

ALERT

**Employee Benefits &
Employment Law**

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**THE CARES ACT AND RETIREMENT PLANS:
CORONAVIRUS-RELATED DISTRIBUTIONS,
PLAN LOANS, AND RMDs**

On Friday, March 27, 2020, the President signed the Coronavirus Aid, Relief and Economic Security Act, commonly known as the CARES Act. Although the CARES Act is a complicated law with a dizzying array of provisions, the focus of this Alert is strictly on those parts that affect eligible retirement plans (e.g., 401(k) plans, 403(b) plans, and governmental 457(b) plans).

While many details will need to be filled in by the IRS and the Treasury Department, the following is a high-level summary of the major provisions in the CARES Act impacting these plans:

- **Taking Money Out.** The CARES Act makes it easier for participants to get money out of their account in an eligible retirement plan. There are two different ways they can do this:
 - **Coronavirus-Related Distribution.** If certain conditions are met, as described below, participants may choose to receive a “Coronavirus-Related Distribution” of up to \$100,000. For income tax purposes, the taxable portion of the distribution may be spread out over three years and the normal 10% penalty tax for a distribution before age 59-1/2 will not apply.

Coronavirus-Related Distributions are *not* eligible rollover distributions, which means they are not subject to the normal 20% mandatory withholding on such distributions. The CARES Act allows for a 10% withholding (not tax), but that is waivable by participants. (Bear in mind that taxes will ultimately need to be paid on the distribution, unless it is repaid – see below.) A Coronavirus-Related Distribution must be made before December 31, 2020.

- **Plan Loans.** If certain conditions are met, as described below, participants will be able to borrow more money from their plan account (assuming the plan allows loans). Instead of being limited to borrowing no more than half of their

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non-forfeitable account balance, participants can borrow up to the entire amount of their non-forfeitable account balance, subject to a \$100,000 upper limit (rather than the normal \$50,000 limit). These special provisions apply to plan loans made to a “qualified individual” during the 180-day period beginning on the date of enactment – that is, March 27, 2020. By our calculation, the last day of the 180-day period will be Wednesday, September 23, 2020.

Please note that plans do not have to offer Coronavirus-Related Distributions or the expanded loan option. Also, as discussed below, these provisions can be implemented immediately and formal plan amendments can follow later.

- **Paying Money to the Plan.** There are also several changes to the rules governing the repayment of distributions and loans from an eligible retirement plan:

- ***Right to Repay Coronavirus-Related Distribution.*** Participants who have received a Coronavirus-Related Distribution will have three years from the date they received the distribution to repay part or all of that distribution, if they choose to do so. It appears that the repayment may be made either to the plan making the distribution or to an IRA.

Although a distribution from an eligible retirement plan must normally be included in a participant’s gross income and will normally be taxable at the time it is made, the CARES Act establishes a special rule for amounts that are repaid during the three-year period following the date of a Coronavirus-Related Distribution. An amount that is repaid within such three-year period will not be subject to federal income tax. If the amount has already been included in a participant’s gross income for tax purposes, the participant will likely need to file an amended return reflecting the repayment. Additional details will be provided by the IRS down the road.

Of course, sooner or later, the money held by an eligible retirement plan will need to be distributed. When that happens, amounts that were previously repaid will still be taxable in the same way that they are taxable now. In other words, repayment will delay taxation, but will not avoid it.

- ***Suspension of Payments on Plan Loans.*** For both existing loans and new loans, if a participant satisfies the conditions summarized below, the “due date” for any loan repayment that is due between the date of the CARES Act’s enactment (i.e., March 27, 2020) and December 31, 2020 will be delayed for one year. When payments later resume, the term of the loan will be extended and the remaining payments will be “appropriately adjusted” to reflect the new term of the loan and the interest that accrued during the period of nonpayment.

The Act uses the term “shall,” which suggests that this should all take place automatically; however, it is possible that the Treasury could clarify that “shall” should be read to say “shall, upon request” since a plan administrator may not have any way of knowing whether a given participant has satisfied the conditions for this relief. Hopefully, guidance will be issued soon.

- **Participants to Whom These Provisions Apply.** The Coronavirus-Related Distribution and special plan loan provisions apply to the following participants:
 - Participants who are themselves diagnosed, using an approved test, with SARS-CoV-2 or with COVID-19;
 - Participants whose spouse or dependent is so diagnosed using an approved test; and
 - Participants who experience “adverse financial consequences” as a result of any of the following:
 - Being quarantined, furloughed or laid off;
 - Having work hours reduced;
 - Being unable to work due to a lack of child care;
 - Having to close or reduce the hours of a business owned or operated by that participant; or
 - Such other factors as the Treasury may determine.

Plan administrators are permitted to rely on a participant’s certification that these conditions have been satisfied.

- **Required Minimum Distributions - Not Required for 2020.** “Required minimum distributions” that would otherwise need to be made in 2020 have been waived. This waiver applies to 401(k) plans, 403(b) plans, profit sharing plans, 457(b) plans, and IRAs. It does not, however, apply to defined benefit plans.
- **Plan Amendments.** While you can start utilizing any of these provisions immediately, a plan amendment reflecting these changes will ultimately be required. As of now, the deadline for non-governmental plans to adopt such an amendment will be the last day of the first plan year beginning on or after Jan. 1, 2022 (i.e., no sooner than December 31, 2022), although the Treasury has the authority to establish a later deadline. Governmental plans have been given an additional two years to adopt an amendment.

Please remember that, as always, it is important to keep track of how your plan was administered so that a future amendment will accurately reflect what actually took place. If our Firm prepared your retirement plan document, we will ultimately be reaching out to you to determine if you want to amend your plan to incorporate these amendments.

- **Additional Guidance.** Additional guidance from the Treasury and IRS is likely. Such guidance may change how the actual statutory text of the CARES Act is interpreted. *So, please, stay tuned!*

If you have any questions, please do not hesitate to call the Employee Benefits and Employment Law team at Hinkle Law Firm at (316) 267-2000.

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