) – available to:

- Participant (or spouse/dependent) who has been diagnosed with the SARS-CoV-2 virus or COVID-19 by a CDC-approved test, **OR**
- Participant who has experienced “adverse financial consequences” as a result of
 - Quarantine,
 - Furlough,
 - Layoff,
 - Reduction in hours (not pay),
 - Inability to work due to lack of child care due to COVID-19,
 - Closing or reducing hours (not pay) of business owned or operated by participant due to COVID-19, **OR**
 - Other factors determined by Secretary of Treasury
- Participant must be at least age 59.5 and spouse must consent for in-service/CRD distribution from money purchase or defined benefit plan
- Plan can rely on participant’s self-certification of meeting qualifying condition unless knowledge to contrary



Coronavirus Related Distribution

Up to \$100,000 per participant

- No 10% early withdrawal penalty or 20% federal withholding

Income tax can be spread over 3 years (unless elect to pay all tax in 2020)

Can be repaid, without adjustment for earnings, within 3 years

- Repay through contribution(s) to any qualified retirement plan or IRA that accepts rollover contributions

Treated as a direct trustee-to-trustee rollover

- Not subject to tax
- Not subject to the one-rollover-per-year rule on rollovers between IRAs
- Participant may need to file amended tax return for year(s) when CRD was treated as taxable distribution

Only available during 2020 (including retroactively available to January 1, 2020)

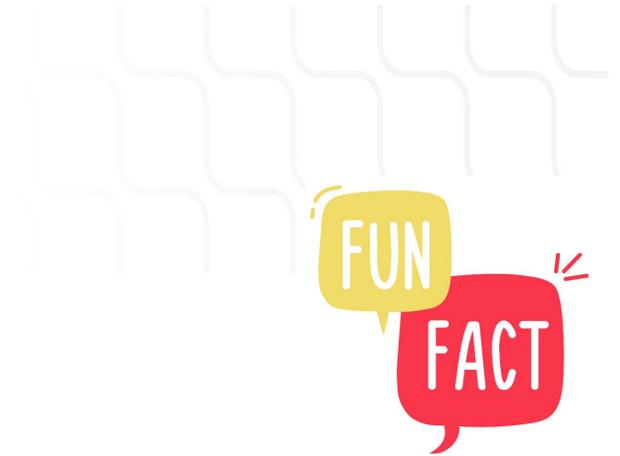
Coronavirus Related Distribution

Example:

- Participant receives CRD in 2020
- Participant chooses to spread tax over 2020, 2021 and 2022
- Participant repays entire CRD in 2022
- Participant can file amended tax returns for 2020 and 2021 to claim refund of tax attributable to amount of CRD taxed in those years
- Participant will not include any CRD amount in income for 2022

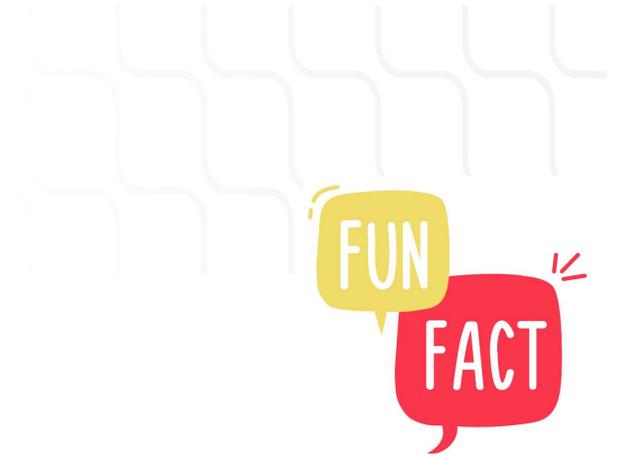


Coronavirus Related Distribution – Fun Facts



- Regardless of whether plan allows CRDs, non-CRD distribution that meets criteria for CRD is eligible for CRD tax treatment (e.g., participant reports as CRD on tax return) up to \$100,000
 - **Example:** Participant who is otherwise eligible for distribution – due to termination of employment or attainment of age 59.5 – may request distribution
 - Subject to 20% withholding and perhaps 10% penalty but waiver available when file tax return
 - Can spread tax over 3 years and can repay within 3 years
- \$100,000 limit is individual limit and applies to aggregate CRDs taken from all qualified retirement plan accounts and IRAs
 - Employer only needs to confirm limit hasn't been exceeded by CRDs from retirement plans it and controlled group members sponsor
- Not clear whether CRD allowed from Roth IRAs or inherited IRAs

Coronavirus Related Distribution – More Fun Facts



- Reported on Form 1099-R for 2020 even if repaid in 2020
 - Unclear whether to report entire amount of CRD as taxable
- Participant reports any repayment and the amount of any taxable CRD on Form 8915-E

Optional Loan Expansion and Repayment Relief

Available to same categories of participants as CRDs

Loan limit temporarily increased to lesser of \$100,000 or 100% of vested account balance from lesser of \$50,000 or 50% of vested account balance

- Limit reduced by amount of existing loan(s)

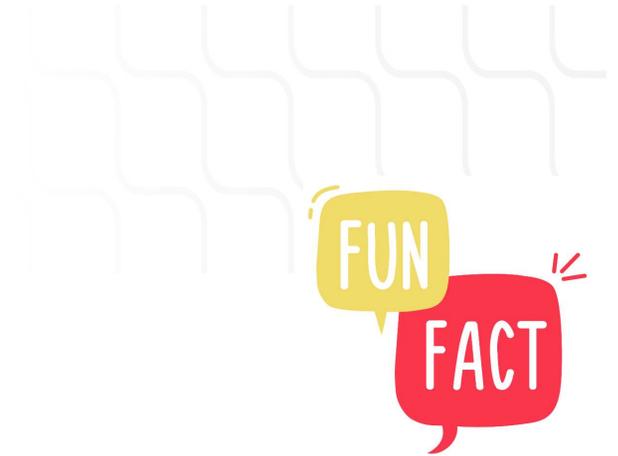
Only available for loans initiated from March 27, 2020 to September 23, 2020 (i.e., 180 days from enactment of CARES Act)

Payments on new or existing loan due from March 27, 2020 through December 31, 2020 can be deferred for up to one year, with accrued interest

- Loan term extended by length of suspension period

Recall that IRS automatically delayed due date for loan repayments due on or after April 1, 2020 and before July 15, 2020 to July 15, 2020, without accruing interest, for all participants (even if plan sponsor doesn't implement CARES Act loan relief)

Optional Loan Expansion and Repayment Relief – Fun Fact



If participant suspends loan payments and has distributable event, plan may offset loan and consider outstanding loan to be a taxable distribution

- Participant could treat distribution as a CRD
- Can pay tax over 3 years, avoid 10% penalty and repay within 3 years

Optional Waiver of Required Minimum Distribution (RMD) from Defined Contribution Plans and IRAs

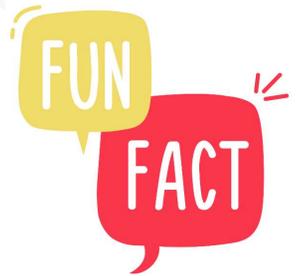
Waiver available to any participant with a Required Beginning Date (RBD) in 2020 (i.e., turned age 70.5 in 2019) and any participant or beneficiary with a RMD due in 2020

- Participant who turned age 70.5 in 2019 and chose to take first RMD in 2020 will be able to waive both the 2019 and 2020 RMDs
- If 5-year RMD rule (e.g., must take full distribution by end of 5th calendar year following year of death) applies, ignore 2020 when determining 5-year period

Recall SECURE Act already delayed RBD to April 1 of year after attainment of age 72 for participants turning age 70.5 in 2020 or later

Check with record-keeper but plan sponsor may be able to choose to waive all 2020 RMDs unless participant elects a distribution (or vice versa)

- Many record-keepers are automatically waiving all 2020 RMDs



Optional Waiver of Required Minimum Distribution (RMD) from Qualified Plans and IRAs – Fun Fact

If participant received/receives a distribution in 2020 that would have been a RMD except for the waiver, participant may be able to roll over the distribution to another plan or IRA and thereby delay tax on distribution

- 60-day deadline to complete rollover extended to July 15, 2020
 - Deadline is July 15, 2020 for any distribution made on or after February 1, 2020 and on or before May 15, 2020
 - Query whether participant has 3 years to roll over if distribution qualifies as a CRD
- Subject to the one-rollover-per-year rule on rollovers between IRAs
- Same treatment for spousal beneficiary
 - Query whether same for nonspousal beneficiary

Optional Pension Plan Relief

- Can delay defined benefit minimum funding contributions for 2020 until January 1, 2021, with interest accruing between original due date and the payment date
- Can treat a defined benefit plan's adjusted funding target attainment percentage (AFTAP) for last plan year ending before January 1, 2020 as the AFTAP for plan years that include calendar year 2020 to avoid triggering benefit restrictions





Considerations for Plan Sponsors

All changes are optional

- Can choose to implement some, all, or none (depending on record-keeper)
- Can customize implementation (e.g., lower dollar limit for CRDs, only allow CRDs from certain contribution sources, or allow lower maximum loan limit) (depending on record-keeper)

Decision as to whether to allow CRDs and/or loan expansion

- Concern about participants taking distribution when market is down
- Leakage of retirement savings due to inability to repay CRD/eventual default on loan
- Could initially choose to opt out and then opt in later in 2020 after market recovers



Additional Considerations for Plan Sponsors

**Per Willis Towers
Watson survey of
816 employers in
April 2020:**

65% added CRDs to their retirement plan with 16% still considering whether to do so

64% allowed deferral of loan repayments with 17% still considering whether to do so

48% increased maximum amount on plan loans with 17% still considering whether to do so

**Plan amendment
required by end of
plan year
beginning on or
after January 1,
2022**

Retroactively effective to when first implemented plan feature(s)

Note if decide to now add loan feature to plan so that participants can utilize loan expansion, plan amendment required by December 31, 2020

Critical Issues & Guidance for Plan Fiduciaries

Continue to monitor performance of investment options and service providers

- Hold periodic committee meetings and include investment professional
- Meet more frequently if needed
- Follow committee charter and investment policy statement
- Focus on prudent process
- Provide additional participant communication and education about investing in volatile market
- Consider/reconsider timing of any blackout period and whether to postpone until market stabilizes



Critical Issues & Guidance for Plan Fiduciaries



- Determine whether partial plan termination (PPT) has occurred
 - Per the IRS, a PPT occurs when there is a “significant percentage decrease” in the number of participants, based on all the facts and circumstances
 - 20% or more decrease creates a rebuttable presumption that PPT has occurred; if less than 20%, a PPT won’t be deemed to have occurred, absent bad faith
 - Percentage decrease determined over the relevant period which is usually the plan year but can be multiple years if there’s a series of related terminations
 - Calculated by dividing the number of terminated participants by the sum of the number of participants at the beginning of the relevant period and the participants added during the relevant period
 - Number of terminated participants excludes terminations due to death, disability, normal retirement, terminations “for cause,” and voluntary terminations (unless constructive discharge)

Critical Issues & Guidance for Plan Fiduciaries



- If PPT is found to have occurred, all participants who terminated during the relevant period become fully vested in their account
- If PPT is not found to have occurred, continue to monitor for rest of 2020 (perhaps longer)
- If furloughed participants, do not count as terminated participants
- If laid off participants, no authoritative guidance on whether to count as terminated participants
 - Whether considered terminated depends on good faith determination of the likelihood of them performing future duties for the employer
 - If strong belief and expectation that the participants will be rehired soon, reasonable to not consider them terminated
 - If uncertainty about the possibility and timing of rehire, probably best to treat as terminated

Best Practices & Next Steps for Employers and Administrators



- If haven't decided whether to adopt optional plan features, be certain to discuss operational capabilities with record-keeper
- Issue communications to participants about any changes to plan features
 - Provide summary of material modifications or updated SPD
 - Issue revised safe harbor notice, if applicable
 - Consider whether electronic delivery of communications is permissible under new DOL rules

Best Practices & Next Steps for Employers and Administrators

If spousal consent is required for distribution or loan, consider whether new relief from physical presence requirement for notary or plan representative is available

Reach out early to record-keeper and plan auditor because there is no extension (yet) of deadline for 2019 Form 5500 for calendar year plans and remote auditing will be complicated

Thank You

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Lisette is a member of Davis Wright Tremaine's employment services group where she focuses her talents on ERISA and employee benefit matters. Her vast experience over her 30 years in practice includes advising employers on documentary and operational compliance for their retirement plans and health and welfare plans.

Lisette understands the constantly changing legal landscape that a company's human resources professionals face and provides practical legal guidance on how to adhere to local, state, and federal employee benefit laws and regulations, and how to correct instances of noncompliance.