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CARES ACT WOULD EXPAND U.S. RETIREMENT PLAN ACCESS TO PARTICIPANTS IMPACTED BY THE CORONAVIRUS PANDEMIC

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The proposed Coronavirus, Aid, Relief and Economic Security Act ("CARES ACT") would, if enacted, provide legislative relief to participants impacted by the Coronavirus pandemic. This relief is expected to be agreed upon and enacted - although likely with some modifications. We will update this post and provide additional detail at that time.

As currently drafted, the CARES ACT would provide the following relief with respect to hardship distributions and loans.

Hardship Distributions

The 10% early distribution tax would be waived for the following virus related hardships:

- Participant is diagnosed with COVID-19;
- Participant's spouse or dependent is diagnosed with COVID-19;
- Participant experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, experiencing a reduction of work hours, inability to work due to lack of child care caused by COVID-19, the closing or reduction of hours by a business owned or operated by such participant due to COVID-19; or
- Other circumstances as determined by the Treasury Secretary.

The CARES Act would provide additional tax relief in the form of a three-year period for (i) payment of tax on the distribution and (ii) tax-free repayment of the distribution to the plan.

Plan Loans

The maximum loan that could be taken would be increased to the lesser of $100,000 or 100% of a participant's vested account balance. This limit would be double the current limit of the lesser of

$50,000 or 50% of a participant's vested account balance. In addition, qualifying participants with outstanding loan balances would be allowed to delay loan repayments for up to one year.

Things to Think About Pending Finalization of the CARES Act and Other Access Relief

Subject to the limitation noted below, participants can currently access plan assets through hardship withdrawals, loans, and early distributions – but without the benefit of the proposed tax relief noted above.

- Hardship Withdrawals. Many plans limit hardship withdrawals to those circumstances which satisfy the IRS safe harbor for deemed immediate financial need. That safe harbor would not generally encompass COVID-19 (although it might cover a safe harbor event triggered by COVID-19 such as medical or burial expenses or avoiding foreclosure on a home). In the absence of (or pending finalization of) legislative relief, employers could make hardship withdrawals more readily available for COVID-19 hardships by adopting a facts and circumstances test for immediate financial need.

- Loan Limits/Leave Policies. Employers may want to consider:

  (i) Loosening limits on loans (*e.g.*, loosen limits restricting the number of loans a participant can take and/or limits on the amount of loans that may be taken subject to the 50%/$50,000 maximum loan amount noted above) and

  (ii) Re-evaluating loan repayment policies during leaves, including unpaid or reduced pay leaves subject to applicable restrictions (*e.g.*, generally no loan repayments are required for unpaid or reduced pay leaves of less than one year).

- In-Service Withdrawals. If the plan does not already provide for in-service withdrawal of contributions, employers could consider amending the plan to permit such withdrawals. This would give participants the ability to withdraw:

  (i) Profit-sharing and/or matching contributions which have been in the plan for at least 2 years or are withdrawn by persons who have been participants for at least 5 years;

  (ii) Rollover accounts; and/or

  (iii) After-tax (not Roth) contributions.

Amending the plan to allow in-service withdrawals could provide an immediate resource to participants who are financially impacted by the Coronavirus. Given the fact that some form of relief will likely be available imminently, however, participants who can wait to access retirement funds may want to consider doing so.

RELATED PRACTICE AREAS

- Employee Benefits & Executive Compensation

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