



IN-DEPTH DISCUSSION

Employee Benefit and Executive Compensation Provisions in the CARES Act

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Enacted on Friday, March 27, 2020, the *Coronavirus Aid, Relief, and Economic Security Act* (H.R. 748, the "CARES Act" or the "Act") is intended to stimulate the U.S. economy in light of the COVID-19 pandemic. The CARES Act contains a number of provisions relating to employee benefits and executive compensation, which are summarized below.

Retirement Plan Provisions

- **Penalty-Free Coronavirus-Related Distributions in 2020.** The CARES Act permits an eligible retirement plan (as defined under Internal Revenue Code Section 402(c)(8)(B), including employer-sponsored 401(k), 403(b) and governmental 457(b) plans) to allow participants to take distributions in 2020 of up to \$100,000 without incurring the 10% early withdrawal penalty that would normally occur for participants who have not attained age 59½. The distribution must qualify as a "coronavirus-related distribution," which is generally defined under the Act as any distribution from an eligible retirement plan made: (i) on or after January 1, 2020 and before December 31, 2020, (ii) to an individual (a) who is diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the Centers for Disease Control and Prevention ("CDC"), (b) whose spouse or dependent is diagnosed with COVID-19, or (c) who experiences adverse financial consequences as a result of being quarantined; being furloughed or laid off or having work hours reduced; or being unable to work due to lack of child care, or as a result of the closure or reduction in hours of a business owned or operated by the individual, in each case due to the virus or disease. Note that employers may rely on the participant's certification that one of these conditions is satisfied.
- **Tax Treatment of Coronavirus-Related Distributions.** A coronavirus-related distribution will not be subject to the 10% early withdrawal penalty for participants who have not attained age 59½. Accordingly, the distribution is not subject to the mandatory 20% federal income tax withholding.
- **Repayment of Coronavirus-Related Distributions.** The Act provides that an individual receiving a coronavirus-related distribution may re contribute the amount (or any portion thereof) back into their

employer's plan, an IRA or any other tax-qualified plan that accepts rollover contributions, at any time within three years following the date of the distribution.

- **Income Inclusion Over Three-Year Period.** If the coronavirus-related distribution is not repaid or recontributed to a qualified plan or IRA, then the income from the distribution must be included ratably over the three-taxable year period beginning with the year in which the distribution is made, unless the individual makes an election *not* to have the three-year income treatment apply.
- **Loans From Qualified Plans.** The CARES Act allows a plan to provide flexibly for plan loans made during the 180-day period beginning on March 27, 2020. Specifically, any participant who would be eligible to receive a coronavirus-related distribution from a tax qualified plan ("Qualified Individual") may receive plan loans in an amount not to exceed the lesser of \$100,000 (increased from the current limit of \$50,000) or 100% (increased from the current limit of 50%) of the participant's vested account balance. Moreover, with respect to such Qualified Individuals, the Act provides a one-year extension of time to repay a plan loan if the due date occurs between the date the Act is enacted and December 31, 2020. This extension includes loans made before the CARES Act, as well as loans made during the 180-day period beginning on March 27, 2020.
- **Waiver of 2020 Required Minimum Distributions ("RMD").** Under the CARES Act, RMDs are waived for profit sharing, money purchase, 401(k), 403(b) and governmental 457(b) plans. This waiver applies to all RMDs due during 2020, including 2019 initial RMDs due by April 1, 2020.
- **Single-Employer Defined Benefit (DB) Plan Provisions.** The CARES Act allows sponsors of single-employer DB pension plans to delay any quarterly or year-end minimum required contributions due during the 2020 calendar year until January 1, 2021. The amount of each such minimum required contribution must be increased by interest accruing at the plan's interest rate for the period from the original contribution due date through the actual payment date. In addition, for plan years that include any portion of 2020, plan sponsors are permitted to elect to treat the plan's adjusted funding target attainment percentage ("AFTAP") as being equal to the percentage from the last plan year ending before January 1, 2020. This relief is important because the DB pension plan's funding status likely declined as a result of COVID-19-related events and—absent this AFTAP relief—such a decline could have triggered funding-related benefit restrictions, such as lump sum prohibitions and benefit accrual restrictions.

Under the CARES Act, an employer-sponsored retirement plan that desires to adopt one or more of the above provisions must be amended to reflect the aforementioned new rules by the last day of the plan year beginning on or after January 1, 2022 (*i.e.*, for calendar year plan years, by December 31, 2022). We believe that the majority of employers will want to adopt all of these rules.

Lastly, the CARES Act expands the Department of Labor's authority to postpone certain deadlines pursuant to ERISA Section 518 in the event of a public health emergency declared by the Secretary of HHS. No actions have been taken pursuant to this authority to-date; however, we expect certain deadlines such as Form 5500, annual funding notice, quarterly (or other periodic) participant statements, and others may be affected.

Implications. If employers wish to adopt one or more of the above provisions, we recommend advising the plan's recordkeeper and, thereafter, distributing a communication to employees informing them of the changes. To the extent an employer adopts the provisions relating to the coronavirus-related distribution, the employer should consult with the plan's recordkeeper to develop a certification (written or electronic) as part of their administrative process.

Health & Welfare Plan Provisions

- **Coverage of COVID-19 Testing.** Under the CARES Act, group health plans and health insurance issuers must cover all testing for COVID-19, without cost-sharing to the participant, even for those tests that have not yet received an emergency use authorization from the FDA.
- **Coverage of Preventive Services and Vaccines for Coronavirus.** The CARES Act requires group health plans and health insurance issuers to cover, without cost-sharing to the participant, any "qualifying coronavirus preventive service" as a preventive benefit under the Affordable Care Act. The term "qualifying coronavirus preventive service" is defined by the Act as an item, service, or immunization that is intended to prevent or mitigate COVID-19 and is (i) an evidence-based item or service that has in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force, or (ii) an immunization that has in effect a recommendation from the Advisory Committee on Immunization Practices of the CDC with respect to the individual involved. The CARES Act requires coverage of such qualifying coronavirus preventive service (without cost-sharing to the participant) within 15 days after the date on which a recommendation is made relating to the qualifying coronavirus preventive service.
- **Exemption for Telehealth Services.** With respect to plan years beginning before January 1, 2022, a high-deductible health plan ("HDHP") with a Health Savings Account ("HSA") can offer cost-free telehealth services and other remote care services prior to an HSA-eligible individual reaching the deductible under the HDHP. It should be noted that HDHPs can offer HSA holders access to telehealth services with no cost-sharing to the individual, regardless of whether the deductible is met, and such individuals will remain eligible to make and receive contributions to an HSA.
- **Reimbursements for Over-the-Counter Drugs and Menstrual Care Products from HSAs, FSAs, and HRAs.** Under the CARES Act, menstrual care products are now treated as a qualified medical expense and can be paid for under an HSA, health flexible spending account ("FSA"), and health reimbursement arrangement ("HRA"). In addition, over-the-counter medicines and drugs can once again be paid for with HSAs, FSAs and HRAs without a doctor's prescription. There is no sunset date for over-the-

counter medicines and drugs being eligible for payment under an HSA, FSA and HRA, meaning these changes are permanent.

Implications. Note that the coverage requirements imposed on group health plans are mandatory, whereas the temporary HSA rules allowing telehealth services and other remote care are optional. The permanent changes to the over-the-counter prescription drug rules are also optional. Employers of self-insured medical plans will need to amend their medical plans as soon as possible to include the mandatory and—if desired—optional health plan modifications. All such changes will require a Summary of Material Modifications to be distributed to plan participants.

Executive Compensation

The CARES Act establishes a \$500 billion “Exchange Stabilization Fund” that will provide direct payments to U.S.-based businesses, not-for-profits, states and municipalities impacted by the COVID-19 pandemic. The payments may be funded by loans, loan guarantees or other investments by either the Department of Treasury or the Federal Reserve. Businesses that receive a loan or loan guarantee from the Exchange Stabilization Fund must limit executive compensation for the period beginning on the date the loan or guarantee agreement is entered into, and ending one year after the loan or guarantee is no longer outstanding (the “Restriction Period”) as follows:

- No officer or employee of the business whose compensation exceeded \$425,000 in calendar year 2019 may receive:
 - “total compensation” (which includes salary, bonuses, awards of stock, and other financial benefits) that exceeds such employee’s calendar year 2019 compensation over any consecutive 12 months during the Restriction Period, *or*
 - “severance pay or other benefits upon termination of employment” that exceeds more than two times such calendar year 2019 compensation; *and*
- To the extent any officer or employee of the business had “total compensation” that exceeded \$3 million in calendar year 2019, then, for any consecutive 12 months during the Restriction Period, the officer or employee may not receive “total compensation” in excess of the sum of:
 - \$3 million, *and*
 - 50% of the amount by which the employee’s “total compensation” for 2019 exceeded \$3 million.

Note that the CARES Act provides similar limits for certain air carriers and contractors that receive financial support under the “Air Carrier Worker Support” provisions of the law, except that the Restriction Period is the two-year period commencing on March 24, 2020 and ending on March 24, 2022.

Student Loans

The CARES Act makes a pre-tax student loan benefit available to employers on a short-term basis.

During the period between April 1, 2020 and December 31, 2021, employers may provide employees with up to \$5,250 on a pre-tax basis pursuant to a written "educational assistance program" under Section 127 of the Internal Revenue Code. The amounts may be paid to the lending institution or directly to the employee and will not be considered taxable income.

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