

THOUGHT LEADERSHIP

LEGAL UPDATES

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MARK D. WELKER

KANSAS CITY:

816.983.8148

MARK.WELKER@

HUSCHBLACKWELL.COM

A Checklist for Sponsors to Consider Before Adopting Retirement Plan Provisions of the CARES Act

As a retirement plan sponsor, you might have directly heard from your plan recordkeeper (a/k/a third-party administrator (TPA)) regarding the following optional provisions of the CARES Act:

The potential grant of special loan rights for “qualified individuals” (defined here) (“COVID Loans”),

The delay in repayment of any plan loan for qualified individuals (“COVID Loan Repayment Delay”),

The potential grant of special withdrawal rights for qualified individuals (“COVID Withdrawals”),

Not paying Required Minimum Distributions (“RMDs”) this year, and

The potential waiver of fees for COVID Loans and COVID Withdrawals (“COVID Fees”)

Many recordkeepers/TPAs are not prepared to answer all of the following questions, as everyone is still working out how the above provisions will be administered and whether all of the provisions should be adopted. Below is a list of issues employers should consider before making any final decisions on CARES Act plan amendments. Even if you have already given instructions to your recordkeeper, we recommend that you review this list to determine whether to revise or re-address any of those instructions.

1. COVID Loans

Does it make sense to permit COVID Loans up to \$100,000? Will participants who take out a \$100,000 loan be able to repay it over the required maximum period of 5 years after the 12-month delay is over? If not, a default will occur which will result in taxes and penalties being owed, and potentially put the participant in a financial bind. If you go that far, will you be setting your participants up for failure?

If you decide not to permit loans up to \$100,000, will the recordkeeper allow you to limit the dollar amount of all loans to a total of \$50,000 but permit COVID Loans to go up to 100% of vested accounts?

With respect to the “100% of accounts” test for COVID Loans, will the recordkeeper permit you to designate only certain accounts for COVID Loans (excluding, e.g., stock sources)?

Does the plan permit terminated employees to take out a loan? If not, have you discussed with the recordkeeper the impact of such restriction on the ability of a participant who has been laid off due to COVID (and hence is a qualified individual) to take out a COVID Loan after layoff?

Does the plan have a maximum limit on the number of outstanding loans? Does the plan permit a loan refinancing that would increase the loan balance? Depending on the answers to the foregoing, a qualified individual who already has the maximum number of loans might not be able to access another loan, unless the plan’s loan policy is amended. Have you discussed this matter with the recordkeeper?

Note that the \$100,000 is total of all outstanding loans. So, even if you decide to permit COVID Loans up to \$100,000, if a qualified individual has a pre-existing loan of \$45,000, the new COVID loan (assuming a second loan is permitted) would be limited to \$55,000.

2. COVID Loan Repayment Delay

Does the plan currently permit terminated employees to continue to repay a loan from the plan indefinitely? Some plans permit that for only 60 days. If the plan does not permit terminated employees to continue to repay a loan indefinitely, and a participant becomes a qualified individual due to layoff, how will the recordkeeper handle:

the impact on any existing non-COVID loans? Will the qualified individual be allowed to keep the loan outstanding and defer payment for one year?

the impact on COVID Loans taken out before the layoff? Will the qualified individual be allowed to keep the COVID Loans outstanding and defer payment for one year?

If a participant certifies that he is a qualified individual to the recordkeeper in order to take a COVID Withdrawal, will the recordkeeper proactively check to see if the participant has an outstanding loan? If the answer is yes, will the recordkeeper automatically flag that loan for a delay in repayment for 12 months?

If a participant certifies that he is a qualified individual to the recordkeeper in order to take a COVID Loan, will the recordkeeper proactively check to see if the participant has an outstanding loan? If the answer is yes, will the recordkeeper automatically flag that loan for a delay in repayment for 12 months?

Is there a procedure for a participant to certify that he is a qualified individual solely for purposes of a COVID Loan Repayment Delay?

Will the recordkeeper permit a qualified individual to elect to start repaying a delayed loan faster, rather than taking advantage of the full 12-month delay?

Will the recordkeeper proactively tell you to stop loan repayment deductions from payroll for any participant who has certified as being a qualified individual?

Will the recordkeeper proactively tell you when to restart loan repayment deductions from payroll with sufficient advance notice for you to timely process the restart?

Will the participant have any responsibility with respect to the restart of loan repayments, such as electing whether to re-amortize or double up payments on the remaining loan upon restart of payments? If so, who will inform the participant of that and who will remind the participant? What happens if the participant does not do that? (It seems to us that the default should be the action that would result in the least likelihood of a loan default, which would be re-amortization rather than doubling up payments. That (and any fee) would need to be communicated as part of the loan application process – will the recordkeeper do that?)

For purposes of the recordkeeper calculating the re-amortization: Although the recordkeeper has a record of the last payment date, will the recordkeeper proactively ask you to confirm the payroll date

that will be the first for loan repayment restart, so the recordkeeper can accurately calculate the new loan amortization schedule and proactively advise you of the new payroll deduction amount?

In short: Will you need to do anything with respect to stopping and starting loan repayments other than to do what the recordkeeper proactively instructs? Confirm with the recordkeeper that you will not need to follow up to prompt the recordkeeper or the participant to do anything.

3. COVID Withdrawals

Will the recordkeeper permit you to select the plan sources that will be available for COVID Withdrawals? (E.g., limiting COVID Withdrawals to pre-tax deferral and rollover sources, although match is an alternative.) So far, none of our clients have permitted COVID Withdrawals from a company stock source.

Do any of the sources that would be eligible for a COVID Withdrawal have a graded vesting schedule, or are they all either 0% or 100% vested at all times? For any source that is subject to a graded vesting schedule, how would the recordkeeper's partial vesting records continue to function if 100% of the partially vested balance were withdrawn?

Does the plan already permit elections to take a lump sum distribution after termination of employment from the sources that would be eligible for withdrawal, so that the \$100,000 limit is an issue only for in-service withdrawals? If that is the case, how will the recordkeeper handle tax reporting of a post-termination distribution that is eligible for the CARES Act special tax treatment?

Will the plan permit there to be no limit on the number of COVID Withdrawals so the participant has flexibility to only take the amount needed as it is needed?

Will there be any fees for COVID Withdrawals, and if so who will pay them?

Will the recordkeeper permit the plan to place a limit on the dollar amount that could be withdrawn that is less \$100,000?

Will the recordkeeper permit repayment of COVID Withdrawals in installments? Since these would be rollovers, we assume so unless there is a limit on the number of rollovers permitted by the plan. If so, will the recordkeeper keep track of the aggregate repayments and cap it when they reach the amount of the earlier COVID Withdrawal?

If you have multiple plans in your “controlled group,” does the recordkeeper have procedures to make sure that the aggregate amount of COVID Withdrawals to any one participant does not exceed \$100,000?

4. RMDs

Would it be possible for the plan to permit participants to elect to proceed with an RMD this year? If so, is the default that there will be no RMD payment this year?

5. COVID Fees

Does the recordkeeper intend to waive any fees for in-service withdrawals (COVID Withdrawals and hardship) and loans (whether or not COVID Loans) for 2020? (We have received word that some recordkeepers are doing so.)

6. Plan Amendments

How should the plan be amended?

For your 401k/Profit Sharing plan: Many recordkeepers are providing their customers with a form that is along the lines of an “intent to amend,” which is not an actual amendment, but instructs the recordkeeper how to administer the plan pending execution of a plan amendment. Often, the initial form sent to customers simply instructs the recordkeeper to adopt for the plan all of the permitted CARES Act changes, even though they are not necessarily required. After considering the above issues, many plan sponsors have decided not to adopt all of the changes, so the recordkeeper has needed to provide a different form of “intent to amend” that permits the customer to pick and choose the provisions that will be added to the plan.

For an Employee Stock Ownership Plan (ESOP): Most sponsors will want to adopt only the RMD waiver.

For documents provided by your Husch Blackwell or other attorney: You will need to work with your attorney to understand all relevant details once they are decided, so a plan amendment may be drafted accordingly.

Generally, plans do not need to be amended until the 2022 plan year. However, if you are adopting discretionary changes, have you discussed with your document provider whether any amendments are needed in 2020?

Comprehensive CARES Act and COVID-19 Guidance

Husch Blackwell's CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.