

Plans in Times of COVID-19: Our FAQs

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First 50 minutes:

- Summarize the rules
- Answer most frequent questions

FORMAT

Talk till you drop

- Keep answering questions

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SERVICE
 TERMINATION
 COMPENSATION
 DISTRIBUTIONS



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What do you call this?



- ▶ Is it a furlough? Lay off? Termination?
- ▶ The real question is severance/separation
 - ▶ Question of fact
 - ▶ What do you do when a worker's employment terminates?
 - ▶ Cancel email account
 - ▶ Cancel health insurance
 - ▶ Take their keys
 - ▶ Tell them they're fired
 - ▶ Stop paying them – except maybe a severance package
 - ▶ Practically, the longer they're gone, the more likely it is a severance

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Consequences



- | | |
|--|--|
| <p style="text-align: center;">Furlough</p> <ul style="list-style-type: none"> ▶ Not distributable event ▶ No partial termination ▶ Elapsed time clocks still ticking ▶ Payments to worker are likely compensation <ul style="list-style-type: none"> ▶ Including sick leave ▶ Hours of service include paid time off | <p style="text-align: center;">Severance</p> <ul style="list-style-type: none"> ▶ Likely distributable event ▶ Can trigger partial termination ▶ May limit availability of loans <ul style="list-style-type: none"> ▶ Consider amending ▶ May limit availability of hardship distributions |
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Partial termination



- ▶ IRS presumes partial termination takes place if 20% of participants have "employer-initiated severance"
 - ▶ "I laid you off because of the virus" is still employer-initiated
- ▶ What if business bounces back and you rehire people?
- ▶ It's simply a presumption
 - ▶ Can be rebutted by actual facts and circumstances
- ▶ If you want certainty, fully vest

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Hardship Distributions



- ▶ The CARES Act does not provide any modification to the hardship distribution rules
- ▶ However, previously issued regulations provide participants have a safe harbor hardship if they live or work in FEMA declared disaster qualifying for individual assistance
 - ▶ As of this writing, there are 18 states (plus Guam and Puerto Rico) that have federal declared disaster status, but not nationwide (and not all qualify for individual assistance)
- ▶ If a participant doesn't qualify for a CARES Act distribution or hardship distribution, rather than rely on the safe harbor hardship events to determine whether the individual has an immediate and heavy need, the employer could amend its hardship distribution provision to rely on "facts and circumstances"
 - ▶ Deadline: Last day of plan year

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CARES Act Distributions



- ▶ Coronavirus-related distribution
 - ▶ Available to qualified individuals
 - ▶ Maximum amount \$100,000
 - ▶ Distributed between 1/1/20 – 12/30/20
- ▶ Available from
 - ▶ Qualified plans
 - ▶ 403(b) plans
 - ▶ Governmental 457(b) plans
 - ▶ IRAs

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Qualified Individual



- ▶ A qualified individual is an individual:
 1. Who is diagnosed with COVID19 by CDC recognized test,
 2. Whose spouse or dependent is diagnosed with COVID19, or
 3. Who experiences adverse financial consequences as a result of
 - ▶ being quarantined,
 - ▶ being furloughed or laid off,
 - ▶ having work hours reduced,
 - ▶ being unable to work due to lack of childcare as a result of COVID19, or
 - ▶ the closing or reduction of hours of a business owned or operated by the individual due COVID19

The plan administrator may rely on an employee's certification that he/she satisfies the conditions

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Tax and plan attributes



- ▶ Not subject to 10% premature distribution penalty
- ▶ 401(k), 403(b), 457(b) distributable event
 - ▶ Pension plans can't distribute in-service before 59½
- ▶ Can spread tax over 3 years
- ▶ Can roll over within 3 years (Check form 8915B)
 - ▶ Only applies to pretax amounts or rollovers to IRAs

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More on tax attributes



- ▶ Normal plan rollover rules don't apply:
 - ▶ Not subject to mandatory 20% withholding
 - ▶ 10% voluntary withholding
 - ▶ Be sure to give a withholding notice Code §3405(e)(10)
 - ▶ Don't have to allow direct rollover
 - ▶ No need for special tax notice
- ▶ Participant has tax benefits whether or not plan adopts COVID-19 relief
 - ▶ Example: Terminating plan distribution qualifies for:
 - ▶ No premature distribution penalty
 - ▶ 3-year spread on income
 - ▶ 3-year rollover period

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Plan amendment deadline



- ▶ Applies to all CARES Act provisions
- ▶ Last day of 2022 plan year
 - ▶ Governmental plan 2024
- ▶ Terminating plan: Adopt prior to termination

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RMDs



- ▶ CARES Act allows participants and beneficiaries to forego taking 2020 RMDs
 - ▶ Includes participants with 2020 Required Beginning Date if RMD not taken in 2019
 - ▶ Limited to defined contribution plans
 - ▶ Doesn't apply to 457(b) plans of tax-exempt organizations
- ▶ See corresponding rules in WRERA
 - ▶ Notice 2009-82

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PARTICIPANT LOANS



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Participant Loan Relief



- ▶ CARES Act provides for a temporary increase in the loan limit for a Qualified Individual
 - ▶ Lesser of (1) the present value of the participant's nonforfeitable accrued benefit, or (2) \$100,000
 - ▶ Applicable for loans made from March 27 to September 23, 2020

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Participant Loan Repayment Delay



- ▶ For qualified individuals, the CARES Act provides that any loan repayments due during the period from March 27, 2020 to December 31, 2020 can be delayed for one year, and the five-year repayment period will disregard the 2020 delayed period.
 - ▶ Interest continues to accrue
 - ▶ May need to revise programs that automatically generate a 1099-R when a normal default event occurs
- ▶ Any subsequent repayments, plus applicable interest, will be reamortized over the extended repayment period
- ▶ Can allow participant to continue payments

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Loan Help for Individuals Who are not Qualified?



- ▶ If a participant is having a difficult time repaying the loan because of COVID19, but the CARES Act does not provide any help (e.g., spouse loses his/her job), the employer could consider the following option:
 1. Modify the mandatory payroll reduction provision to allow an employee who is having difficulty to opt for payment by check.
 2. Participant can then decide not to continue paying the loan.
 3. The employer could then decide to delay treating the loan as a loan default.
 4. After the economic crisis is over, the employer could use EPCRS to correct the loan failure by reamortizing the loan over what's left of the 5-year repayment period, or, treating the loan as a deemed distribution in the year of correction (as opposed to the year of failure)
- ▶ *Intentionally failing and then using EPCRS to correct the loan would be considered an aggressive approach.*

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Loan Acceleration Upon Termination of Employment



- ▶ Many plan loan policies provide for an acceleration of a loan upon termination of employment unless the participant is a party-in-interest (most are not)
 - ▶ If the participant is a Qualified Individual, the loan offset distribution should qualify as a CARES Act distribution
 - ▶ If not a Qualified Individual, still can roll over to IRA by extended due date of 2020 return
 - ▶ Could use loan rules to delay acceleration for a Qualified Individual for one year

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Loans to Terminated Participants



- ▶ Many plan loan policies limit loans to parties in interest
 - ▶ Plan can temporarily modify the loan policy to permit loans to terminated participants affected by COVID19
 - ▶ Later, the employer could amend back to its original policy (amendment not subject to anti-cutback rule).
 - ▶ Loans to terminated employees may qualify under the CARES Act provisions

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EXITING/ SUSPENDING/ TERMINATING SAFE HARBOR 401(K) PLANS



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Safe Harbor 401(k) Plans – CARES Act



- ▶ Neither the CARES Act nor the IRS has provided any special guidance regarding Safe Harbor 401(k) Plans
- ▶ However, the existing regulations provide rules for exiting, suspending or terminating Safe Harbor 401(k) contributions



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Exiting a Safe Harbor 401(k) Plan



- ▶ An employer can amend its safe harbor 401(k) plan to eliminate the safe harbor contribution (match or nonelective) if either:
 1. The employer is operating at an economic loss for the plan year (Code §412(c)), or
 2. The plan's safe harbor notice, issued before the beginning of the plan year, includes a statement that:
 - ▶ The employer may amend the plan during the year to reduce or suspend the safe harbor contributions, and
 - ▶ The amendment would not be effective sooner than 30 days after the participants receive a supplemental notice
- ▶ *The preamble to the regulations require that the employer prorate compensation limit under Code §401(a)(17)*

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Requirements for Exiting a Safe Harbor 401(k) Plan



- ▶ The employer must provide a supplemental notice to all eligible employees explaining the effect of the amendment and informing employees of the effective date of the reduction
 - ▶ The notice must advise employees that they have a reasonable opportunity to change their deferral election
- ▶ Effective no earlier than 30 days after providing the notice (i.e., not retroactive)
- ▶ Must provide safe harbor contributions up through the effective date of the amendment
- ▶ The employer is subject to ADP and ACP testing for the entire year
 - ▶ Current year testing
- ▶ Plan loses the top heavy exemption (must provide TH minimum for non-key EEs employed on the last day of the plan year)

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Safe Harbor 401(k) Plan Termination



- ▶ An employer can terminate a safe harbor plan (nonelective or match), midyear without regard to the employer's financial condition or safe harbor notice.
- ▶ Conditions:
 1. All participants receive a supplemental notice explaining the change;
 2. The employer adopts an amendment (which cannot be retroactively effective) making the change, effective no earlier than 30 days after the participants receive the supplemental notice;
 3. The amendment specifies that the plan will pass the ADP and ACP (if applicable) tests for the entire year using full year testing (current year); and
 4. The employer satisfies the safe harbor rules (including the obligation to contribute safe harbor contributions) through the date of the amendment.
- ▶ *Plan loses top heavy exemption, but see Termination for Cause*

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Safe Harbor 401(k) Plan Termination – For Cause



- ▶ If the termination is for cause, the employer can terminate the plan without providing advance notice and the plan can retain its safe harbor status.
 - ▶ No ADP and ACP testing
 - ▶ Doesn't lose top heavy exemption
- ▶ A termination is for cause if it results from:
 - ▶ a substantial business hardship
 - ▶ a merger, acquisition, or
 - ▶ other event which qualifies for the coverage transition rule of Code §410(b)(6)(C).

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Reinstatement of Safe Harbor 401(k) Plan in the Same Plan Year as Suspension



- ▶ Unless modified by Congress or guidance issued by the IRS, the regulations don't provide for a suspension of a Safe Harbor 401(k) plan and a reinstatement to safe harbor status in the same plan year
 - ▶ The Code prohibits an employer from using the delayed SH nonelective option in the same plan year it is providing a SH match
 - ▶ Using the delayed SH nonelective option in the same year the employer suspended a SH nonelective provision would be a very aggressive application of the new provision
 - ▶ Of course, an employer can reinstate the Safe Harbor provisions for the following plan year

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Discretionary Match and Profit Sharing Contributions



- ▶ Since the contributions are discretionary, an employer has the ability to start/stop or increase/decrease at any time
- ▶ If the employer has a plan with an annual match contribution for which it has been depositing contributions periodically throughout the year, discontinuing the match mid-year may result in a need to true-up at year end.
 - ▶ True-up will require a reallocation or additional contributions
 - ▶ Similar principal applies for the profit sharing contribution

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Fixed Profit Sharing and Matching Contributions



- ▶ The anticutback rule would protect plan-required contributions
 - ▶ Therefore, once a participant has completed the conditions (e.g., last day) for a contribution, the employer may not eliminate the contribution retroactively
 - ▶ 2019 fixed contributions would be protected
 - ▶ For 2020, if the plan has a last day or hours of service (e.g., 1,000 hours of service) requirement and the employee has not satisfied the condition, the employer may amend the plan to eliminate the contribution
 - ▶ If the employee has completed the allocation conditions or the plan doesn't have conditions, the employer still can freeze the fixed contribution for the balance of the plan year

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Deadlines for Contributions



Rule/Type of contribution	Deadline
Deduction	Due date of the tax return (plus extensions)
415	30 days following the deduction deadline
412 (money purchase)	8½ months after the close of the plan year
Safe harbor 401(k) nonelective	Last day of the 12 th month following plan year
Safe harbor 401(k) matching (annual)	Last day of the 12 th month following plan year
Safe harbor 401(k) matching (periodic)	Last day of the following plan year quarter
Profit sharing and matching	Neither the Code nor the regulations impose a deadline for contributions. However, in order for the contribution to be considered for nondiscrimination purposes, it needs to be contributed by the close of the following plan year.
QNECs/QMACs	Last day of the 12 th month following the plan year

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Missed Deadlines



- ▶ **Deduction.** A contribution which misses the deduction deadline would be deductible in the year of contribution, subject to the limits for that taxable year
- ▶ **415.** A contribution which misses its 415 deadline generally would be subject to the following year's 415 limit
- ▶ **Corrective contributions.** If an employer misses the deadline for a required contribution (generally 12 months after the close of the plan year), the employer would need to correct under EPCRS (contribution plus earnings)
 - ▶ **Corrective contributions are subject to the deduction limit in the year of contribution. However, corrective contributions are subject to the 415 limit for the year of correction**

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Depositing Elective Deferrals and Loan Payments



- ▶ The DOL Regulations remain in place.
 - ▶ The employer must deposit deferrals and loan repayments as soon as reasonably possible (i.e., a few business days).
 - ▶ For plans with fewer than 100 participants, the safe harbor is the 7th business day after withholding.
- ▶ The DOL is not likely to allow an employer with cash flow problems to use deferrals or loan payments to support ongoing operations on a short-term basis because this is the employee's money.

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INTERIM VALUATIONS EXTENSIONS FUNDING



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Crucial issue for non-daily valuation plans



- ▶ Check plan document provisions for interim valuation authority
- ▶ If not there, it's likely too late to add for terminated employees
- ▶ If it's there, it's likely a fiduciary decision
- ▶ Best move: adopt policy to guide interim valuations
 - ▶ E.g., Change in market of + or – 20% triggers interim valuation
- ▶ <https://www.relius.net/News/TechnicalUpdateDetails.aspx?T=P&1=1&ID=1131>

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April 15 Extension



- ▶ All April 15 tax returns extended to July 15
- ▶ So sole proprietor return date is extended
 - ▶ Deduction deadline extended
 - ▶ IRA contribution deadline extended
- ▶ Doesn't extend 5500 deadline
- ▶ Doesn't extend deadline to distributed 402(g) excess deferrals

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Document extensions



- ▶ 403(b) remedial amendment period extended from March 31 to June 30, 2020
- ▶ DB restatement deadline extended from April 30 to July 31, 2020
- ▶ DB cycle 3: August 1, 2020 to July 31, 2020
- ▶ No update on DC cycle 3

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Funding deadline extension



- ▶ 2020 minimum funding contributions due January 1, 2021
 - ▶ Contribution increased by accrued interest
 - ▶ Quarterly contributions delayed too
- ▶ Doesn't apply to multiemployer plans

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Thank you!



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QUESTIONS

ANSWERING
YOUR
QUESTIONS

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