

## >> COVID-19 ALERT

# COVID-19 Considerations for Retirement Plan Sponsors and Committees

### THE BOTTOM LINE

>> The novel coronavirus is presenting employers with new challenges on a daily basis. Employers should work closely with their ERISA counsel to ensure that they are administering their qualified retirement plans correctly and satisfying their fiduciary obligations while taking appropriate steps to protect their employees and retirement plans.

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**Employers must take action now to provide appropriate oversight of their retirement plans, both in reaction to recent legislation and extreme stock market volatility due to COVID-19.**

This is especially true for those employers that have needed to reduce their active workforce, including through layoffs and furloughs.

In particular, retirement plan committees should, in many cases, call an ad hoc meeting to review the effects that the coronavirus pandemic may have on their qualified retirement plans, including 401(k), 403(b) and defined benefit pension plans. Plan sponsors and retirement plan committees should meet with their investment consultants and Employee Retirement Income Security Act (ERISA) counsel to review the recent coronavirus-related legislation, including the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which President Trump signed into law on March 27, 2020, and ongoing market volatility. Retirement plan committees must understand their role as plan fiduciaries and take action to fulfill their fiduciary responsibilities.

The following is a number of important discussion points to address at a retirement plan committee meeting:

### PARTICIPANT EDUCATION

Employers should consider implementing participant education programs (*e.g.*, webinars or communications) regarding market volatility and the importance of retirement savings. Contact your recordkeeper to understand how they have been communicating, identify any gaps that might prevent your participants from joining and help bridge those gaps. This is not the time for original education pieces; instead, use your recordkeeper's pieces that are currently available.

### INVESTMENT POLICY STATEMENTS

Plan fiduciaries should review their investment policy statements for each plan. The investment policy statements provide procedures for plan fiduciaries to review a plan's investment funds, including target date funds, and determining when action should be taken (if any) with respect to these investment funds.

For pension plans, investment policy statements should be reviewed when assessing the employer's funding obligations under the plan to help strategize how to raise cash to fund distributions in a down market. The CARES Act provides some funding relief for single-employer pension plans that are subject to the minimum funding requirements

by allowing plan sponsors to delay their minimum required contributions that would otherwise be due during calendar year 2020 until January 1, 2021. The contributions will be increased by interest accruing for the period between the original due date (determined without regard to the funding relief provided for under the CARES Act) and the actual payment date at the effective rate of interest for the plan for the plan year that includes the payment date.

### ELECTIVE DEFERRALS DURING PAID LEAVE

Many employers will have many more employees who are out on paid leave due to the coronavirus. Depending on a retirement plan's definition of compensation, an employee's paid leave may be treated as compensation and subject to elective deferrals. This means that elective deferrals would need to be deducted from an employee's paid leave payments. In other cases, deferrals should not be taken for an employee on leave.

An employer that is interested in amending its plan's definition of compensation should discuss this change with its ERISA counsel to ensure that it is compliant with the applicable Treasury regulations regarding the definition of compensation.

### CORONAVIRUS-RELATED DISTRIBUTIONS

The CARES Act also provides for a new penalty-free coronavirus-related distribution for participants impacted by the coronavirus. This hardship distribution allows participants to receive an early withdrawal during the 2020 tax year of up to \$100,000 from their IRAs and certain other qualified plans without incurring the 10 percent early withdrawal penalty. Income required to be reported with respect to such amounts withdrawn would be subject to tax over a three-year period, and the taxpayer could re-contribute those funds to an eligible retirement plan within three years without regard to that year's cap on contributions.

A "coronavirus-related distribution" is a distribution made to an individual:

- 1) That is diagnosed with SARS-CoV-2 or with coronavirus disease 2019 (COVID-19);
- 2) Whose spouse or dependent is diagnosed with COVID-19; or
- 3) Who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, work hours reduced, unable to work due to lack of child care due to COVID-19, closing or reducing hours of a business operated by the individual due to COVID-19 or other factors to be prescribed by the IRS.

A plan administrator may rely on an employee's certification that the employee satisfies the conditions of for a coronavirus-related distribution.

### HARDSHIP DISTRIBUTIONS AND PLAN LOANS

Plans will likely see an uptick in hardship distributions and plan loan applications during this time. Plans will need to follow their procedures for these hardship distributions and plan loans. In particular, plan sponsors or their delegates will need to determine whether or not an employee's personal situation constitutes a financial hardship (e.g., will the payments be used to pay for eligible medical expenses, to prevent eviction or foreclosure on the participant's mortgage, or to pay for certain burial or funeral expenses).

The CARES Act increases the maximum amount that a qualified individual (i.e., a participant who is eligible for the abovementioned coronavirus-related distributions) may borrow from the participant's plan account from \$50,000 to \$100,000, provided that the amount borrowed does not exceed the present value of the participant's vested account balance. These new rules apply to loans processed during the 180-day period beginning on the date of the enactment of the CARES Act (i.e., March 27, 2020). Additionally, the CARES Act provides that outstanding plan loans with repayment due dates

in 2020 be delayed a year without violating the terms of the loan.

## REQUIRED MINIMUM DISTRIBUTIONS

The CARES Act includes a waiver of certain required minimum distributions for the 2020 tax year.

## DISTRIBUTION EVENTS

### Termination of Employment

If employees have been let go through layoffs or furloughs, this may result in employees requesting distributions from their 401(k) or 403(b) plans on account of their termination of employment. Employees should be notified that these distributions may be subject to an excise tax unless they are rolled over into another qualified retirement plan or an individual retirement account in a timely fashion.

In some cases, furloughs will not be construed as a termination of employment. In cases where workforce action results in a termination of employment, plan loans may become due as well, although the CARES Act provides an employee with more time to pay the loan if the employee is a qualified individual (as described earlier regarding coronavirus-related distributions).

Laying off a significant number of employees (e.g., 20 percent of workforce) may also constitute a partial plan termination resulting in the requirement to fully vest affected employees.

### Age 59½ In-Service Distributions

Many retirement plans allow participants to request a distribution upon reaching age 59½ while in service. Employers that do not offer this form of distribution from all sources in their plans should discuss with their ERISA counsel whether or not they should amend their plans to allow for these distributions to provide their older employees early access to their retirement funds.

### SUSPENDING SAFE-HARBOR EMPLOYER CONTRIBUTIONS

Some employer's defined contribution plans satisfy the ACP/ADP nondiscrimination rules by providing for a safe-harbor employer contribution. Unlike discretionary employer contributions, which an employer can choose whether or not to make at any time, safe-harbor employer contributions may only be suspended midyear by a plan amendment under certain circumstances.

### TIMELY DEPOSIT OF ELECTIVE DEFERRALS

Plan sponsors must make sure they are continuing to deposit elective deferral contributions into the plan's trust in a timely fashion.

### WITHDRAWAL LIABILITY

Employers that contribute to multi-employer pension funds should review the impact of layoffs with their ERISA counsel to determine if the layoffs will trigger a complete or partial withdrawal

from the fund, triggering withdrawal liability.

### THIRD-PARTY ADMINISTRATOR (TPA) AGREEMENTS

Employers should review the force majeure provisions in their TPA agreements and other contracts to see if the coronavirus pandemic triggers a force majeure event and assess the implications for the employers and their retirement plans.

### RESTATEMENT DEADLINES

The IRS has extended the restatement deadlines for 403(b) plans and defined benefit plans that are using pre-approved plan documents to June 30, 2020 and July 31, 2020, respectively.