



## CARES Act includes several Employee Benefits-related provisions

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On March 27, 2020, the president signed into law the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) as part of the \$2 Trillion stimulus package intended to stabilize the economy during the devastating coronavirus pandemic. The CARES Act is far-reaching and provides economic relief to several industry sectors while aiding individuals who have been impacted by the coronavirus pandemic. This Benefits Alert describes the CARES Act’s employee benefits-related provisions, including, among other things, expanded participant access to retirement plan funds, telehealth access, and coverage of testing procedures and vaccines.

### Retirement plans

The CARES Act contains several provisions designed to help retirement plan sponsors and participants under financial distress due to the pandemic. These provisions include the following:

1. **Plan distributions and loans.** Tracking previous disaster relief afforded to retirement plan participants (e.g., the Disaster Tax Relief and Airport and Airway Extension Act of 2017, which provided relief following wildfires and a trio of hurricanes), the CARES Act relaxes plan distribution and loan rules to give participants impacted by the coronavirus pandemic enhanced access to retirement plan funds.
  - a. *Coronavirus-related distributions.* The CARES Act permits an eligible retirement plan to allow one or more “coronavirus-related distributions” to a participant up to an aggregate of \$100,000 (across all plans within the employer’s controlled group). A “coronavirus-related distribution” is any distribution from an eligible retirement plan between January 1, 2020, and December 31, 2020 to an individual:
    - i. who is diagnosed with the coronavirus or COVID-19 (i.e., the infection caused by coronavirus);
    - ii. whose spouse or dependent is diagnosed with the coronavirus or COVID-19; or

- iii. who has incurred adverse financial consequences as a result of quarantine, job loss, or work hour reductions; being unable to work due to the lack of child care because of the coronavirus or COVID-19; closure or reduced operating hours of an owned or operated business due to the coronavirus or COVID-19; or any other factors determined by the Department of Treasury.

Plan administrators may rely on a participant's self-certification that he or she satisfies one of the conditions noted above.

Coronavirus-related distributions are exempt from the 10% early withdrawal penalty, are not subject to the standard 20% income tax withholding applied to indirect eligible rollover distributions (i.e., distributions made to individuals instead of directly to the employer-sponsored retirement plan or individual retirement account custodian), and are not required (or permitted) to be deposited into an eligible retirement plan within 60 days to avoid taxation. A participant who receives a coronavirus-related distribution is permitted to repay the distribution to the plan over a 3-year period starting on the date the distribution is received. To ensure that repaid distributions remain tax-neutral, they are treated as direct trustee-to-trustee rollovers made within 60 days of the distribution. Finally, if a participant chooses not to repay the distribution, the distribution will be subject to income tax ratably over the 3-year period beginning with the tax year in which the distribution was received (though a participant could elect to be taxed all at once).

Plans are permitted to implement coronavirus-related distributions immediately. The deadline to amend plans to include language permitting these distributions is the last day of the plan year beginning on or after January 1, 2022.

- b. *Plan Loans.* During the 180-day period following the enactment of the CARES Act, plans may permit a "qualified individual" to obtain a loan from the plan in an amount up to the lesser of \$100,000 or 100% of the individual's vested account (compare this to the standard limitation of up to the lesser of \$50,000 or 50% of the individual's vested account). For this purpose, a "qualified individual" is any person who satisfies one of the three eligibility criteria described above for a coronavirus-related distribution.

In addition to this higher maximum loan amount, loan repayments for any outstanding loan (whether obtained before or after enactment of the CARES Act) held by a qualified individual will be suspended for one year. The suspension applies to any repayments due between the CARE Act's enactment and December 31, 2020. The suspension period is not counted when determining the maximum permitted loan period (five years for a general loan and usually longer for loans used to purchase a primary residence).

Plans are permitted to implement the enhanced loan provisions immediately. The deadline to amend plans to include language for this loan relief is the last day of the plan year beginning on or after January 1, 2022.

2. **Temporary RMD waiver for certain plans.** The CARES Act also provides for a waiver of required minimum distributions that would otherwise be payable in 2020 for defined

contribution plans subject to Section 401(a), 403(a) and 403(b), governmental IRC Section 457(b) defined contribution plans, and individual retirement plans. For purposes of the 5-year death distribution rules, the 2020 year will be disregarded.

Note that the CARES Act also provides a special waiver specifically applicable for required minimum distributions that were required to start in the 2020 calendar year, and were not yet made as of January 1, 2020. In other words, the special waiver applies to those individuals whose initial required minimum distribution was originally due to be made by their required beginning date of April 1, 2020 (because they either attained the later of age 70½ or retirement in 2019, or were a 5% owner who attained age 70½ in 2019), and who did not take that distribution on or before December 31, 2019. These individuals will not be required to take their initial distribution by their April 1, 2020 required beginning date. Plan sponsors will need to review any initial required minimum distributions made after January 1, 2020, with respect to 2019, and coordinate with the affected individuals to determine whether the individuals wish to retain these distributions or wish to either roll them over or redeposit them.

- 3. Funding requirements for single employer defined benefit plans.** For purposes of IRC Section 430, any minimum required contribution (including quarterly contributions) that would otherwise be due during the 2020 calendar year is now due on January 1, 2021. Interest will accrue at the plan's effective interest rate for the plan year, which includes the payment date. Additionally, for purposes of determining whether any benefit limitations for underfunded plans apply under IRC Section 436, a plan sponsor is permitted to treat a plan's adjusted funding target attainment percentage (AFTAP) for the last plan year ending before January 1, 2020, as the AFTAP for the plan year(s) that include(s) the 2020 calendar year.

## Health and welfare plans

Several provisions contained in the CARES Act impact design and administration of health and welfare benefits. A summary of these provisions is provided below.

- 1. Coronavirus and COVID-19 testing coverage.** The CARES Act amends the Families First Coronavirus Response Act's requirement that group and individual health plans cover without cost-sharing testing for coronavirus detection or COVID-19 diagnosis. The amendment is intended to define the type of tests for which no cost-sharing would apply. To be covered without cost-sharing, a test must (1) be approved, cleared, or authorized under the Federal Food, Drug, and Cosmetic Act; (2) be subject to a request (or a stated intent to request) by the developer for emergency use authorization unless and until such request is denied or the request is not submitted within a reasonable amount of time; (3) be developed in and authorized by a state that has notified the Department of Health and Human Services (HHS) that it will review the tests; or (4) be another test determined appropriate by HHS.

In addition to defining diagnostic tests subject to no cost-sharing, the CARES Act also contains rules regarding reimbursement rates to providers of the items and services related to the testing. If a group health plan has a negotiated rate with a provider, the reimbursement rate will be the negotiated rate. If there is no negotiated rate (e.g., the provider is out-of-network), the reimbursement rate is either the cash price listed on a public internet website, or such lower price negotiated by the plan. As a corollary, during

the emergency period (currently through December 31, 2020), all providers of diagnostic testing for COVID-19 must publish the cash price on their public websites or potentially be subject to a civil penalty.

1. **Accelerated coverage of preventive care and vaccines.** The Affordable Care Act generally requires that group health plans cover without cost-sharing preventive care services and vaccines. Under normal circumstances, when the United States Preventive Service Task Force (USPSTF) issues a rating of “A” or “B” for an item or service in its recommendations, group health plans are required to eliminate cost-sharing for that item or service by the first plan year following the 1-year anniversary of the USPSTF’s recommendation. The CARES Act accelerates this adoption period in the case of coronavirus-related preventive services and ensures that vaccines are rapidly covered as well. Any coronavirus-related item or service that is recommended by the USPSTF with a rating of “A” or “B” and any coronavirus-related vaccine that has a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention must be covered without cost-sharing within 15 business days following the recommendation. This rapid adoption period may be challenging for claims administrators and health care providers, as both groups will need to quickly adjust adjudication and coding practices to reflect the changes.
2. **Telehealth and high-deductible health plans.** Effective immediately, telehealth or remote care services may be provided to individuals covered by high-deductible health plans (HDHPs) at no cost (or at a subsidized cost) prior to satisfaction of the statutory minimum HDHP deductible. Prior to the CARES Act, the statutory minimum deductible for HDHPs had to be satisfied prior to receiving non-preventive telehealth services.
3. **OTC menstrual care products as qualified medical expenses.** Generally, in the absence of a prescription, over-the-counter (OTC) health products are not considered qualified health expenses eligible for reimbursement under health savings accounts (HSAs), Archer medical savings accounts (Archer MSAs), health flexible spending arrangements (Health FSAs), and health reimbursement arrangements (HRAs). The CARES Act provides that, effective for reimbursements paid after December 31, 2019, the cost of menstrual care products will be qualified medical expenses reimbursable by HSAs, Archer MSAs, Health FSAs, and HRAs.
4. **HIPAA privacy requirements.** The CARES Act mandates that HHS issue, within 180 days, guidance on sharing protected health information during the coronavirus-related health emergency. Additionally, the CARES Act also contains provisions that align requirements under the Health Insurance Portability and Accountability Act (HIPAA) with regulations issued by HHS’s Substance Abuse and Mental Health Services Administration. The amendments to the Public Health Service Act are intended to provide more flexibility to disclose and redisclose protected health information pertaining to substance abuse disorders and received by federally-supported treatment programs.
5. **Student loan repayments and educational assistance programs.** IRC Section 127 excludes from an employee’s income amounts (up to \$5,250 per year) paid by an employer for education assistance. The CARES Act expands the definition of “education assistance” to include any payments made by an employer prior to January 1, 2021, with respect to qualifying student loans. The payments can be made directly to the employee or to the

relevant lender. Note that any amount paid by the employee under this new provision would not be deductible by the employee under IRC Section 221.

6. **Expansion of DOL authority to extend deadlines.** Section 518 of the Employee Retirement Income Security Act gives the Department of Labor (DOL) the authority to delay by one year any applicable compliance deadline. The CARES Act adds a public health emergency declared by HHS to the list of events that can trigger the DOL authority. In the upcoming weeks, it is possible that the DOL will begin delaying compliance deadlines.

## Summary

Although many of the CARES Act's benefits-related provisions are temporary efforts to provide relief during the coronavirus pandemic, employers and plan sponsors may nevertheless want to consider adopting the changes so that employees can have access to much-needed financial resources. Several of the CARES Act provisions are effective immediately, so third-party administrators should be contacted as soon as possible to get the changes implemented quickly. Employers and plan sponsors seeking to make these changes and communicate the relief with their employees and plan participants should consult with their legal advisors to ensure compliance with relevant laws and regulations.

For more information on the content of this alert, please contact our [Coronavirus Response team](#), your Nixon Peabody attorney, or:

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