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BLOG

Employer Provisions in the Senate CARES Act

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Late on March 25, 2020, the U.S. Senate approved a massive $2 trillion stimulus bill, the Coronavirus Aid, Relief, and Economic Security Act (H.R. 748) (CARES Act or Act), aimed at shoring up the U.S. economy in light of the disruption caused by the coronavirus pandemic. The U.S. House of Representatives is expected to take up the bill and pass it on Friday with the President expected to sign the CARES Act into law later that day. The CARES Act contains a number of provisions of interest to employers that we summarize below.

Health and Welfare Benefits

Features of the CARES Act that impact employer-sponsored group health plans include:

- **COVID-19 Diagnostic Testing.** The CARES Act requires group health plans and health insurance issuers to cover, without cost-sharing to the participant, diagnostic testing for detection or diagnosis of COVID-19, including tests approved by the FDA, by developers under emergency use authorization provisions of the Food and Drug Administration, a State, or other methods approved by the Secretary of Health and Human Services. Group health plans and health insurance issuers will be required to cover such testing at the in-network provider negotiated price or, if the health plan or issuer does not have a negotiated in-network rate with such provider, at an amount that equals the cash price for such service as listed by the provider on a public Internet website. Group health plans and issuers are also free to negotiate a lower payment rate with providers.
- **COVID-19-Related Preventive Services.** Group health plans and health insurance issuers are required to cover (without cost-sharing to the participant) any "qualifying coronavirus preventive service" as a preventive benefit under the Affordable Care Act (ACA). A "qualifying coronavirus preventive service" is an item, service, or immunization that is intended to prevent or mitigate COVID-19 and is (A) an evidence-based item or service that has in effect a rating of "A" or "B" in the current recommendations of the U.S. Preventive Services Task Force; or (B) an immunization that has in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved. Contrary to the current rule under the ACA, which permits a delay in covering certain preventive services or medications, there is an

accelerated effective date of 15 days after the date upon which a recommendation is made related to the qualifying coronavirus preventive service for the plan to cover such services or medications.

- **Telehealth.** The CARES Act amends the Health Savings Account (HSA) rules under Code Section 223 to provide that for plan years beginning on or before December 31, 2021, a high-deductible health plan ("HDHP") with an HSA can cover telehealth services and other remote care services prior to an HSA-eligible individual reaching the deductible under the HDHP, effective as of the date of enactment. It remains to be seen how telehealth services are defined for this purpose. It is also important to note that this does not otherwise change rules under ERISA and the ACA that apply to stand-alone group health plans.
- **Over-the-Counter Products and Medications.** The CARES Act permits reimbursement of menstrual care products and other over-the-counter medications from an HSA prior to an HSA-eligible individual reaching the deductible under the HDHP and also clarifies that such items are reimbursable under health care flexible spending accounts. Over-the-counter products and medications, including those needed in quarantine and social distancing, are now reimbursable through an HSA or flexible spending account without a prescription from a physician. This provision is effective as of the date of enactment.

Winston Takeaway: *Employers will need to work with their third-party administrators and service providers to ensure group health plans are amended to cover reimbursement of these new benefit mandates. Employers will need to evaluate how these new benefit requirements impact compliance under other federal laws, such as ERISA, COBRA, and the ACA.*

Retirement Benefit Plans

- **Penalty-Free Coronavirus-Related Distributions in 2020.** The Act would allow participants in eligible retirement plans to take distributions in 2020 of up to $100,000 from their plan benefits (including distributions of 401(k) deferrals) without incurring the 10% early distribution tax that would otherwise generally apply to payments made prior to age 59-1/2. "Eligible retirement plans" would include retirement plans such as 401(k) or profit-sharing plans, and IRAs. The distribution must qualify as a "coronavirus-related distribution," which can only be made to a "qualified individual." A "qualified individual" includes (i) a participant who has experienced adverse financial consequences resulting from a reduction in work hours, been laid off, quarantined, furloughed, or is unable to work due to lack of childcare on account of the disease, and (ii) a participant, spouse, or dependent who has been diagnosed with the virus. Employers can rely on a certification from an employee that the distribution was a coronavirus-related distribution. It appears that plans would be permitted, but not required, to offer these distributions. The distribution would need to be made between January 1 and December 31, 2020.
- **Repayment of Coronavirus-Related Distributions.** The Act would allow a qualified individual who takes a coronavirus-related distribution to repay it to an eligible retirement plan within three years of taking the distribution. Such repayment would be treated as a rollover contribution to such eligible retirement plan.
- **Income Inclusion Over Three Years for Coronavirus-Related Distributions.** A coronavirus-related distribution under the Act would be included in the qualified individual's taxable income ratably over a three-year period, unless the individual elected to have it taxed in the year of distribution. The distributions would not be treated as eligible rollover distributions, so mandatory 20% withholding would not apply.
- **Plan Loan Dollar Limits Increased Temporarily.** The Act would temporarily increase to $100,000 the maximum amount that a qualified individual may borrow from his or her plan account balance, starting on the date the Act is enacted and ending 180 days later. The Act would also allow qualified individuals to borrow up to the greater of $10,000 or 100% of their account balance, rather than 50% of their account balance under current rules. It appears that plans may, but are not required to, incorporate these limit increases.
- **Extension for Loan Due Dates.** The Act would provide 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. It appears that remaining payments, plus applicable interest, can be re-amortized over the extended period, and that these extension rules are mandatory. It is not clear whether employees are allowed to opt out of having their loan due dates extended.

- **Required Minimum Distributions.** Plan participants age 70-1/2 and older have complained that they are faced with receiving required minimum distributions in 2020 from defined contribution plans that would be based on the value of their accounts at the end of 2019, but which would be distributed from balances decimated by recent market declines. To address this situation, the Act would allow plans to suspend making required minimum distributions in 2020. This suspension would also apply to participants who turned age 70-1/2 in 2019 and had not yet received their 2019 distribution. Amounts distributed in 2020 that would have been required minimum distributions but for the Act would not be treated as eligible rollover distributions for purposes of 20% withholding, and would not require employers to provide the special tax notice under 402(f) of the Internal Revenue Code applicable to eligible rollover distributions. However, such amounts are eligible for rollover by the participant to an eligible retirement plan. The suspension of required minimum distributions under the Act is similar to the suspension that applied in 2009 after the financial crisis of 2008. If the new waiver rules apply the way similar rules applied in 2009, participants would be allowed to elect whether or not to receive required minimum distributions in 2020.
- **Plan Amendments.** Plans would need to be amended to reflect these new rules under the Act 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).
- **Single-Employer Plan Funding Relief.**
  - Any minimum required contribution to a single-employer-defined benefit plan, including any quarterly contribution, that would otherwise be due during calendar year 2020 will not be due until January 1, 2021. The amount of any such minimum required contribution will be increased with interest (at the effective rate of interest for the plan for the plan year) for the period between the original due date and the payment date.
  - In addition, a plan sponsor may elect to treat the plan's adjusted funding target attainment percentage (AFTAP) for the last plan year ending before January 1, 2020 as the AFTAP for plan years that include calendar year 2020. This relief will let plans avoid applying the benefit and payment restrictions (such as limitations on lump sum distributions) applicable to plans with an AFTAP of less than 80% for the plan year beginning on or after January 1, 2020, if the plan's AFTAP for the immediately prior plan year is equal to or greater than 80%.

Winston Takeaway: *The proposed changes to the required minimum distribution rules should not present significant difficulties for plan sponsors and administrators, as they are similar to rules that applied to required minimum distributions in 2009 after the financial crisis of 2008. The extension of loan due dates in the CARES Act could be more problematic for employers to administer, requiring communication with employees, updated loan procedures, and re-amortization of loans due in 2020. Since it appears that plan sponsors may voluntarily decide to adopt the coronavirus-related distribution provisions of the CARES Act, they will need to decide with their plan service providers whether their plans can administer the new distributions. The relief for defined benefit plans is very welcome, allowing deferral of required 2020 contributions until 2021, which will aid cash-strapped businesses for the short-term. The Act also provides welcome relief from the possible imposition of benefit and payment restrictions on defined benefit plans that otherwise could have occurred due to depressed asset values being included in AFTAP funding measurements during 2020.*

Executive Compensation

Two of the provisions of the CARES Act impose certain limits on executive compensation paid by businesses that receive loans, loan assistance, or other financial assistance under Title IV of the CARES Act, which provides $500 billion to the U.S. Treasury's Exchange Stabilization Fund. Note that these limits do not apply to companies seeking relief under the Paycheck Protection Program established by Title I of the CARES Act.

- Eligible Businesses, Generally. As a condition of receiving a loan or loan guarantee under the CARES Act, an eligible business must agree that it will comply with the following two conditions for a period (the "covered 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:
  - No officer or employee of the business who received aggregate base salary, bonuses, awards of stock, and other financial benefits ("total compensation") that exceeded $425,000 in calendar year 2019 may receive:

    - total compensation exceeding such calendar year 2019 compensation over any consecutive 12 months of the covered period, or
    - severance benefits exceeding 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 during any consecutive 12 months of the covered period, such employee or officer may not receive total compensation that exceeds the sum of:
    - $3 million, plus
    - 50% of the excess over $3 million of the total compensation received by the officer or employee in calendar year 2019.
- Specific Rule for Air Carriers or Contractors. Air carriers or contractors receiving other financial relief under the "air carrier worker support" provisions of the CARES Act are subject to the broader eligible business compensation limit described above except that the covered period is the two-year period ending on March 24, 2022.

Winston Takeaway: *Companies receiving assistance under the Act will need to quickly identify which of their employees are subject to the compensation limits in the CARES Act and then determine the aggregate 2019 compensation for each such employee to serve as the baseline. The CARES Act is silent as to whether the value of non-cash benefits like stock awards should be assessed for purposes of the limits at the time of grant or at the time of vesting, which, without additional guidance, may complicate that determination. In addition, the application of the limits is unclear with respect to employees who commenced employment following 2019 and for employees who received compensation for only a portion of 2019. Going forward, these companies will need to implement procedures to track—and limit— compensation paid to covered employees; that process could be tricky in light of the need to apply the limit on a rolling 12-month basis during the covered period. Air carriers receiving both federal loans or loan guarantees and "pandemic relief" for their workers under the CARES Act may be subject to the longer of the two covered periods.*

Fringe Benefits/Payroll Taxes

- Student Loan Payments. The CARES Act provides for a much sought-after change to permit employers to pay employees up to $5,250 per year on a tax-free basis for student loan debt expenses incurred while employed with an employer maintaining a written program pursuant to Code Section 127. For the first time, employers will be permitted to assist employees with already incurred student loan debt. With student loan debt estimated to be $1.5 trillion, many have been looking for ways in which employers can assist employees to repay the debt on a tax-favored basis. Specifically, Code Section 127 is amended to effectively provide that payments up to $5,250 made before January 1, 2021, by an employer either to the employee or to a lender of principal and/or interest on qualified education loans will not be taxable to the employee. Employees may not receive both a loan payment and a deduction on interest paid on such debt. This provision is effective with the enactment of the Act.

Winston Takeaway: *While this provision appears to only be effective for calendar year 2020, many hope that it will be permanently adopted. Employers will need to adopt a written program for such direct payments to employees or lenders to help alleviate this debt for their employees.*

- Payment Relief for Employment Taxes. The CARES Act provides for special delayed payment relief for a portion of certain payroll taxes generally for 2020, but does not provide permanent reduction or forgiveness of the liability. Specifically, the CARES Act provides for the delayed payment of the 6.2% employer portion of Social Security tax on employee wages. Furthermore, the employer is relieved of deposit requirements through these delayed payment dates. This provision applies to payments effective as of the date of enactment of the Act until January 1, 2021 ("delayed payments"). With respect to these delayed payments, 50% have a due date of December 31, 2021 and 50% have a due date of December 31, 2022. Employers receiving loan forgiveness under new paragraph (36) of Section 7(a) of the Small Business Act ("SBA") are not eligible for this relief. Employers which use Section 3504 payroll agents or Section 3511 Certified Professional Employer Organizations are liable for the tax where the delay

provisions are utilized at the request of the employer. Similar rules apply with respect to Railroad Retirement taxes. Equivalent relief is provided for self-employed individuals.

Winston Takeaway: *The Act's delay for payment of these taxes, deposit, and estimated tax rules do not apply to Medicare tax or other employment taxes (e.g., federal income tax). The Social Security Trust Funds will be held harmless under this provision.*

Unemployment Insurance

- Extension of Unemployment Benefits. Through a patchwork of federal and state programs and agreements, the Act extends unemployment benefits to individuals—including individuals who would not otherwise ordinarily be entitled to unemployment benefits, such as self-employed individuals, independent contractors, individuals without a sufficient work history to qualify for benefits, and individuals who have previously exhausted their benefit entitlement—who are unemployed, partially unemployed, or unable or unavailable to work because of any one of a litany of COVID-19-related reasons enumerated in the Act.
  - The amount of benefits equals the amount that would be calculated under state law (with a minimum equal to 50% of the average weekly payment of regular compensation in the state), plus, through July 31, 2020, an additional $600 per week, representing a potential windfall for individuals whose regular compensation is below that amount. The normal one-week waiting period for benefits has been waived. The duration for such assistance is up to 39 weeks (up from the normal 26 weeks in most states), between January 27, 2020 and December 31, 2020. Excluded from the receipt of benefits are (i) individuals who have the ability to telework with pay, and (ii) individuals who are receiving paid sick leave or other paid leave benefits, even if they would otherwise be qualified for benefits.
  - The Act also extends federal financial support for states that have or create "short-time compensation" programs, where employers reduce employee hours instead of laying off workers and the employees with reduced hours receive a pro-rated unemployment benefit.

Small Business Loans

The 7(a) loan program is the Small Business Administration's primary program for providing financial assistance to small businesses. The Keeping American Workers Paid and Employed Act amends the SBA to create the Paycheck Protection Program (the "Program") and makes a 7(a) loan available to eligible small businesses through June 30, 2020. As discussed below, a key feature of this Program is loan forgiveness if the borrowing business meets certain conditions.

Among other ways to be eligible, a business seeking the 7(a) loan may be eligible if it employs no more than 500 employees. Both full-time and part-time employees are considered "employees" for purposes of this eligibility determination. A business that is controlled by a private equity sponsor would likely be deemed an affiliate of the other businesses controlled by that sponsor and could thus be ineligible for loans under the Program, unless certain criteria are met to waive the affiliation requirement.

The amount of the loan depends on a formula tied to payroll costs incurred by the business over a period pre-dating the loan, but the maximum loan amount an eligible entity can receive through December 31, 2020 is $10 million. Loan funds can be used for payroll costs, mortgage interest (not principal) payments, rent payments, utilities, and interest on indebtedness incurred prior to February 15, 2020. The term "payroll costs":

- includes salaries, wages, cash, tips, paid leave, severance, group healthcare benefits (including insurance premiums), retirement benefits, state or local payroll taxes, and compensation paid to independent contractors.
- excludes compensation paid in excess of $100,000.
- excludes federal taxes; compensation paid employees who principally reside outside of the United States; and sick leave and family leave wages for which the employer received a payroll tax credit pursuant to the Families

First Coronavirus Response Act.

The most noteworthy feature of the Program is loan forgiveness. A business can be eligible for loan forgiveness equal to the amount it spent during the eight-week period after the origination date of the loan (the “covered period”) on (i) payroll costs; (ii) interest payments on any mortgage incurred prior to February 15, 2020; (iii) rent on any lease in force prior to February 15, 2020; and (iv) utilities (electricity, gas, water, transportation, telephone, or Internet access) for which service began before February 15, 2020.

There are two limitations on the amount of the loan that can be forgiven. First, the amount forgiven may not exceed the principal amount of the loan. Second, the amount forgiven is reduced (a) if the employer does not maintain certain pre-crisis levels of full-time equivalent employees during the covered period, with the reduction in forgiveness being proportional to the reduction in employees; and (b) by the amount of certain wage and salary reductions during the covered period. To encourage employers to rehire employees who have already been laid off and to raise wages and salaries reduced due to the COVID-19 crisis, the Act provides that businesses re-hiring laid-off workers and raising previously lowered wages and salaries will not be penalized in the above forgiveness reduction analysis for having a reduced payroll at the beginning of the period.

Loan amounts not forgiven at the end of one year are carried forward as an ongoing loan with a maximum term of 10 years and a maximum interest rate of 4%. For more information on the Paycheck Protection Program, click here.

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