

MEMORANDUM

DATE: April 2, 2020

RE: Update for Employee Benefit Plan Sponsors and Plan Administrators

Greetings:

On Friday, March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief and Economic Security (CARES) Act, which contains several important optional and mandatory provisions affecting employee benefit plans. Hershner Hunter has provided a summary of the CARES Act (and related legislative provisions) employee benefit provisions below. We will keep you updated as new guidance is issued.

Please note this legislative update discusses issues largely pertaining to defined contribution plans. An update regarding the impact of recent COVID-19 legislation on defined benefit plans will be forthcoming.

Loosened Restrictions on Employees' Ability to Access Retirement Account Funds

The CARES Act includes several provisions that allow employees affected by the COVID-19 pandemic to access their vested account balance in an eligible retirement plan by authorizing:

- New in-service withdrawals of up to \$100,000;
- Increased aggregate plan loan limit;
- Delayed plan loan repayment for existing and COVID-related plan loans.

A plan may make these payments to a “qualified individual,” which means any individual: (i) who is diagnosed with the virus SARS-CoV-2 or with COVID-19 by a test approved by the Centers for Disease Control and Prevention (“CDC”); (ii) whose spouse or dependent (as defined in section 152 of the Internal Revenue Code (the “Code”)) is diagnosed with the above-listed viruses; or (iii) who experiences adverse financial consequences as a result of being quarantined, being furloughed, being laid off, or having work hours reduced due to the above-listed viruses, closing or reducing hours of a business owned or operated by the individual due to the above-listed viruses, or other factors as determined by the Secretary of the Treasury.

Notably, plan administrators may rely on an employee’s self-certification of their status as a “qualified individual.”

- **New In-Service Withdrawals of up to \$100,000 (CARES Act, Section 2202):** During the 2020 calendar year, a qualified individual may take in-service withdrawals totaling \$100,000 from the individual's vested account balance in an eligible retirement plan (as defined under Code Section 402(c)(8)(B), including employer-sponsored 401(k), 403(b), and governmental 457(b) plans). The withdrawals are called "Coronavirus-Related Distributions" ("CRDs") and are not subject to the 10% excise tax on early distributions under Code Section 72(t). While the CRDs are subject to normal income taxation rules, the individual may choose to pay the income tax ratably over a three-year period. The IRS is expected to issue more guidance on the mechanics of the ratable income taxation.

A participant who takes a CRD may avoid the income tax on the CRD by repaying some or all of the CRD within a three-year period beginning on the date of the CRD. The participant may repay the CRD amount into any qualified retirement plan, IRA, or plan allowing rollovers.

The new CRD rules are permissive, and plan sponsors who wish to allow CRDs must amend the Plan by the end of the first plan year beginning on or after January 1, 2022 (for calendar year plans, December 31, 2022), or by the end of the first plan year beginning on or after January 1, 2024 for governmental plans. The Plan must operate consistently with the amendment on or after the effective date of the amendment (the "Amendment Requirements").

- **Increased Aggregate Plan Loan Limit (Section 2202):** Plan sponsors may increase the loan limit for loans taken by a qualified individual to the lesser of \$100,000 or 100% of the individual's vested account balance. The loans with an increased limit must be made during the 180-day period following the enactment of the CARES Act (that is, by September 23, 2020).

The increased loan limit is permissive, and plan sponsors who allow the increased loan limits must amend the Plan in compliance with the "Amendment Requirements" (as defined in the CRD section above). A plan amendment may not be needed if Plan documents cross-reference the Code Sections setting plan loan limits.

- **Delayed plan loan repayment for existing and COVID-related plan loans (Section 2202):** Qualified individuals who have outstanding loan(s) may delay payments for up to one year. This delay applies to loan payments due during the period beginning March 27, 2020 (enactment date of the CARES Act) through December 31, 2020. Payments due after the one-year delay period must be adjusted to reflect the delay period and any interest accruing during the delay period. Also, the five-year repayment term of the loan must be extended to reflect the delay period.

While the loan repayment delay provisions are drafted using mandatory language, it appears an individual may be able to opt-out of the one-year delay in loan payments. Further guidance on this topic may be forthcoming.

Waiver of 2020 Required Minimum Distributions (Section 2203)

Under the CARES Act, any required minimum distributions (“RMDs”) due for 2020 have been waived (“RMDs” refer to the distributions required under Code Section 401(a)(9) to begin at age 70½ (since changed to age 72)). The waiver applies to the 2019 RMDs that were due by April 1, 2020, and RMDs to be made by December 31, 2020, unless those payments were already made during 2019. The waiver applies to defined contribution plans under Code Sections 401(a), 403(a), 403(b), and governmental 457(b) plans.

RMDs that have already been received during 2020 are eligible for indirect rollover and are not subject to the mandatory federal 20% withholding tax. Currently, the 60-day indirect rollover period applies to such rollovers, but the IRS is expected to extend the rollover period as it has done under similar crisis/disaster-related legislation (e.g., <https://www.irs.gov/pub/irs-drop/n-09-09.pdf>).

For post-death distributions, this one-year RMD waiver is disregarded for calculating the five-year post-death payout requirement.

Plan sponsors should review plan documents and procedures and comply with the Amendment Requirements (as defined above) for any operational changes. The Plan will not violate the anti-cutback provisions of Code Section 411(d)(6) by failing to make 2020 RMDs.

Increased Authority for Secretary of Labor to Extend Deadlines (Section 3607)

The CARES Act authorizes the Department of Labor to extend various deadlines pursuant to ERISA Section 518 in the event the Secretary of Health and Human Services declares “a public health emergency.” The Department of Labor has not yet extended any deadlines, but deadlines extended could include Form 5500 deadlines, for example.

Changes Applicable to Health Plans

Building on the changes contained in the Families First Coronavirus Response Act (“FFCRA”), the CARES Act includes several provisions affecting group health plans, including:

- In-Network and Out-of-Network Coverage for Coronavirus Testing
- Temporary Telehealth and High Deductible Health Plan Relief
- Reimbursements for Over-the-Counter Drugs under HRAs, FSAs, and HSAs
- Expedited Coverage of COVID-19 Vaccines and Preventative Services

Employers are encouraged to review their health plans to determine how best to comply with the provisions of the CARES Act, FFCRA, and relevant guidance.

- **In-Network and Out-of-Network Coverage for Coronavirus Testing (Sections 3201 and 3202):** The FFCRA requires group health plans and health insurance issuers to cover

diagnostic testing for COVID-19 and other specified evaluation services with no cost-sharing during the declared public emergency. The CARES Act clarifies that coverage for COVID-19 diagnostic testing applies to services provided both in-network and out-of-network.

Regarding diagnostic testing pricing, if a plan or issuer negotiated a price for such diagnostic testing prior to the Secretary of HHS' declaration of a public health emergency, the negotiated price will apply through the period of the declaration. If no price has been negotiated prior to the declaration, the plan or issuer must pay the cash price for such services, both in-network and out-of-network. Providers must post a cash price on their public internet website. Providers who fail to post cash prices may be subject to a \$300-per-day penalty until the cash price is posted.

- **Temporary Telehealth and High Deductible Health Plan Relief (Section 3701):** The CARES Act provides a safe harbor for high deductible health plans ("HDHPs") that choose to offer pre-deductible coverage for telehealth services. The safe harbor allows HDHPs to continue to be compatible with Health Savings Accounts ("HSA") while offering first-dollar (i.e., cost-free) coverage for telehealth services. The safe harbor is applicable as of March 27, 2020 (enactment date of the CARES Act) and for plan years beginning on or before December 31, 2021.
- **Reimbursements for Over-the-Counter Drugs under HRAs, FSAs, and HSAs (Section 3702):** The CARES Act removes an Affordable Care Act provision prohibiting use of HSAs, health flexible spending accounts ("FSAs"), and health reimbursement arrangements ("HRAs"), to reimburse the cost of over-the-counter drugs with no prescription. This change is effective for expenses incurred after December 31, 2019. Unlike the temporary safe harbor for telehealth coverage discussed above, this allowance for non-prescribed over-the-counter drugs has no sunset.
- **Expedited Coverage of COVID-19 Vaccines and Preventative Services (Section 3203):** The CARES Act requires group health plans and health insurance issuers to cover "qualifying coronavirus preventative service" with no-cost sharing to the participant. A "qualifying coronavirus preventative service" means "an item, service, or immunization that is intended to prevent or mitigate" COVID-19 and receives a "rating of 'A' or 'B'" from the United States Preventative Services Task Force or is recommended by the Advisory Committee on Immunization Practices of the CDC. For services rated or recommended as described above, the CARES Act requires coverage within 15 days of the rating or recommendation.

For more information, please contact our Employee Benefits attorneys, Jeff Kirtner and Anthony Hunt.

This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with your attorney concerning your own situation.