



March 29, 2020

The CARES Act and Employee Benefits

On Friday, the President signed the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) which amends certain provisions of the Families First Coronavirus Response Act (“FFCRA”). The CARES Act also temporarily eliminates deductibles for certain services in high deductible health plans and expands the type of reimbursable expenses through health savings accounts, health flexible spending accounts and health reimbursement arrangements. The CARES Act authorizes penalty-free early distributions from qualified retirement plans for COVID-19 related reasons, increases the amount of plan loans, and implements delays to loan repayments, required minimum distributions, and contribution deadlines for defined benefit plans. Finally, the CARES Act impacts the compensation paid to certain highly compensated employees if their employer receives CARES Act assistance and allows employers to provide limited tax-free payments to employees to pay for student loans.

Amendments to the FFCRA

The CARES Act clarifies that employers will not need to pay employees for the emergency sick leave or emergency FMLA (“EFMLA”) in excess of the daily and aggregate amounts employers are obligated to pay. See our [COVID 19-Leave Table](#) for a quick overview of the daily and aggregate amounts.

In addition, the CARES Act provides:

- Rehired employees are immediately eligible to take EFMLA if they were laid off after March 1, 2020 but had worked for the employer for at least 30 of the last 60 calendar days prior to the layoff.
- If tax credits do not fully cover an employer’s leave payments, the employer may request an expedited advance from the IRS. A claim form will be available soon.
- The IRS will waive penalties for an employer’s failure to make a payroll tax deposit if it determines the failure was in anticipation of the receipt of refundable tax credits.

The CARES Act also changes some of the FFCRA provisions applicable to group health plans (see our [FFCRA Client Alert](#) for additional details) by:

- Requiring group health plans to cover a wider scope of COVID-19 diagnostic tests from States and other entities approved by the Secretary of the Department of Health and Human Services.
- Providing a framework for COVID-19 pricing negotiations between group health plans and providers for diagnostic testing related to COVID-19.

Health Plan-Related Changes

The CARES Act impacts health plans in the following ways:

- High deductible health plans are temporarily permitted to provide telehealth and other remote care services without a deductible.
 - *This provision is effective immediately and will end with the last day of the plan year that begins on or before December 31, 2021.*

- Over-the-counter medications and drugs, as well as menstrual care products may be reimbursed through a health savings account (“HSA”), health flexible spending account (“health FSA”) or health reimbursement arrangement (“HRA”).
 - *These changes apply to amounts paid (for HSAs) or incurred (for health FSAs and HRAs) after December 31, 2019.*
- Group health plans are required to cover, without cost-sharing, any qualifying coronavirus preventative service.
 - *This requirement is effective for any particular service within 15 days of when the US Preventative Services Task Force or the Advisory Committees on Immunization Practices qualifies the service or vaccine.*
- The Department of Health and Human Services will issue guidance within 180 days regarding the sharing of patients’ protected health information during the declared public health emergencies with respect to COVID-19.
- Health plans will be required to update their HIPAA notice of privacy practices to reflect new regulations that will be issued within the next year.

Retirement Plan Provisions

COVID-19 Distributions

The CARES Act permits penalty-free distributions of up to \$100,000 in 2020 (“COVID-19 distributions”) for participants who experience COVID-19 related medical expenses or financial consequences (“qualifying individuals”). These distributions are different from regular hardship withdrawals and generally offer more favorable terms to participants. Specifically:

- The 10% early withdrawal penalty does not apply to COVID-19 distributions, and COVID-19 distributions are not subject to mandatory withholding.
- COVID-19 distributions may be taxed over three years.
- A participant may repay COVID-19 distributions on a pre-tax basis over three years.

COVID-19 distributions can be made on account of medical expenses if a participant, their spouse, or dependent is diagnosed with COVID-19. COVID-19 distributions can be made on account of adverse financial consequences if a participant is quarantined, furloughed, laid off, has work hours reduced, or is unable to work due to lack of childcare because of COVID-19. A plan administrator may rely on the certification of a participant that they meet the COVID-19 related distribution requirements.

Loan Relief

Separately, the CARES Act increases the loan amount permitted from a qualified plan to a qualified individual to the lesser of \$100,000 or 100% of the participant’s vested account balance (up from \$50,000 or 50% of the participant’s vested account balance) for the next 180 days.

In addition, qualifying individuals who have outstanding loans may delay loan payments due between March 27, 2020 and December 31, 2020 for one year. The loan must be re-amortized to reflect this delay.

Miscellaneous Provisions

- The Act waives RMDs from defined contribution plans for the entire 2020 calendar year.
- The Act delays contribution deadlines that would otherwise come due in 2020 for defined benefit plans to January 1, 2021. In addition, defined benefit plans may use their funded status as of January 1, 2020 for purposes of determining whether the funding based restrictions of Code Section 436 will apply.
- The DOL has expanded authority to provide extensions of ERISA compliance deadlines in the event of a health emergency declared by the Secretary of Health and Human Services.

- Two provisions of the CARES Act impose limits on executive compensation paid by companies that receive loans or other financial assistance under the CARES Act. The compensation limitations vary but generally only apply to employees earning more than \$425,000 in calendar year 2019. The restrictions generally apply for the duration of the loan or financial assistance received under the CARES Act.
- Employers may pay employees up to \$5,250 tax-free to cover eligible student loan expenses through a Code Section 127 tuition reimbursement plan. This applies to student loan assistance provided through December 31, 2020.

Action Items for Employers

- Be proactive with tax credits, especially if you anticipate needing an expedited refund advance from the IRS.
- Review high deductible health plans and decide whether to provide telehealth and other remote care services with a deductible (or with a lower deductible) and prepare necessary amendments.
- Review cafeteria plans, health FSAs, and HRAs for possible amendments to permit reimbursement of over-the-counter drugs and menstrual care products.
- Prepare to communicate telehealth deductible changes to high deductible health plan participants, and reimbursable medical expense changes to HSA, health FSA and HRA participants.
- Reach out to retirement plan recordkeepers to determine what steps are necessary from an administrative standpoint to enable hardship withdrawals on account of a major disaster, COVID-19 distributions, and loan relief for participants.
- Document what changes were made to your retirement plans to permit such withdrawals, distributions and loan relief and when they were made to ensure that plan amendments are accurate.
- Reach out to retirement plan recordkeepers to ensure that they have procedures in place to waive 2020 RMDs and provide proper notices to participants regarding tax treatment and withholding.
- For defined benefit plan sponsors, work with the plan's actuary to assess plan funding for 2021.
- Be aware of the deadline to amend plans for the CARES Act. Generally, calendar year retirement plans must be amended by December 31, 2022 (December 31, 2024 for calendar year government plans.)
- Determine whether any of the executive compensation restrictions apply to your employees and put in place safeguards to ensure compliance.
- Consider adopting or amending an existing Code Section 127 tuition reimbursement plan to cover student loan payments.
- Develop a strategy for communicating all of the relevant provisions of the CARES Act to employees.

If you have any questions about the CARES Act or how its changes impact your benefit plans, please contact a member of the Kutak Rock [Employee Benefits Practice Group](#).

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