Holland & Hart

COVID-19: Retirement Plans

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Extended Deadlines

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What's The Problem: COVID-19 has made it difficult to meet certain deadlines with respect to plan administration.

Answer: The IRS granted limited relief to filing deadlines, including certain Form 5500 relief, under IRS Notice 2020-23 on April 9, 2020. A Form 5500 that is required to be filed between April 1, 2020 and July 14, 2020 is now due July 15, 2020. The relief does not impact calendar year plans as the normal due date for filing Form 5500 (July 31st) falls outside of the delay period. This extension helps some non-calendar year plans and potentially plans with short plan years that caused the Form 5500 deadline to occur during that period. We are hoping that additional guidance may be on the way.

Notice 2020-23 also extended other plan-related deadlines to July 15, 2020 for deadlines occurring during the delay period, including deadlines related to:

- plan loan repayments;
- distributing excess deferrals; and
- indirect rollovers.

Hardship Distributions

Last updated 4.1.2020

What's the Problem: Employers sponsoring 401(k) plans are preparing for an increase in hardship withdrawal requests. What issues should they be mindful of?

Answer: COVID-19 is likely to present serious financial difficulties for individuals and employees. Employers and plan administrators should expect to receive inquiries from participants regarding access to retirement savings. COVID-19 could form the basis for a hardship distribution depending upon the terms of the employer-sponsored retirement plan. Most plans limit hardship distributions to the IRS for “safe harbor” reasons. The safe harbor definition of permissible hardship expenses includes expenses for medical care (for the employee, employee's spouse, employee's dependents or employee's primary beneficiary) to the extent the care would be deductible under Code Section 213(d). The safe harbor definition also includes expenses and losses incurred by the employee as a result of a FEMA declared disaster. While President Trump's declaration of national emergency did not constitute a FEMA disaster and therefore

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didn't qualify as a hardship under the safe harbor definition, many states have now petitioned and been granted FEMA disaster status. Employers can access FEMA's website for updates on each state's disaster declaration: www.fema.gov

Now might be a good time to consider the e-certify streamlined process for hardship distributions. This process has been available for several years under existing IRS guidance, and permits the TPA to accept limited documentation from participants. Don't forget, however, that the employer will have an obligation to spot-check audit the hardship process on a quarterly if not annual basis.

In the event that the situation leads to unpaid leaves of absence, there could be other issues such as problems making loan repayments, or needs for hardships under provisions for other permitted types of hardship expenses such as tuition or payments to prevent eviction from the participant's principal residence. Employers may also see a corresponding uptick in participants taking plan loans.

Coronavirus-Related Distributions and Loan Relief

What's the Problem: Employees are facing financial difficulties due to COVID-19 and looking to access retirement account balances to help supplement or replace lost income. What options are available?

Answer: The CARES Act increases available retirement plan distributions and the amount of loans available from retirement plans to participants.

Coronavirus-Related Distributions

Plan sponsors may now offer participants the option to take coronavirus-related distributions (CV distributions) of up to $100,000 from their accounts in qualified retirement plans, 403(b) plans, and governmental 457(b) plans.

- CV distributions will be available to participants who become ill (or whose spouses or dependents become ill) from COVID-19 or who experience adverse financial consequences from being furloughed, laid off, or quarantined; losing childcare; losing work hours; or other impacts identified by the U.S. Department of Treasury. Participants will be able to self-certify their eligibility for a distribution.
- CV distributions are available effective immediately and may be taken up until December 30, 2020.
- CV distributions are not subject to the 10% early withdrawal penalty for distributions to made participants under age 59.5. While the distributions otherwise remain taxable (unless repaid, as discussed below), participants may include the income from the distribution ratably over a 3-year period.
- Participants are permitted to repay CV distributions within 3 years of the distribution. If the distribution is repaid within the 3-year period, it will be treated as a rollover.

Changes to Plan Loan Rules

The Internal Revenue Code was amended to increase the maximum plan loan amount available from $50,000 to $100,000 (or 100% of a participant's vested account if less than $100,000) for loans taken within the 180-day period following the enactment of the CARES Act for participants who become ill (or the participant's spouse or dependents become ill) from COVID-19 or experiences adverse financial consequences as a result of being furloughed, laid off, or quarantined; losing childcare; losing work hours; or other impacts identified by the U.S. Department of Treasury in connection with COVID-19. Additionally, effective for both existing loans made prior to the CARES Act and new loans taken prior to December 31, 2020, loan repayment dates are permitted to be delayed for 1 year if a participant with a loan becomes ill (or the participant's spouse or dependents become ill) from COVID-19 or experiences adverse financial consequences as a result of being furloughed, laid off, or quarantined; losing childcare; losing work hours; or other impacts identified by the U.S. Department of Treasury in connection with COVID-19.

Waiver of Required Minimum Distributions

What's the Problem: Participant retirement plan accounts have been impacted by the turmoil in the financial markets and required distributions could cause investments to be sold at a loss. Does the plan have to process required minimum distributions (RMDs) during this time?

Answer: The CARES Act eliminates RMDs for 2020. Participants who are required to take RMDs from their retirement plans (generally those over age 72) are not required to take RMDs for 2020 or 2019 RMDs that were to be made by April 1, 2020 for participants age 70.5 and older. The RMD waiver applies to all qualified defined contributions plans, 403(b) plans, governmental 457(b) plans, and individual retirement accounts (IRAs). Further, the year 2020 will be disregarded for purposes of determining the 5-year period for the required depletion of inherited retirement plan accounts and IRAs. Finally, distributions of amounts that would have otherwise been subject to RMDs in 2020 may be rolled over.

Partial Plan Terminations

What's the Problem: A company that terminates a substantial portion of its workforce might be required to fully vest accounts in its 401(k) plan. What does the IRS look for in determining whether a partial plan termination has occurred?

Answer: Companies in industries that will be particularly hard hit by the financial impact of COVID-19 should be mindful of the partial plan termination rules when considering layoffs. The IRS regulations require that on a complete termination of a retirement plan, participants must be fully vested in their accounts. The IRS has long had a practice of extending this principle to partial plan terminations. The IRS requires retirement plans to 100% vest all participants who are affected by a partial plan termination. There are no bright line rules for determining when the tipping point has

been reached, but previous rulings from the IRS have made clear that a partial plan termination might occur as a result of one or a chain of group layoffs. If an employer will be making layoffs and has unvested amounts in its 401(k) plan, they should consult with their advisors to see if vesting might be required.

Plan Investments

What's the Problem: What steps should a fiduciary take in monitoring employer retirement plan investment lineups?

Answer: The financial turmoil is also causing investment performance in retirement plans to sag. While experts may advise plan fiduciaries to “stay the course,” those fiduciaries should continue to monitor investment performance, ask experts questions as to prudent actions, and properly document the steps taken by the fiduciaries to monitor the situation. Fiduciaries should check their plan investment policies to determine whether any actions are required at this time and consult with their plan financial advisors about proper actions, if any.

Valuation Issues

What's the Problem: Can an employee stock ownership plan continue to use its December 31, 2019 valuation of company stock?

Answer: For “balance forward” plans like private company employee stock ownership plans (where plan assets are not valued on a daily basis), market volatility is particularly challenging. Many ESOPs are in the process of or have just completed their December 31, 2019 valuations. Most likely that process will continue on course, but the question immediately becomes whether the product is now stale. Most plans allow for an interim valuation date. It is important to follow the fiduciary delegations in each plan document when determining whether an interim valuation date will be set, and what the impact is on participant distributions, diversification, and other plan administrative processes.

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