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Impact of the Historic Coronavirus Aid, Relief and Economic Security Act on Retirement Plans – and Action Items for Plan Sponsors

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On March 27, 2020, the United States Congress passed the historic Coronavirus Aid, Relief and Economic Security Act (the "CARES Act"), the largest rescue bill to date, which provides economic relief to individuals, businesses, local and state governments, and health care systems financially impacted by the coronavirus pandemic ("COVID-19"). Through the CARES Act, Congress seeks to address the economic hardships caused by COVID-19 in essentially all industries and sectors, including by providing relief to retirement plan sponsors and participants. In this special alert, we address the relevant CARES Act provisions affecting retirement plans, which plan sponsors should be aware of immediately, and suggest practical steps that plan sponsors should consider now in light of the passage of the CARES Act.

New COVID-19 Penalty-Free Distribution Event for 2020

Under the CARES Act, a plan sponsor may allow certain eligible participants to take penalty-free distributions (a "Coronavirus-related Distribution") from their retirement plan accounts, subject to the following conditions:



Qualified Individuals: In order to qualify for a Coronavirus-related Distribution, the participant must either:

1. be diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 by a test approved by the Centers for Disease Control and Prevention (CDC);
2. have a spouse or dependent (as defined in Section 152 of the Internal Revenue Code of 1986, as amended [the "Code"]) who is diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 by a test approved by the CDC; or
3. experience adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced, be unable to work due to lack of child care, or close or reduce hours of their owned or operated personal business due to the virus SARS-CoV-2 or coronavirus disease 2019, or other factors as determined by the Secretary of the Treasury (or the Secretary's delegate).

Distributable Event: A Coronavirus-related Distribution is treated as a permissible distributable event from any "eligible retirement plan." An eligible retirement plan for this purpose is defined under Code Section 402(c)(8)(B) (e.g., Code Section 401(k), 403(b), and governmental 457(b) plans and individual retirement plans or IRAs). As such, plan sponsors of these types of plans can permit participants to take Coronavirus-related Distributions even if an individual has not incurred any of the eligible retirement plan's other distributable events (e.g., if your plan allows for in-service distributions upon attaining age 59½).

Trucker Huss Comment: We note that under the CARES Act, the new Coronavirus-related Distribution event does not provide relief from the normal distribution rules that apply to defined benefit and money purchase plans which prohibit in-service distributions prior to attaining a certain age. As such, a reasonable reading of the CARES Act suggests that defined benefit and money purchase pension plans may be eligible to make in-service distributions available to

participants subject to the normal rules under the Code governing in-service distributions from such plans (i.e., upon attaining age 59½) and that the other benefits of the Coronavirus-related Distributions rule are applicable after meeting the in-service distribution requirements under such plans. We expect guidance from the Internal Revenue Service (IRS) that will clarify this issue.

Employee Self-Certification: A plan sponsor may rely on an individual's self-certification that they are eligible to receive a Coronavirus-related Distribution (i.e., they meet the definition of "qualified individual," defined above). There is no additional substantiation or verification requirement. Subject to any guidance from the IRS, such self-certification likely can be made in the same forms permitted under the hardship distribution rules, which include the use of an electronic medium. We understand that certain third-party administrators are already updating their procedures to permit online self-certification for Coronavirus-related Distributions.

Maximum Amount Available for Distribution: The total amount of any Coronavirus-related Distributions made to an individual for a taxable year may not exceed \$100,000, including the aggregate amount of any such distributions from all plans maintained by the plan sponsor (and any member of the plan sponsor's controlled group within the meaning of Code Section 414(b), (c), (m), or (o)).

Trucker Huss Comment: This will require tracking by the plan fiduciary if the plan sponsor has employees who transfer between different plans of its controlled group members or if the plan sponsor maintains multiple eligible retirement plans.

Distribution Time Period: Distributions must be made between January 1, 2020 through December 31, 2020, in order to be treated as a Coronavirus-related Distribution.

Trucker Huss Comment: Because the text of the CARES Act allows plans to treat distributions taken any time in 2020 as Coronavirus-related Distributions, and the CARES Act was not passed until March 27, 2020, plan sponsors and plan administrators will need to determine how reclassifications of distributions taken

in 2020 before the passage of the CARES Act can be handled. Additional guidance from the IRS may be needed on this issue.

Tax Treatment of Coronavirus-related-Distributions: An individual who takes a Coronavirus-related Distribution from their retirement plan account will not be subject to the 10% early distribution penalty tax under Code Section 72(t) that would otherwise generally apply to distributions made prior to attaining age 59½. Any income taxes due on a Coronavirus-related Distribution may be spread ratably over a 3-taxable-year period, beginning with the taxable year in which the distribution is made (unless otherwise elected by the taxpayer). Additionally, Coronavirus-related Distributions are not treated as eligible rollover distributions; therefore, such distributions are not subject to the mandatory 20% tax withholding or 402(f) notice requirements. However, as non-periodic payments, Coronavirus-related Distributions are subject to 10% income tax withholding, which may be waived by the participant. A plan sponsor must send notice of the right to waive withholding, or face significant penalties for not doing so.

The CARES Act also provides that a participant who obtains a Coronavirus-related Distribution may repay the distribution amount to an eligible retirement plan, subject to the following rules:

Repayment Plan: An individual may make repayments to any "eligible retirement plan" in which he or she is a beneficiary (and not only the plan from which the Coronavirus-related Distribution was received), provided that the plan permits rollover contribution of such distributions under Code Section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), as applicable. An eligible retirement plan for this purpose is defined under Code Section 402(c)(8)(B) (e.g., 401(k) plans, 403(b) plans, profit-sharing plans and individual retirement plans or IRAs).

Repayment Period: An individual may make such repayments at any time during the 3-year period beginning on the day after the date on which any such Coronavirus-related Distribution was received. For example, if a participant received 2 Coronavirus-related Distributions, the first on April 1, 2020 and the second on July 1, 2020,

the 3-year repayment period will commence on April 1 for the first distribution and July 1 for the second distribution. If a participant does not repay the distribution within the 3-year repayment period, then the participant loses his or her opportunity to repay the distribution.

Repayment Amount: Repayments may be made in 1 or more installments, which in the aggregate may not exceed the total amount of the Coronavirus-related Distribution made to the individual.

Repayment Treatment: In general, an individual making such repayments shall be treated as if they had (i) originally received the Coronavirus-related Distribution in an eligible rollover distribution, and (ii) later transferred the amount to an eligible retirement plan in a direct trustee-to-trustee transfer within 60 days of the distribution (e.g., treated as a rollover contribution).

Trucker Huss Comment: We believe that, similar to prior guidance, IRS Form 8915-B (Qualified Disaster Retirement Plan Distributions and Repayments) will be updated for the taxpayer to report the distribution and tax treatment.

New COVID-19 Plan Loan Maximums in 2020

Under the CARES Act, the maximum thresholds for retirement plan loans under Code Section 72(p) have been temporarily increased to the lesser of: (1) \$100,000 (increased from \$50,000), or (2) the greater of \$10,000 or 100% (increased from 50%) of the present value of the participant's vested account balance. This temporary increase is only available for plan loans made to participants during the 180-day period commencing on March 27, 2020, who meet the definition of "qualified individuals," as defined above.

New COVID-19 Plan Loan Repayment Period for 2020

Under the CARES Act, a 1-year extension period for plan loan repayments will be provided to any "qualified individuals" (as defined above) who have outstanding plan

loans on or after March 27, 2020, if the due date for any such loan repayment occurs during the period beginning on March 27, 2020 and ending on December 31, 2020. Upon expiration of the 1-year period, any subsequent loan repayments must be appropriately adjusted to reflect the delay and any interest accruing during the delay, over the extended period. The period of the delay is not counted against the 5-year loan term applicable to general purpose loans and the longer term (e.g., 10 years) applicable to principal residence loans.

Waiver of Required Minimum Distributions for 2020

Under the CARES Act, any minimum distributions required under Code Section 401(a)(9) ("RMD payments") that are due for 2020 have been waived. This waiver applies to both 2019 RMD payments that are due by April 1, 2020 and RMD payments to be made by December 31, 2020. However, this waiver only applies to defined contribution plans (i.e., 401(k) plans, 403(b) plans and governmental 457(b) plans) and individual retirement plans. Additionally, any such waived RMD payments that are distributed to a participant in 2020 are eligible for rollover treatment. For plans which require that RMD payments be made to beneficiaries of deceased participants within 5 years of death, the 2020 year is disregarded for determining the 5-year period.

Trucker Huss Comment: It is unclear from the text of the CARES Act what retroactive action, if any, employers must (or may) take with respect to RMD payments that were taken between the period of January 1, 2020 through March 27, 2020. Additional guidance from the IRS on this issue is expected.

Defined Benefit Plans Relief for 2020

Under the CARES Act, the deadline by which plan sponsors of single-employer defined benefit plans must make required minimum contributions otherwise due in the 2020 calendar year has been extended to January 1, 2021. Without this extension, the deadline for plan sponsors to make required minimum contributions to their defined benefit plan is 8½ months after the close of the plan year (i.e., September 15, 2020 for a calendar year plan). A plan

sponsor that takes advantage of this extension must include interest at the plan's interest rate calculated from the date the minimum required contribution was due to January 1, 2021.

Trucker Huss Comment: We understand that at least part of the rationale for this extension is to give Congress time to consider and enact other pension relief that might lower a plan sponsor's funding obligations or otherwise assist plan sponsors.

In addition, for purposes of meeting the benefit restriction rules of Code Section 436 and Section 206 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), the CARES Act allows plan sponsors of single-employer defined benefit plans to 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 the plan years that include the 2020 calendar-year. For calendar year plans this means plan sponsors can use the AFTAP as of December 31, 2019. As a result, plans should have higher AFTAPs and be less likely to have to implement certain benefit restrictions (e.g., cease benefit accruals).

Plan Amendment Deadlines

The deadline to amend a retirement plan to reflect the CARES Act is the last day of the first plan year beginning on or after January 1, 2022 (e.g., December 31, 2022 for a calendar year plan). The deadline for governmental plans is the last day of the first plan year beginning on or after January 1, 2024 (e.g., December 31, 2024 for a calendar year government plan). This amendment deadline applies to both mandatory provisions under the CARES Act (i.e., waiver of 2020 RMD payments) and any optional provisions that a plan sponsor chooses to implement under the CARES Act (i.e., Coronavirus-related Distributions). In order for any retroactive amendment reflecting the CARES Act to be effective under a retirement plan, the plan sponsor must operate its plans as if the amendment was in effect during the entire period of the amendment (the "operational period"), and the amendment must be retroactive to the first date of such operational period.

Trucker Huss Comment: This deadline appears to apply to both individually designed plans and preapproved plans (prototype or volume submitter plans).

Expansion of Department of Labor Authority

Under the CARES Act, ERISA Section 518 was amended to expand the Department of Labor's (DOL) authority to extend certain deadlines up to 1 year in the event that the Secretary of the Department of Health and Human Services (HHS) declares a public health emergency pursuant to Section 319 of the Public Health Service Act. Prior to this change, it was limited to certain terrorist and military acts. Examples of such deadlines that potentially could be extended under the DOL's expanded authority include certain required notices and government filings (e.g., the Form 5500).

Trucker Huss Comment: On January 31, 2020, the Secretary of HHS declared COVID-19 a public health emergency.

Action Items for Plan Sponsors

If a plan sponsor wishes to take advantage of any of the relief provided under the CARES Act to allow for increased access to retirement plan funds for participants adversely impacted by COVID-19, we recommend the following action items:

1. A careful review of your retirement plan's procedures and plan administrator's constraints should be conducted to determine if any platform changes are required in order to implement the applicable CARES Act provision(s), including but not limited to, the following:
 - If you intend to allow for Coronavirus-related Distributions in 2020, a new distribution event would have to be created that is not subject to the 10% early distribution penalty tax or mandatory 20% withholding. Additionally, if you have multiple retirement plans, procedures must be put in place to make sure that the aggregate amount of Coronavirus-

related Distributions to any 1 individual do not exceed \$100,000. This should not present huge difficulties for plan sponsors and record-keepers, as these same requirements apply to qualified disaster distributions that are available to assist participants impacted by certain natural disasters (e.g., hurricanes, floods and wildfires).

- If Coronavirus-related Distributions are being repaid to your retirement plans, procedures must be in place to treat any such payments as rollover contributions and limit such repayments to the aggregate amount of distributions that the individual received from all retirement plans in your controlled group.
- If you intend to increase the plan loan maximum thresholds under your retirement plan(s) in 2020, procedures must be in place to allow for the increase. In addition, if your retirement plan(s) currently includes a limit on the amount of outstanding plan loans an individual may have, careful consideration should be made to determine if the limit could be increased to allow participants to take advantage of this new feature.
- Any delayed loan repayments should be properly documented to ensure that such loans are not treated as being in default.
- Loan procedures and amortization schedules will have to be updated to address the loan changes.
- If your retirement plan does not provide for plan loans, now is the time to consider if you want to make plan loans available to your participants.
- Procedures must be in place to ensure that the mandatory 20% withholding is applied to any distributions in 2020 that include waived 2020 RMD amounts. This should not present huge difficulties for plan sponsors

and recordkeepers, as these requirements are similar to rules that were adopted to waive 2009 RMD payments after the economic crisis of 2008.

2. Participant communications should be prepared and distributed to properly inform participants of any operational changes under your retirement plan(s) as a result of the CARES Act and any additional steps that participants will have to take in order to take advantage of any such changes.
3. Plan documents should be timely reviewed and amended in order to incorporate any operational changes under your retirement plan(s) as a result of the CARES Act. We encourage you to consult with your ERISA attorney, plan recordkeeper, and third-party administrator to ensure that your plan's operations and documents are consistent with respect to its new features under the CARES Act.

Conclusion

As the number of employees impacted by COVID-19 continues to grow each day, we understand that participants are looking to their retirement plan accounts now more than ever to help cover the unforeseen costs and financial hardships they are experiencing. While the CARES Act provides the framework to help retirement plan participants during these difficult times, further guidance will be needed from the IRS, DOL, and Treasury Department, as well as other agencies, to answer any outstanding questions following the enactment of the CARES Act. We will continue to closely monitor the latest news and provide updated guidance as it relates to your employee benefit needs.

We at Trucker Huss hope that all of our clients, friends and colleagues are healthy and safe during this difficult and challenging time, and we look forward to getting through it together. If you need assistance with understanding and/or implementing the CARES Act, or if you have other employee benefits needs, we are here (remotely) to help you.

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