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Employee Benefits Corner

CARES Act Impact on Retirement Plans

By Elizabeth Thomas Dold and David N. Levine

Effective March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") brings immediate changes and relief to certain qualified retirement plans, consistent with natural disaster relief issued in the past and the relief provided after the 2008 economic downturn. The changes are described below in Q&A format, which provide participants with increased access and special tax treatment for plan distributions in the midst of a pandemic.

What Is the Relief That Was Provided?

There are four pieces of relief available for plan sponsors under Sections 2202 and 2203 of the CARES Act:

- *New Withdrawal Right*. A plan that is subject to the restrictions of Code Secs. 401(k)(2)(B)(i), 403(b)(7)(A)(i), 403(b)(11), 457(d)(1)(A), and section 8433(h)(1) of title 5 of the U.S. Code can provide a new in-service distribution right of up to $100,000, meaning this distribution right is generally available under 401(k) plans, 403(b) plans, and governmental 457(b) plans. This coronavirus-related distribution (CRD) is not subject to the early 10% additional tax, is not eligible for rollover to another IRA or qualified plan, is not subject to mandatory 20% withholding (rather it is subject to 10% optional withholding), and is taxed over a three year period (unless the participant elects otherwise). Moreover, the amount withdrawn can be recontributed to an IRA or plan within a three year period.

  Up to $100,000 can be taken by the individual, in the aggregate, from all the plans that the individual participates in and any IRAs that the individual holds. A plan sponsor is obligated to ensure that the $100,000 distribution cap is not exceeded for plans within the employer's controlled group.

  Unlike a hardship distribution, there is no requirement to show documentation of losses or expenses to justify the distribution; the individual just must certify they are a qualifying individual.
- *Higher Loan Limit*. A plan may permit loans in accordance with the increase in the loan limit under Code Sec. 72(p) from $50,000 to $100,000 (or 100% of the participant's account balance, if less) for loans made from March 27, 2020, through September 22, 2020. A plan sponsor may also want to expand the number of plan loans available to facilitate these loans.

- *One-Year Loan Suspension*. A plan may permit the suspension of loan payments due March 27, 2020, through December 31, 2020, for up to one year.
- *Minimum Required Distribution (MRD) Relief*. 2020 minimum required distributions under Code Sec. 401(a)(9) (*e.g.*, benefits to participants who reached age 70-½ in 2019 and beneficiaries required to take a distribution) are suspended. The idea is to not force out these payments, allowing participants and beneficiaries to stay in the market in order to give the market a chance to recover from the current volatility.

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What Type of Plans Are Impacted?

Both defined contribution and defined benefit plans are eligible for the relief. For the loan provisions, any qualified plans that offer (or elect to offer) loans. As noted above, for the CRD, 401(k), 403(b), and governmental 457(b) plans are impacted with a special withdrawal right. Moreover, participants that participate in a pension plan (including a money purchase pension plan) that have a distributable event can get the tax benefits of the CRD. For the MRD relief, a defined contribution plan that is a 401(a) plan, a 403(a) plan, a 403(b) plan, and a governmental 457(b) plan.

Is the Relief Mandatory or Optional?

The relief is optional.

What Participants Are Eligible for the Relief?

Anyone is eligible for the MRD relief. However, for the CRD and the special loan provisions, the participant must be a qualified individual. A qualified individual is defined as an individual:

- Who is diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the CDC,
- Whose spouse or dependent (under Code Sec. 152) is so diagnosed,
- Who experiences adverse financial consequences as a result of being quarantined; being furloughed or laid off or having work hours reduced due to such virus; being unable to work due to a lack of child care due to the virus; closing or reducing hours of a business owned or operated by the individual due to the virus, or
- Such other factors determined by Treasury. No such other factors have been published by Treasury to date, but guidance is pending.

An employee certification will be accepted for this purpose, provided there is not actual knowledge to the contrary.

When Is the Relief Effective?

The effective date varies depending on the relief:

- A CRD is available from January 1, 2020, through December 30, 2020.
- A $100,000 loan is available from March 27, 2020, through September 22, 2020.
- A loan suspension is available for loans with payments due between March 27, 2020, and December 31, 2020.
- The MRD relief is available for the following payments:
  - 2020 RMD payments for individuals who already are receiving them (*e.g.*, attained 70-½ before 2019),
  - 2020 RMD payments for individuals who turned age 70-½ or retired (if later) in 2019, along with the 2019 MRD payment to the extent it was not already made in 2019,
  - 2020 RMD payments for individuals who have a required beginning date of April 1, 2021, as a result of their retirement in 2020, and
  - 2020 RMD payments that were required to be made to a beneficiary.

How Does a Plan Sponsor Take Advantage of the Relief?

A plan sponsor must adopt a plan amendment by the end of the 2022 plan year (2024 plan year for governmental plans), and be in operational compliance with the provisions from the date the provisions are put into place.

For the MRD relief, it may be helpful to review Notice 2009-82, which provides for two different approaches (and sample amendments) for plan sponsors:

(1) Default to Continue 2020 RMDs. This approach provides individuals an opportunity to elect to stop receiving such distributions.

(2) Default to Discontinue 2020 RMDs. This approach provides individuals an opportunity to elect to continue receiving such distributions.

The plan sponsor can also elect to treat these 2020 MRD payments as eligible for direct rollover.

For post-death distributions, this one-year period (*i.e.*, 2020) is disregarded for purposes of the five-year payout period. It also provides a one-year extension for a beneficiary to elect to commence lifetime payments where that decision was otherwise due in 2020.

Is There Any IRS Guidance to Help Implement These Changes?

Yes, recently, the IRS issued its first round of guidance in the form of frequently asked questions (FAQs), and indicated that additional guidance is coming soon.[1]

Importantly, the FAQs clarify that the key guidance for the loan and distribution rights is set forth in Notice 2005-92, which contains a number of details on how the relief works. There are 14 FAQs and they cover the following issues:

Q&A-1. Briefly describes the CRD and loan relief provisions.

Q&A-2. Indicates that IRS guidance is pending on the CRD and loan provisions and anticipates that the guidance will apply the principles of Notice 2005-92.

Q&A-3. Describes who is a qualified individual for purposes of the CRD and loan relief, which tracks the statute but indicates that additional factors are under consideration.

Q&A-4. Defines a CRD.

Q&A-5. Explains that a CRD is not subject to the 10% additional tax on early distributions under Code Sec. 72(t) (*e.g.*, no additional tax for participants who are not yet age 59-½).

Q&A-6. Explains when a participant who takes a CRD is taxed—including the income ratably over 2020–2022, unless the participant elects to tax the entire payment in 2020.

Q&A-7. Explains that the CRD can be repaid in whole or in part to an eligible retirement plan (including an IRA) within three years after the receipt of the distribution, which will be treated as a tax-free direct trustee-to-trustee transfer.

Q&A-8. Describes the loan relief that is available under a plan.

Q&A-9. Confirms that it is optional for a plan sponsor to offer the CRD and/or loan relief, and even if a plan sponsor does not offer the CRD, a participant that is permitted to take a distribution can elect to treat a distribution as CRD on his tax return.

Q&A-10. Explains the new distribution right for CRDs from a 401(k) plan, 403(b) plan, and governmental 457(b) plan, and confirms that the CARES Act does not otherwise change the limits on when other plan distributions are permitted.

Q&A-11. Explains that an administrator can rely on an individual's certification that they are a qualified individual, unless the administrator has actual knowledge to the contrary. But for the individual to obtain the special tax treatment, the individual must actually meet the eligibility requirements.

Q&A-12. Explains that eligible retirement plans are anticipated to accept repayments of CRDs, but acknowledges that plans are generally not required to accept rollover contributions, which is how these repayments are treated.

Q&A-13. Explains how individual reports the CRD on their tax return *via* Form 8915-E (which is pending).

Q&A-14. Explains how plans and IRAs report CRDs on Form 1099-R and indicates that additional guidance is pending.

We anticipate relief similar to Notice 2009-82 for the MRD changes, where the IRS provided sample plan amendments and transition relief when Congress previously suspended MRD payments in 2009.

What Are Appropriate Next Steps?

Plan sponsors should notify participants of the relief being provided, coordinate with their service providers in rolling out any available relief, and keep a clear record of the provisions that were offered and the effective date of the provisions in order to document them in a formal plan amendment in the future (generally by the end of 2022). The provisions will also require updated loan and distribution forms, along with changes in policies and procedures.

ENDNOTE

1 *See www.irs.gov/newsroom/coronavirus-related-relief-for-retirement-plans-and-iras-questions-and-answers.*