Patterson Belknap Webb & Tyler LLP

Employee Benefits and Executive Compensation Alert March 2020

CARES Act – Retirement Plan Provisions for Employers and Plan Administrators

The Coronavirus Aid, Relief, and Economic Security Act (H.R. 748), known as the CARES Act, was enacted on March 27, 2020. This legislation contains several important provisions for employers and plan administrators regarding their retirement plans.

Special Withdrawal, Loan and Distribution Provisions

Tax-Favored Withdrawals from Retirement Plans

The CARES Act includes provisions to enable certain plans to make coronavirus-related distributions. These distributions will not be subject to the 10% early distribution tax imposed by Internal Revenue Code ("IRC") §72(t). They will need to be limited to an aggregate of $100,000 in any taxable year, including any such distribution from all plans maintained by the employer and members of its controlled group (as defined in IRC §414(b), (c), (m) or (o)). The distributions may be repaid in one of more payments at any time during the three-year period beginning on the day after the date the distribution was made, to any eligible retirement plan of which the distributee is a beneficiary and to which such distributee would be eligible to make a rollover contribution (if the distribution would have otherwise been eligible for rollover), including 401(k) plans, 403(b) plans and IRAs, among others. The repayments will be limited to the amount of the coronavirus-related distribution. Notably, it appears the repayment will not be required to be made to the plan which made the distribution. The statute does not specify, however, how the plan administrator of the plan accepting the repayment will need to be informed of the participant's eligibility to make the repayment, though prior IRS guidance related to similar prior legislation permitted a plan administrator to rely on a participant's representation, absent actual knowledge to the contrary.

Coronavirus-related distributions can be made available on or after January 1, 2020 and before December 31, 2020, to the following 'Qualified Individuals':

i. Individuals diagnosed with SARS-COV-2 or Coronavirus 2019 ("COVID-19") by a test approved by the Centers for Disease Control and Prevention,

ii. Individuals whose spouse or dependent (as defined by IRC §152) is so diagnosed, or

iii. Individuals who experience adverse financial consequences as a result of being quarantined, furloughed or laid off or having work hours reduced due to COVID-19, being unable to work due to lack of child care due to COVID-19, closing or reducing hours of a business owned or operated by the individual due to COVID-19, or other factors as may be determined by Treasury.

Employers will be permitted to rely on an employee's certification that he or she satisfies the above conditions in determining whether a distribution is coronavirus-related.

While such distributions are not required to be permitted from plans, they can be permitted by 401(k) and 403(b) plans and likely also from non-401(k) profit sharing plans. In light of IRS interpretation of similar language in prior legislation, we anticipate that these distributions would not be permitted from money purchase and defined benefit plans prior to normal retirement age or another eligible distribution event, and that other limitations on distributions from certain contribution sources may still apply.

Amounts required to be included in income with respect to coronavirus-related distributions will, unless the distributee elects otherwise, be included in taxable income ratably over a three-year period. The special coronavirus-related distributions are not eligible for direct rollover and would not be subject to automatic 20% tax withholding.

Loans from Qualified Plans and 403(b) Plans

The CARES Act also liberalizes certain of the rules regarding loans from qualified plans and 403(b) plans if made to Qualified Individuals (as defined above). Loans made from tax qualified plans and 403(b) plans to Qualified Individuals during the 180-day period starting with the date of the CARES Act enactment can have their loan cap doubled to the lesser of $100,000 or the present value of the participant's nonforfeitable accrued benefit under the plan (rather than the lesser of $50,000 and one half of the present value of the nonforfeitable accrued benefit under the plan). The rules requiring consideration of the highest loan balance during the 1-year period before a loan is made when applying the loan cap is not changed, however.

Additionally, a Qualified Individual with an outstanding plan loan with a repayment due between the date the CARES Act is enacted and the last day of 2020 could have such due date delayed for one year, with subsequent repayments adjusted accordingly. In addition, the five-year loan term limit would not be required to take this period of delay into account.

Temporary Waiver of Required Minimum Distributions

The CARES Act also waives required minimum distributions for 2020 under qualified 401(a) defined contribution plans, as well as 403(b) plans and governmental 457(b) plans and IRAs. If a required beginning date occurs in 2020 (including the April 1, 2020 required beginning date for individuals who had attained age 70½ in 2019 (or, where appropriate, if later, terminated service in 2019)), and the required distribution wasn't made prior to January 1, 2020, the required beginning date could[1] also be postponed (and the 2020 year will be disregarded in applying the relevant 5 year period for required minimum distribution purposes, when applicable for certain distributions after a participant's death). Distributions that would otherwise be treated as 2020 required minimum distributions but for this change can be rolled over by the receiving participant within 60 days of receipt. Plans appear to not be required to offer direct rollovers for these amounts but we are hopeful that IRS guidance will be provided (as it was when a similar provision was adopted with respect to required minimum distributions in 2009) clarifying that direct rollovers could optionally be permitted.

Plan Amendments

It is contemplated that plans will need to be amended to permit any of the changes described above to apply to them under the CARES Act. Plans will be permitted, however, to operate in accordance with these changes before amendments are formally adopted, and then be amended retroactively, provided such amendments are made on or before the last day of the first plan year beginning on or after January 1, 2022 (with an extra two years provided for governmental plans).

[1] Prior guidance under Notice 2009-82 interpreting a similar statutory waiver of required minimum distributions under the Worker, Retiree, and Employer Recovery Act of 2008, permitted plans to either distribute (unless the participant opted out) or not distribute (unless the participant opted in) the amount that would otherwise be treated as a required minimum distribution for the year, but for the change in the law in that year.

Delayed Payment of Minimum Required Contributions for Defined Benefit Plans and Changes Regarding Restrictions under IRC §436

Minimum required contributions to single-employer plans due during 2020 (pursuant to IRC §430(a) and Employee Retirement Income Security Act ("ERISA") §303(a)) can be delayed under the CARES Act until January 1, 2021. Note, however, that the amount of the payment to later be made would be increased by interest which accrued from the original due date until the new payment date. Additionally, under the CARES Act, a plan sponsor could elect to treat the plan's adjusted funding target attainment percentage (the "AFTAP percentage") for the last plan year ending before January 1, 2020 as the AFTAP percentage for plan years which include calendar year 2020 when determining whether restrictions on certain amendments and lump sums (or certain other accelerated payment forms) under IRC §436 apply for such plan years.

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