The CARES Act Impact on Employee Benefit Plans

Related Attorneys

Christine M. Poth

Jennifer Bibart Dunsizer

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Employee Benefits and Executive Compensation

Labor and Employment

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The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was enacted on March 27, 2020 and contains many provisions that affect employee benefit plans. The chart below summarizes these features and provides some preliminary comments regarding how they will affect employers.

Summary of Benefits-Related Provisions under the CARES Act

Description

Detail

Vorys Comments

Many of the provisions apply to Coronavirus Affected Individuals (our phrase)

A "Coronavirus Affected Individual" is an individual:

(1) diagnosed with SARS-CoV-2 or coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention;

(2) whose spouse or dependent (as defined in IRC §152) was diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the Centers for Disease Control and Prevention; or

(3) who has experienced adverse financial consequences as a result of being quarantined, furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child

care due to such virus or disease, closing or reducing hours of a business owned or operated by an individual due to such virus or disease, or other factors determined by Secretary of Treasury.

Although technically drafted narrowly, we expect that the requirements to be considered impacted by the coronavirus will be interpreted broadly.

Allowance for Coronavirus-Related Distributions and Waiver of IRC §72(t) 10% Penalty for Coronavirus Distributions (§2202)

Permits "coronavirus-related distributions" to Coronavirus Affected Individuals from eligible retirement plans and IRAs up to $100,000 during calendar year 2020. The limit is applied to all plans maintained by an employer (and any member of an employer's controlled group).

A coronavirus distribution is not rollover eligible, so no mandatory tax withholding applies. The income inclusion for the coronavirus distribution is ratably spread over a 3-year taxable period that begins with the taxable year of distribution (unless the participant elects otherwise).

Any individual who receives a coronavirus distribution from an eligible retirement plan (other than an IRA) may repay the distribution to an eligible retirement plan of which such individual is a beneficiary. Such repayment may be made in one or more installment during a 3-year period beginning on the date the distribution was received.

If the individual repays the coronavirus distribution, the individual shall be treated as having received an eligible rollover distribution and the repayment shall be treated as an eligible rollover and as having transferred the amount to an eligible retirement plan in a direct rollover within 60 days of the distribution.

An employer may rely on an employee's certification that they satisfy the conditions.

Effective Date: For distributions on or after January 1, 2020 and before December 31, 2020.

This provision applies to defined contribution plans including 401(k) and 403(b) plans and defined benefit plans.

It is not clear whether plans:

- Must permit these distributions.

- Must accept repayments of coronavirus distributions.

- Would be permitted to limit repayment to participants who took a distribution from the plan and who are still participants, or if the repayment right would also apply to participants who took a distribution under an unrelated plan or who have ceased to be a participant after the distribution.

It appears the repayment is able to be made to any eligible retirement plan and IRA that would accept the repayment.

Increased Loan Limits (§2202)

The dollar limit on loans from a qualified retirement plan is increased from $50,000 to $100,000 and the limit on how much of a participant's vested account balance may be accessed has been increased from 50% to 100%.

Effective Date: These expanded limits are effective for only 180 days after enactment of the CARES Act.

It is not clear whether employers are required to raise their loan limits.

Delayed Loan Repayments (§2202)

If any Coronavirus Affected Individual has an outstanding loan from a qualified retirement plan on or after the date of enactment of the CARES Act, the loan repayments due between the enactment date of the CARES Act and December 31, 2020 are delayed for 1-year (Delay Period). Any subsequent repayments will be increased for interest during the Delay Period. The Delay Period is ignored in determining the 5-year period or term of the loan, which means that outstanding loans will not need to be re-amortized.

Effective Date: Loan payment due between date of enactment and December 31, 2020.

It is not clear whether employers are required to revise their plan or plan policies and whether the loan repayments are required to be delayed for the whole 1-year period. Employers interested in implementing this provision will want to consult with their third party administrator. Finally, it is not clear how the extra accrued interest will be collected.

Amendments for CARES Act Provisions may be Retroactive (§2202)

Employers have until the last day of the plan year starting in 2022 (or such later date set by the Secretary of Treasury) to amend the plan to reflect the plan's operation under these CARES Act provisions. Governmental entities have until the last day of the plan year beginning in 2024 to amend their plans.

Make sure that you document when and how you implement the changes so that the amendment can appropriately reflect your plan operations.

Temporary Waiver of Required Minimum Distributions (§2203)

Waives required minimum distributions (RMD) from defined contribution plans (including 401(k), 403(b) and governmental 457(b) plans) and IRAs for calendar year 2020 (including the first distribution for individuals who reached age 70½ during 2019, which were originally due April 1, 2020). Calendar year 2020 is ignored when applying the 5/10 year distribution periods for trusts/beneficiaries.

Effective Date: RMDs from certain defined contribution plans during 2020 calendar year.

Note that RMDs for 457(b) plans maintained by tax-exempt employers are NOT waived.

Many third party administrators have already processed the RMDs previously required to be paid in 2020. We expect guidance to be issued permitting individuals to rollover 2020 distributions that had been coded as RMDs.

Employer Payments of Student Loans (§2206)

An employer's payment of up to $5,250 per year toward an employee's student loans, tuition, fees and books is not included in the employee's gross income. Applies for any student loan payments made by an employer between enactment and December 31, 2020.

Effective Date: Payments made after enactment date through December 31, 2020.

Although many employers had been hoping to be able to pay off their employees' student loans on a tax-free basis, because of the state of the current economy we expect that most businesses will not be adding this benefit.

Retention Credit (§2301)

Adds a new refundable payroll tax credit (credited against Social Security taxes) equal to 50% of Qualified Wages (and an allocable share of health plan expenses) paid by an Eligible Employer to any employee between March 13, 2020 and December 31, 2020.

Eligible Employers: An Eligible Employer for purposes of the retention credit is any employer carrying on a trade or business (including a tax-exempt employer) during calendar year 2020 that satisfies one of the following:

(1) it fully or partially suspended operations during the calendar quarter due to a coronavirus-related shut down order, or

(2) its gross receipts for any quarter beginning after December 31, 2019 declined by more than 50% from the same quarter in 2019. Once an eligible employer's gross receipts for a calendar quarter are greater than 80% of the gross receipts for the same calendar quarter in 2019, the credit ends in the second calendar quarter after the 80% threshold is met.

An Eligible Employer does not include a governmental employer or a small employer that took advantage of the business interruption loan available under the CARES Act.

Qualified Wages: While all employers are potentially eligible for the retention credit, the definition of Qualified Wages varies based on employer size during 2019. Employer size is based on the number of full-time employees for purposes of IRC §4980H for 2019.

(1) Eligible Employers with less than 100 full-time employees: Aggregate wages paid to all employees for Social Security taxes (capped at $10,000) while the employer is an Eligible Employer.

(2) Eligible Employers with 100 or more full-time employees: Wages paid to a furloughed employee during their furlough period (capped at $10,000) while the employer is an Eligible Employer.

Qualified Wages do not include wages taken into account under the Families First Coronavirus Response Act (FFCRA §§7001 and 7003). Any wages considered for this credit cannot be double counted as wages for purposes of the paid family medical leave credit (IRC §45S). To prevent abuse, Qualified Wages may not exceed the amount the employee would have been paid for working an equivalent duration during the 30-days prior to the period that the employer is considered an Eligible Employer.

The credit is limited to Social Security taxes and is reduced by any credits allowed for qualified veterans (IRC §3111(e)), qualified small businesses (IRC §3111(f)), and under the Families First Coronavirus Response Act (FFCRA §§7001 and 7003).

The employer has the option whether or not to take the credit.

Effective Date: Qualified Wages paid by an Eligible Employer on or after March 13, 2020 but not later than December 31, 2020.

It is not clear how the suspension of operations "due to a coronavirus-related shut down order" will be interpreted. We suspect an employer will be required to perform a state-by-state, position-by-position analysis to determine whether it can claim the tax credit with regard to a particular employee.

Anticipation of expected credits (§§2302 and 2301(k))

Employers may anticipate their expected credits in calculating their regular payroll tax remittances and will not face failure to deposit penalties if the employer reasonably calculated the estimated credit amounts.

This will help employers from a cash flow perspective. You do not have to wait until you file your quarterly Form 941 to realize the benefit from the credits.

Clarification of scope of FFCRA mandated coverage of Diagnostic Testing for SARS-CoV-2 and COVID-19 (§3201)

Clarifies that the required coverage of coronavirus testing includes coverage of tests that may not have full FDA clearance.

Group Health Plan Coverage of Diagnostic Testing for SARS-CoV-2 and COVID-19 (§3202)

The CARES Act caps the amount that a group health plan or health insurance issuer is required to reimburse for SARS-CoV-2 and COVID-19 testing required to be covered under such plan or policies:

(1) The negotiated rate, if there is one in place with the provider;

(2) if there is no negotiated rate (whether negotiated in advance or as part of the claims process), the amount equal to the cash price for such service listed by the provider on a public internet website. Spot negotiation for a discount is permitted.

Each provider of a diagnostic test for COVID-19 is required to make public the cash price for such test on a public interest website of such provider.

This helpful limit will reduce potential price gouging that could otherwise occur if plans were required to pay the full charge for any out-of-network provider.

Group Health Plan Coverage of Coronavirus Vaccine (§3203)

Requires coverage of a coronavirus vaccine or other coronavirus preventive service within 15 days of the date the Advisory Committee on Immunization Practices or the U.S. Preventive Service Task Force adds it to its recommendations (instead of the first day of the plan year starting 6 months after the recommendation is added).

Authority to Delay ERISA Deadlines (§3607)

The DOL has been given the authority to delay any ERISA filing deadline by up to 1 year.

We will provide updates if/when the DOL exercises its authority under this provision.

Single-Employer Defined Benefit Plan Funding Relief (§3608)

Single employers may delay the funding of minimum required contributions that are due after enactment until January 1, 2021 and can pretend that their most recent funding zone status continues.

This will delay the need for businesses to make large contributions during the pandemic, but it may exacerbate funding problems.

Telemedicine (§3701)

Between the enactment and the last day of the plan year that starts on or before 12/31/2021, a high deductible health plan may cover telemedicine services below the deductible without endangering HSA eligibility.

Effective Date: Date of enactment through December 31, 2021.

Some vendors are indicating that they cannot distinguish between a coronavirus-related telemedicine service (where coverage must be provided without cost) and other telemedicine services (where coverage is permitted but not required). This means that some plans will be required to cover all telemedicine visits.

Inclusion of Certain Over-the Counter Products as Qualified Medical Expenses (§3702)

The definition of Qualified Medical Expenses has been expanded to include menstrual care products. This means that menstrual care products may be reimbursed from HSAs, HRAs and health flexible spending accounts.

Menstrual care products are defined to include a tampon, pad, liner, cup, sponge or similar product used by individuals with respect to menstruation or other genital-tract secretions.

The definition of Qualified Medical Expenses has also been expanded by no longer requiring prescriptions for over-the-counter medications.

Effective Date: Reimbursements for medical expenses incurred after December 31, 2019.

Employers are not required to amend their plans to cover these expenses.

We expect that employers will amend their health care flexible spending account programs, health reimbursement arrangements (HRA), employer sponsored HSAs to cover these expenses.

Limit on Executive Compensation for Companies Taking Advantage of the Non-SBA Loans (§4004)

Any eligible business which enters into a loan agreement under the Coronavirus Economic Stabilization Act of 2020 (§4003(b)(1), (2) or (3)) with or guaranteed by the U.S. government must agree to the following limits on compensation paid for any officer or employee whose total compensation in calendar year 2019 exceeded $425,000 (limited individual):

(1) A limited individual cannot be paid more during any 12-month period within the restricted period than the individual had been paid during 2019 (subject to the further cap described below); and

(2) During the restricted period, no limited individual can be paid severance pay or any other benefits in connection with a termination of employment from the business that would exceed two times the individual's pay during 2019 (subject to the further cap described below).

The total payment to a limited individual during any 12-month period cannot exceed $3,000,000 plus 50% of the individual's pay during 2019 in excess of $3,000,000.

Total compensation is defined to include salary, bonuses, awards of stock, and other financial benefits provided by a business to the officer or employee.

This limitation does not apply to any individual whose compensation is determined through a collective bargaining agreement entered into prior to enactment.

An eligible business for this provision is the following:

(1) an air carrier (both passenger and cargo); and

(2) any U.S. business that has incurred losses and whose continued operations is jeopardized as determined by the Secretary of Treasury and has not applied for or received loans or loan guarantees under any section of the CARES Act other than §3102.

Effective Date: The compensation limits apply from the date of the loan until 1 year after the loan is no longer outstanding (restricted period).

This limit may make companies reconsider usage of the available governmental loans and guarantees, especially if they are contractually required to pay large deferred compensation plan benefits or severance benefits.

Limit on Compensation Paid by Air Carriers (§4116)

Any air carrier that takes advantage of the payroll support under §4113 must agree to the following limits on compensation paid between March 24, 2020 – March 24, 2022 for any officer or employee whose total compensation in calendar year 2019 exceeded $425,000 (limited individual):

(1) A limited individual cannot be paid more during any 12-month period within that 2 year period than the individual had been paid during 2019 (subject to the further cap described below); and

(2) During the restricted period, no limited individual can be paid severance pay or any other benefits in connection with a termination of employment from the business that would exceed 2 times the individual's pay during 2019 (subject tot the further cap described below).

The total payment to a limited individual during any 12-month period cannot exceed $3,000,000 plus 50% of the individual's pay during 2019 in excess of $3,000,000.

Total compensation is defined to include salary, bonuses, awards of stock, and other financial benefits provided by a business to the officer or employee.

This limitation does not apply to any individual whose compensation is determined through a collective bargaining agreement entered into prior to enactment.

Air carriers will need to consider the differences between benefits and limits under the loan/loan guarantees (§4003) and payroll support (§4113).

To access a PDF copy of this chart, click here.

If you have questions about the CARES Act and how it applies to employee benefit plans, please contact Christine Poth, Jennifer Dunsizer, or your regular Vorys attorney.

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Vorys COVID-19 Task Force

Outside of this new law, employers continue to face myriad issues as COVID-19 continues to spread and impact communities and workplaces (some of these issues are addressed in our prior alerts located here). We will continue to keep you posted on any important developments. In the meantime, if you have any questions regarding this new law or any other aspect of COVID-19, please contact your Vorys lawyer.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.