

4/14/2020

We understand that the uncertainty and disruption caused by COVID-19 have led to a lot of questions including many related to retirement plan administration. While the situation has been changing on an almost hourly basis, we wanted to distribute answers to the questions we are seeing often based on the information we have at this time.

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act of 2020 (the CARES Act) was signed into law. This expansive law included a number of provisions that affect retirement plans that are intended to give participants affected by the current pandemic access to their assets in retirement plans while minimizing the tax consequences and maximizing the ability to return the assets to the plan, if it is possible.

While much of the language regarding retirement plan provisions is similar to provisions used in the past for disaster relief and RMD waiver, it is unclear at this time how much we can rely on guidance issued related to those changes. This FAQ is intended to be a general overview of the provisions and it is expected that the IRS and/or DOL will issue guidance related to these provisions in the future.

For issues not addressed by the CARES Act, the current rules continue to apply unless there is further legislation or guidance.

Many of the topics discussed below (e.g., removal of employer contributions, partial plan terminations) are complex topics that we only address at a very high level; this FAQ is not intended to be a full discussion of all factors involved in making plan administration determinations.

Coronavirus-Related Distributions

Q1. What is a Coronavirus-Related Distribution (CVRD)?

A1. A CVRD is a distribution to a "CVRD Qualified Participant" that is taken on or after January 1, 2020 and before December 31, 2020.

Q2. Do plans have to allow for Coronavirus-Related Distribution (CVRD)?

A2. No, CVRDs are optional distribution triggers.

Q3. Who is a CVRD Qualified Participant?

A3. A CVRD Qualified Participant is a participant who meets at least one of the following three requirements.

1. Has been diagnosed with the virus SARS-CoV-2 or with the disease COVID-19 by a test approved by the CDC.
2. Whose spouse or dependent (as defined in IRC sec. 152) has been diagnosed with SARS-CoV-2 or COVID-19.
3. Has experienced adverse financial consequences as a result of being (a) quarantined, (b) furloughed, (c) laid off, (d) who has reduced work hours that is due to SARS-CoV-2 or COVID-19, (e) who is unable to work due to lack of child care due to SARS-CoV-2 or COVID-19, (f) closed or reduced hours of the business the participant owns or operates due to SARS-CoV-2 or COVID-19, or (g) any other factors as determined by the Secretary of the Treasury.



Q4. Does a participant need to be an active employee to be a CVRD Qualified Participant?

A4. No. There is nothing in the Bill that would require the participant to be a current employee to be a CVRD Qualified Participant.

Q5. If a participant's spouse or dependent is the one who meets the requirements in Q&A 3 (3) can a participant take a CVRD from their plan?

A5. No. A furlough, lay off, etc. of a spouse or dependent does not qualify a participant for a CVRD.

Q6. What kind of documentation does the plan need to obtain to determine that a participant is a CVRD Qualified Participant?

A6. The plan administrator may allow participants to self-certify that they are a CVRD Qualified Participant.

Q7. Where can CVRDs be taken from?

A7. Any "Eligible Retirement Plan" as defined in IRC Sec. 402(c)(8)(b) which includes:

1. IRA and IRA annuities under IRC Sec. 408(a) and 408(b)
2. Defined Contribution and Defined Benefit plans under IRC Sec. 401(a)
3. An annuity plan under IRC Sec. 403(b)
4. A plan under IRC Sec. 403(b)
5. A Governmental 457(b) plan under IRC Sec. 457(e)(1)(A)

* Note for Defined Benefit plans – the CARES Act does not add an independent distribution event. In order to take a CVRD from a Defined Benefit plan the participant must be eligible to take a distribution from the plan under the Code and Regulations (e.g., age 59 ½ for an active employee).

Q8. How much can be taken in a CVRD?

A8. A participant's CVRD cannot exceed \$100,000 (or their vested account balance) from all plan maintained by the employer. If the employer is a member of a controlled group or affiliated service group this limit will be aggregated over all the plans.

Q9. What are the tax implications of taking a CVRD?

A9. The 10% early withdrawal penalty tax has been waived for CVRD. The pre-tax portion of the CVRD is subject to normal taxation. However, the participant may choose to spread the taxable income evenly over 3 taxable years starting with the 2020 tax filing.

While a CVRD will be treated as an eligible rollover distribution for many plan purposes, the 20% mandatory withholding will not apply.

Q10. Can a CVRD be repaid?

A10. Yes. The participant will have three years starting from the day following the day the distribution was received. The amount can be rolled over following the normal rules for an eligible rollover distribution (ERD) and will be treated as an ERD for plan purposes.

Q11. Does the plan have to be amended before CVRDs are allowed?

A11. No, plans may operationally allow for CVRDs before the plan is formally amended. The amendment deadline is the last day of the plan year beginning on or after January 1, 2022 (or a later date if specified by the Secretary of the Treasury) with an additional two years for governmental plans.

Q12. Does the plan need to provide an SMM right away?

A12. No, the SMM requirements are tied to when the plan is actually amended. However, for the plan benefit to be considered available on a nondiscriminatory basis, all participants need to know the options that are available. To assist with this Datair has prepared participant communication pieces which can be download from our discussion forums.

Q13. Are there any special considerations for 401(k) safe harbor plans?

A13. Yes. Because the annual safe harbor notice contains information on distributions an update notice is required if the plan adds the CVRD provisions. A sample update notice is provided with the Datair participant communication packet on the discussion forums.

Coronavirus-Related Loan Provisions

Q14. Are there special loan provisions for CVRD Qualified Participants?

A14. Yes. The CARES Act has two main loan provisions:

1. An increase in the amounts used to determine the maximum loan amount allowed.
2. A delay in repayment for new and existing loans.

Q15. What are the changes to the loan maximum calculations?

A15. For loans made during a 180-day time frame starting on March 27, 2020, when calculating the maximum loan amount that a CVRD Qualified Participant may take the \$50,000 or 50% of vested account balance portion of the calculation is increased to \$100,000 and 100% of the vested account balance.

Q16. What are the loan repayment changes?

A16. For a CVRD Qualified Participant who has a loan payment due on a new or existing loan from March 27, 2020 thru December 31, 2020, those payments will be delayed by a year. Loan payments will restart with any payments due on or after January 1, 2021. The skipped payments (and any interest that accrued on those skipped payments) must be repaid starting on the one-year anniversary of the first skipped payment.

When the repayments start, the amount will be adjusted to account for the missed interest. Additionally, the maximum repayment period (5 years for most loans) will be extended by the time frame in which payments were skipped.

Q17. Does the plan have to be amended before the loan provisions are utilized?

A17. No, plans may operationally use the loan provisions before the plan is formally amended. The amendment deadline is the last day of the plan year beginning on or after January 1, 2022 (or a later date if specified by the Secretary of the Treasury) with an additional two years for governmental plans.

2020 RMD Waiver

Q18. What plans can waive the 2020 RMD requirements?

A18. The plan types that can waive the 2020 RMD requirements are:

1. 401(a) defined contribution plans (this includes 401(k) and profit sharing plans).
2. 403(a) and 403(b) defined contribution plans.
3. Governmental 457(b) plans.
4. IRAs.

Q19. What RMDs are waived?

A19. RMDs that are required to be distributed to participants or beneficiaries in the 2020 calendar year. This includes first year RMDs that have a required beginning date in 2020.

Q20. What about participants who turn 72 in 2020?

A20. 2020 is disregarded in determining the required beginning date so a participant who turns 72 in 2020 will be treated as if they turned 72 in 2021.

Q21. Do plans have to allow participants to waive their 2020 RMD? Can they force participants to waive their 2020 RMD?

A21. While it is unclear from the CARES Act if this is a mandatory or permissible provision, the language used is mostly identical to the language used in WRERA for the 2009 RMD waiver which the IRS determined was a permissible waiver. If the IRS follows the logic they did in 2008/2009 the plan sponsor would have the options to (1) allow their participants the choice to waive their RMD; (2) waive all RMDs that had not already been distributed; or (3) make no change and force participant to take their RMD as set forth in the plan.

Q22. If the participant has already taken their RMD, can they roll it back into a qualified retirement plan or an IRA?

A22. It is unclear at this time if those amounts could be rolled back into a qualified retirement plan or IRA. The ability to do so for the 2009 RMD waiver came from IRS Notice 2009-82.

Other Distribution Issues

Q23. How are employees treated for plan purposes when they are laid off?

A23. There is no specific definition in the Internal Revenue Code of terms such as "termination of employment", "laid off" or "furloughed", so it depends on what the employer means and how the individual is being treated for other employment purposes. Because these terms can be rather ambiguous, for purposes of this discussion, we are going to use the terms "terminated" and "furloughed".

If the employee is no longer working for the employer and there is no current intent to rehire the employee, then they are considered "terminated". If an employee is no longer working for the employer but there is intent to rehire after a period of time, then the employee is considered "furloughed".

An employee who is furloughed is not considered to have a termination of employment for plan purposes and thus does not have a termination distributable event. Any distributions to a furloughed employee would need to be made under the plan's in-service or hardship distribution provisions.

If there are multiple employees who are considered terminated from service, the plan administrator should look to the partial plan termination rules to determine if one has occurred. If a partial plan termination has occurred the plan administrator needs to address vesting issues appropriately. None of the current legislation changes the rules regarding partial plan terminations.

Please be aware that the determination between termination and furloughed must be done on a uniform and nondiscriminatory basis. Additionally, this determination is only done once for all plan purposes. A participant cannot be considered terminated for one purpose under the plan and furloughed for another.

Q24. Are there special rules for hardship for COVID-19?

A24. No. The normal hardship rules apply.

Q25. Are those affected by COVID-19 covered by the disaster relief portions of the safe harbor hardship definition?

A25. Only if they live in an area included in a federally declared disaster area. At this time there are only three states (California, New York, and Washington) that have been declared federally declared disaster areas due to COVID-19. This is likely to change. A current list of declared disaster areas can be found on the FEMA website at:

https://www.fema.gov/disasters/year/2020?field_dv2_declaration_type_value=All&page=1

Disaster areas are designated as "DR-*****".

Q26. My state is in an area with a declared state of emergency, does that affect any retirement plan provisions?

A26. No, it must be federally declared disaster to trigger the disaster area relief provisions in retirement plans.

Q27. What value should be used in calculating the amounts available for distribution? For balance forward plans is there a way to halt distributions until the situation has become more stable?

A27. The plan must continue to follow the plan document provisions with regards to distributions. Additionally, distribution availability is a protected benefit. While many 401(k) plans are valued daily, some are valued less frequently. Because of market losses, the value of accounts in a plan that is not daily valued will be artificially high. If the plan document states that distribution will be done as soon as administratively feasible after the request for distribution that must be followed. While a delay to do an interim valuation before the distribution is completed would most likely fall in the "administratively feasible" guidelines, it is not possible to withhold a distribution until the next valuation or withhold a percentage of the amount to be distributed in order to avoid distributing amounts that have been lost because of market conditions since the last valuation of the plan.

On a related note, there have also been many questions about distributions on plans that are not valued daily. The DATAIR base plan documents include a section titled "Interim Valuations" which allows the plan administrator to call for an interim valuation when there has been "an extraordinary change in general economic conditions" provided that the interim valuation does not discriminate in favor of highly compensated employees.

Contributions

Q28. Can an employer cease safe harbor contributions due to COVID-19 issues?

A28. There is nothing specific to COVID-19 with regards to ceasing safe harbor contributions. Plan sponsors would need to follow the current rules for ceasing safe harbor contributions mid-year. There are a couple of things to keep in mind.

1. Check to ensure the "maybe not" language was included in the safe harbor notice. This is optional if they are using the DATAIR notices. If this language was not included your business must have a "substantial business hardship" in order to remove the contribution. This is a facts and circumstances determination.
2. Check the top-heavy status of the plan. If the plan is top-heavy it is possible that having to make the top-heavy contribution will be more expensive than the safe harbor contribution would have been.
3. Be aware that the safe harbor contribution will have to be made on compensation/deferrals up thru the amendment date and the plan will have to test ADP, ACP, and top-heavy for the entire year.
4. There is no waiver of any of the notice requirements for removing a safe harbor provision mid-year.

Q29. Can I remove non-safe harbor employer contributions mid-year?

A29. This is another instance where the existing rules have not changed. The ability to remove employer contributions will depend on if the participant has earned that benefit under the current terms of the plan.

- a. Discretionary Contribution – a discretionary contribution can be removed any time before it has "accrued". A discretionary contribution accrues when (1) the plan sponsor communicates to the participants that a contribution will be made; (2) the plan sponsor takes a step to actually make the contribution (e.g., board of directors resolution stating that the contribution will be made); or (3) the plan sponsor actually makes the contribution.
- b. Mandatory Contribution with Allocation Conditions – a mandatory contribution can be removed back to the beginning of the plan year provided participants have not met the allocation conditions. However, once allocation conditions have been met the contribution can only be removed for compensation/deferrals earned after the prospective date of the amendment.
- c. Mandatory Contribution without Allocation Conditions – a mandatory contribution without allocation conditions can only be removed for compensation/deferrals earned after the prospective date of the amendment.

Q30. What funding relief was included in the CARES Act for defined benefit plans?

A30. For single employer defined benefit plans only, the deadline for making the minimum required contribution can be delayed until January 1, 2021. The contribution will need to be adjusted for the earnings based on the actual date contributed.

Additionally, a plan sponsor may choose to treat the plan's adjusted funding target attainment percentage for the plan year ending on or before December 31, 2019, as the adjusted funding target attainment percentage for plan years ending in the 2020 calendar year.