

## ERISApedia.com COVID 19 Webcast Questions 4/2/2020

**[NOTE: The following Q&As reflect guidance as of 4/2/2020 and have not been updated for subsequent developments.]**

*Most of the questions posed during the program were answered in the program or repeat questions other people asked. In this document, I answer 98% of the unique questions related to the topic of the program. If you don't find your question here, I probably answered a similar question from someone else. I hope you will understand if my answers are brief. Because of the large volume of participants in the webcast, I will not be able to reply to individual questions outside of the ERISApedia.com ASK service other than on a fee-for-service basis. In these answers "CRD" stands for coronavirus-related distribution. These answers reflect my best judgment at the time and I am solely responsible for them. They are subject to change based on additional reflection or official guidance. Thanks for joining us for the program. SDW*

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#### **Coronavirus-Related Distribution - [Top](#)**

**Q.** Slide 13 states "only applies to pretax amounts or rollovers to IRAs." Please confirm that designated Roth amounts can be rolled back to an eligible plan, and that bullet on Slide 13 means any nontaxable rollover is not reported on Form 8915B (or whatever form is designated for reporting the coronavirus-related distributions).

**I'm revising my remarks. I think after-tax and Roth amounts can be rolled into a plan because CARES treats the distributions as trustee-to-trustee transfers. My apologies.\**

**Q.** Any thoughts on whether CRD may act as a trigger for In-plan Roth Conversions in an employer-sponsored plan?

It's an in-service distribution and an eligible for rollover, so Yes. Of course, since 2013 plans haven't needed that kind of trigger.

**Q.** Will there be a new 1099-R code for the CRD distributions?

I expect not. Use Codes 1 and 7.

**Q.** Can you confirm if the coronavirus related distributions are only available to active participants? Or do they (and the favorable tax treatment) apply to both terminated and active participants?

Former employees are included.

**Q.** Can participants take multiple CRD distributions as long as the total remains below the \$100k limit?

Yes.

**Q.** Thanks for the information. Could a person who was already considering the conversion of his traditional IRA to Roth do this and spread the tax liability over three years given the distribution rules under the CARES Act?

I don't see why not.

**Q.** Can the Plan Sponsor set a lower distribution amount for Covid-19 related distributions ie \$75,000 rather than \$100,000?

Yes.

**Q.** If a 401(k) plan doesn't allow for in-service or hardship distributions, does the plan have to be amended in order to allow the CARES Act withdrawal to be effective? If yes, when does this plan need to be amended to allow for in-service or hardship distributions?

You don't have to add hardship withdrawals to authorize CARES Act withdrawals.

**Q.** What about Roth withdrawals? Did the Act address them? Under current rules, contributions and earnings in a Roth 401(k) can be withdrawn without paying taxes and penalties if the account owner "qualifies" (at least 59½ and has held their Roth 401(k) account for at least five years). Did the Act address these rules?

The Act did not discuss Roth. It did not magically transform a distribution which was not qualified into a qualified distribution.

**Q.** Repayments of distributions are deposited to the rollover source, correct? If so and if Roth, would go to Roth rollover source? Or back to the original source from which it was distributed?

I would include them in a rollover source, although Roth contributions will need to be tracked as Roth.

**Q.** Is CARES Act distribution/RMD Available for DB plans?

RMD relief is not available in defined benefit plans. Pension plans can make CRDs but are subject to normal distribution restrictions. An in-service participant cannot receive a CRD before the earlier of 59 ½ or normal retirement age. Normal spousal consent rules would apply. The same would be true for a money purchase plan or for pension money transferred to a profit sharing or 401(k) plan.

**Q.** Should sponsor treat all distribution request this year as CRD?

No. CRDs are available only to qualified participants.

**Q.** Does the new distribution rules apply to ESOPS?

Yes

**Q.** Does this also apply to governmental 414h plans?

414(h) is limited to qualified plans. And qualified plans can use the CARES relief

**Q.** If the plan document does not allow for any in-service distributions, do you have to amend the plan to allow in-service distributions, generally, before you can utilize this for furloughed people?

No.

**Q.** If a participant's spouse is laid off, would that qualify for the participant to take a COVID-19 distribution?

No.

**Q.** What if a person is sick with most likely Corvid but was not given a test by the doctor because they were not high risk? Actually happening now.

He or she would be a qualified individual because they experience "adverse financial consequences as a result of being quarantined."

**Q.** What if a participant's spouse isn't diagnosed with COVID19, but the spouse experiences adverse financial questions as in item 3 on this slide?

That doesn't cut it.

**Q.** Do you have to amend the plan to provide for this additional type of distribution?

If you want to make it an additional distributable event, yes.

**Q.** Does a partner count for adverse financial if: the business is actually exempt from closure, and the firm is successfully working from home, but the partners have suspended distributions?

I don't think the partner qualifies as someone who suffered adverse impacts by "closing or reducing hours of a business owned or operated by the individual due to such virus or disease."

**Q.** A client asked if an existing part-time employee who is still working but lost his part-time employment with a second employer, can he take a distribution for the client's 401k plan

Yes.

**Q.** Follow up to the in-service situation.....if a person has been gone from current employer for 5 years but has qualifying event for new employer. Plan requires terminated to take full distributions (partial distributions are not allowed), if they allow the Coronavirus distributions, are they required to allow partial distributions for terminated employees?

This is going to require a plan amendment. Word it as you choose.

**Q.** What if the CDC recognized test shows up as a false negative?

You haven't been diagnosed by a CDC recognized test.

**Q.** So if your state issues a stay at home order does that mean you are quarantined? Any therefore eligible for a CARES act distribution?

No. Quarantine is much more rigorous than "stay at home."

**Q.** Does the employer have the responsibility to ask terminated participants if they qualify for Coronavirus distribution? For instance, someone who terminated in 2018 and is now requesting a distribution. Since there is no early withdrawal penalty, it would presumably make a difference for them as well.

The law does not impose that requirement.

**Q.** Does that mean that an employee who has their hours reduced doesn't qualify for a distribution?

False. Having hours reduced is one of the factors making one a qualified individual.

**Q.** Can someone roll money out to an IRA instead of taking as a cash distribution out of a 401(k)?

Yes, although the plan is not required to cooperate with a direct rollover for a CRD.

**Q.** On the COVID Distribution and it applies to Governmental 457b plans but not non-profit 457b seems to be different than what I am reading.

Check the definition of qualified distribution. It is limited to a distribution from an eligible retirement plan. Act §2202(a)(4)(A). That refers you to Code §402(c)(8)(B). [Act §2202(a)(4)(C)] Tax-exempt 457(b) plans aren't eligible retirement plans. Code §402(c)(8)(B)(v).

**Q.** So why would a non-exempt 457b not be a qualified option?

Because that's the way Congress wrote it! Tax-exempt 457(b) plans are limited to key management and highly compensated employees. They cannot receive or make rollover distributions.

**Q.** Can a participant choose to change current deferrals over to payroll deductions to re-pay the COVID distribution?

If the plan administrator can support it, yes. I imagine that would be administratively challenging.

**Q.** To spread the tax - they would only receive one 1099R from the vendor, correct? It is the participant's responsibility to spread the tax on their individual taxes?

Correct. The participant's election does not impact the plan's reporting on Form 1099-R.

**Q.** With regard to COVID-19 distributions, do you know how the tax is spread over the 3 years (evenly or the participant can choose how much to pay each year)?

Include 1/3 of the income each year, or else include 100% in 2020.

**Q.** Can tax payments on distribution be postponed until the 3rd year (if employee wants to try to pay back) or do taxes need to be paid each year?

Pay taxes each year. File for refunds for earlier years. See Form 8915-B instructions.

**Q.** 10% voluntary withholding - so default is none or default is 10%? And participant can choose 10%, none, or other?

Yes. Use W-4P to get the participant's election.

**Q.** What about mandatory state withholding for states that have it?

Federal law does not impact state withholding.

**Q.** Is the 20% withholding waived only if the plan permits these distributions?

No.

**Q.** Do you have a sample 3405e10 notice you could provide?

No. The key thing is to provide the participant Form W-4P.

**Q.** If a participant "rolls" the COVID-19 distribution back into the Plan, is it considered a related rollover?

I'd say yes.

**Q.** So every distribution during 2020 can essentially not have 20% tax withholding if participants certify they are qualified?

Pretty much.

**Q.** If coronavirus-related distributions are distributable events, does that mean a deemed loan can be offset?

To receive a CRD, you have to be a qualified individual. In the typical case, you won't have deemed distributions to qualified individuals.

**Q.** If the plan allows for the in-service, can the employer require the employee take their IRA available funds first?

I have no idea how you would enforce that.

**Q.** Is the employer responsible for making sure that the participant doesn't exceed \$100,000 from all source (IRA, 401(k)?).

No. The employer is responsible for limiting CRDs to \$100,000 from all plans the employer or any related employer maintains. If I participate in the Ford plan and the GM plan, I could conceivably take \$100,000 from each and another \$100,000 from my IRA. But only \$100,000 would qualify for special tax treatment. The plan, however, is blameless if it treats its distribution as a CRD.

**Q.** If it is not a specific COVID-19 distribution, how would you know to do the voluntary 10% rather than the mandatory 20% withholding?

If the participant has certified the participant is a qualified individual, and the amount does not exceed \$100,000, use the voluntary withholding.

**Q.** Is the plan Sponsor required to disseminate CARES / CRD information to the participants?

The pension rules of CARES do not require it. Practically speaking, you really haven't made the provisions available unless and until you inform participants. If the only person who takes a CRD is the owner of the company, because the owner was the only person who knew about it, you likely have a benefits, rights, and features nondiscrimination issue.

**Q.** Are 401(a) Governmental or tribal plans affected by the CARES Act in any way?

Yes. Qualified plans can take advantage of it, regardless of the sponsor.

**Q.** On your example of Terminating Plan qualifying for no penalty, 3-year spread, and rollover - does that apply to a plan that terminated in January? Or plans that terminated after the Act was signed?

The law doesn't ask why you are getting the distribution. The law doesn't care when the distributable event took place. The law only cares that the distribution is made in 2020 and the recipient is a qualified individual.

**Q.** Relating to slide 13 and pension funds not being available for in-service prior to 59.5. I have seen multiple providers indicate CARES dist will be pro-rated across all sources and investments. Is this an issue?

That's an administrative decision and not one mandated by the statute. But that provision could be a problem if there is transferred money purchase funds.

**Q.** Doctor says stay home due to medical conditions and chance of getting Covid 19. Person does not have COVID 19. Can he take a COVID 19 distribution?

My take: Isolation is different from quarantine. However, I could argue that under the circumstances the individual has had "work hours reduced because of" the disease.

**Q.** Can a plan allow for the distribution due to COVID-19, but don't allow the 3-year payback into the plan?

Yes.

**Q.** I'm from ND where a few companies laid off a number of employees, because of the drop in oil prices (indirectly related to COVID) any advice on this?

Tough one. I'd buy that it's indirectly related and they are qualified individuals.

**Q.** Are coronavirus distributions from 401(k) plans permitted from all fully vested money types? If so, are they permitted from all fully vested money types even if the participant is under age 59 1/2?

Yes, except for transferred pension accounts.

**Q.** If a terminated employee takes a COVID distribution, can that employee repay the distribution to the plan of the employer he no longer works for? Does the prior plan have to accept it if the employer is otherwise allowing the repayment for active employees? What if the plan says that rollovers cannot be made by former employees?

Follow the plan document. CARES doesn't mandate that a plan accept the rollovers.

**Q.** Can you take out a CRD distribution and then pay off the outstanding loan after termination?

Why not?

**Q.** I have a plan (restaurant group) that excludes hourly employees. They have let most of the managers go due to COVID19. However a few have been hired on as hourly employees (no longer participants in the plan). Does that qualify them as eligible for a CRD?

Have they been terminated, furloughed, or had hours reduced? Yes. They qualify.

**Q.** Can a CRD Qualified Participant choose to roll their money out of the Plan in addition to taking a lump sum cash distribution?

Check plan terms. CARES does not address this.

**Q.** Do terminated participant balances count for top heavy balances?

Yes. And CRD's count for 5 years for participants in service (1 year for terminated participants).

**Q.** Just so I'm clear...all reference to 457(b) in the slides and discussion are ONLY gov't 457(b)'s (not tax-exempt 457b's)

Yes. 457(b) plans do not enjoy any relief under CARES.

**Q.** When you mentioned "no need for special tax notice", does that mean this will not have to reflect any of the new rules at any point?

I mean you don't have to provide a 402(f) notice (special tax notice) in connection with CRDs

**Q.** If plan does not permit rollover contribution, then does the plan not have to take repayments of Coronavirus distributions?

True. But, then, no plan "has to" take CRD rollovers.

**Q.** No one is mentioning state taxes. California has a 2.5% pre 59-1/2 tax in addition to ordinary income tax. Absent state legislation CARES distributions would be subject to full state tax and applicable penalties - right?

Correct.

**Q.** If the plan decides to use the Coronavirus in-service distribution option, people are certainly only able to take vested amounts, but what about source limitations? They still have to be at least 59 1/2 to take from Deferrals and Qualified contributions, correct?

No. The Act specifically provides that CRDs satisfy the distribution restrictions for 401(k), 403(b), and governmental 457(b) plans.

**Q.** Is the 10% penalty going to be up to a Participant to claim on their 2020 tax return or will there be new 1099R codes that are applied to these distributions and deemed loans?

The participant will need to claim it unless the IRS decides to provide new 1099 codes. They have not done so with prior disasters.

**Q.** But if the Act states that a CRD is an exemption under IRC Section 72(t), if a participant certifies wouldn't we have to put code 2?

Qualified reservist distributions are also exempt from 72(t), but we use Code 1.

**Q.** Who has responsibility of monitoring if the individual has exceeded the 100k coronavirus relief limit? For example, if participant takes a 59 1/2 distribution for 50k and then later terminates in 2020 taking their remaining balance of 100k, is the TPA responsible for saying only 50k of the termination distribution is eligible for relief?

The participant is ultimately responsible. However, if the participant is a qualified individual, and hence the 59 1/2 distribution is a CRD, the plan would take that into considering in calculating the limitation on CRDs available from the plan.

**Q.** Please, if CRD distribution taken do they have to pay taxes in year 1 and year 2 if they plan to pay back all of CRD in year 3?

Yes. They then file a refund claim in year 3 when they repay.

**Q.** If someone is being laid off for Covid - he is asking to take a rollover distribution to move the balance to an IRA (and not take any as cash). Does this qualify?

The plan does not need to cooperate with the direct rollover but can. Yes, it qualifies.

**Q.** Are Covid Distributions available through 12/31/20 or 12/30/20? Did I ready it wrong?

The last day for distribution is December 30. Quoting the Act, a CRD is made "on or after January 1, 2020, and before December 31, 2020."

**Q.** How does vesting come into play when distributing funds for a coronavirus related distribution? Would it follow the same rules as the in-service distribution provisions in the plan?

This will likely depend on the wording of the CARES amendment.

**Q.** Some vendors are treating CRDs as hardships and allowing it only if the plan allows hardship distributions already. Others consider COVID-19 distributions as a separate distribution, not hardship, and it available to every plan. WHICH ONE IS IT? I am confused!

By statute a CRD is a separate distributable event. But a recordkeeper can impose limits on the plan provisions it chooses to administer. If you don't like your recordkeeper's choices, change. But first, give them a little time to think things through. As I type this the ink on the President's signature is only 8 days old.

**Q.** If I took a distribution from my IRA and rolled it into another IRA within the last year, would I be able to repay a CRD from my 401k account into another IRA within 12 months of my IRA distribution?



Yes you would, because the repayment is treated as a trustee-to-trustee transfer.

**Q.** The Coronavirus-related distribution (CRD) provision indicates the limit is Section 2202(a)(2) (A) is \$100K per individual but then the next section talks about limiting this amount to all employer plans of the same controlled group. So, is this an overall \$100k limit by individual similar to 402(g) limit or if the employee works for several different unrelated employers can they have individual \$100K limits per each employer (similar to 415 limits)?

This is similar to the 402(g) limit and that's a helpful analogy. 402(g) limits what the employee can exclude. 401(a)(30) limits what the plan can allow the participant to defer. 401(a)(30) looks only to plans of the employer and related employers. 402(g) looks at all employers. By the same token, I can claim favorable tax treatment for only \$100K of CRDs, but each unrelated employer could distribute up to \$100K of what that employer thinks are CRDs. (Side note: that may be one of the reasons we don't use Code 2 on a 1099-R.)

**Q.** The plan document states after year end payout.....if a terminated participant falls under the COVID19 can they pay out early or does the plan have to be amended to allow for immediate payouts?

Follow the terms of the document. If you don't like it, amend it.

**Q.** Is there a way to categorize distributions taken in 2020, but prior to 3/27 as CRD so the participants get the relief?

There is no categorization that needs to happen because there is no special 1099-R reporting

**Q.** I understand that the coronavirus related distributions have 10% withholding that needs to be done but is there an option that participants can select to have no withholding done?

Yes. See Form W-4P

### **Coronavirus-Related Loan Extensions - [Top](#)**

**Q.** If a participant previously had a plan loan and defaulted on the loan, are they now able to take a Coronavirus Loan?

That's a function of the plan terms and plan loan policy. CARES did not address this issue.

**Q.** If a plan does not currently allow loans, can they add loans temporarily, for the 180 days of the COVID-19 enhancements only? Would they have to amend the plan to add loans and then amend again to remove them?

Yes to both questions,

**Q.** Are the old regular plan loans automatically eligible for the waiver of the loan payments?

Yes.

**Q.** Is the ability to allow a qualified individual to delay their existing or newly issued loans an "optional" provision.

Yes, but the tax rules are not.

**Q.** If a plan doesn't permit participant loans, will the plan need to be amended prior to allowing the CARES Act loan expansion? When does the plan need to be amended to permit participant loans?

If the plan wishes to allow loans, it will need to be amended to do so. Conservatively speaking, such an amendment should be adopted before the end of the 2020 plan year.

**Q.** Many folks are suggesting take the loan first. However, if they take the loan and default within a year or so will they be subject to paying the entire tax in the year of default including the 10% penalty?

That's a valid point. Deemed distributions in 2021 will not qualify for special tax treatment. Note that additional interest will accrue.

**Q.** Does the \$100,000 loan increase include loans already outstanding?

Yes, just as the \$50,000 balance does. So, suppose I have a vested account balance of \$250,000, an outstanding loan of \$25,000, and my highest balance in the last year was \$28,000. The most I can borrow is \$72,000.

**Q.** For the loan changes due to coronavirus, is the 1-yr delay in repayments optional or required?

It is optional but the taxation consequences are mandated.

**Q.** Furlough vs. Leave of absence - Some employers are wanting to say furloughs are a LOA for suspension of loan repayments. CARES Act suspends loan re-payments from 3/27/20 - 12/31/20. If classified as LOA and not furlough, most states (Texas possibly excluded i.e. FMLA) do not allow participants to collect unemployment while on LOA. However, most states allow collecting unemployment while on furlough. Thoughts on not calling a furlough a LOA and could preclude the participant from collecting unemployment by mis-characterizing a furlough a LOA?

Why are you worrying about this? Use the CARES loan relief and eliminate the question. But if you want to use the Treas. Reg. §1.72(p)-1 Q&A 9 leave of absence rules, they don't focus on what you call the "leave." They focus on whether your compensation from the employer exceeds the loan payments.

**Q.** What if the plan document only allows 1 loan and the employee already has an existing loan?

Amend the loan policy/plan document if you want to permit addition loans. If you decide to stay with one loan, beware the refinance rules in Treas. Reg. §1.72(p)-1 Q&A 20.

**Q.** Could a qualified individual be a business owner wanting to use the loan to meet payroll for employees?

CARES amends the maximum loan limits. It doesn't amend the prohibited transaction rules. I've always been leery of a business owner taking a loan to plow it into the business as an indirect prohibited transaction.

**Q.** Does loan relief apply to defined benefit plans as well as defined contribution plans?

Yes.

**Q.** Can the expanded loan provisions be applied to the purchase of a primary residence and amortize over a 15 year period if the Plan allows?

Yes.

**Q.** One recordkeeper (so far) is saying clients can only choose 'all or nothing' with regard to the CARES act provisions. Can't a client choose distributions & not additional loan amount; or include loan repayment delay but not increased loan limit?

What the law allows and what the recordkeeper allow are two different things. The law allows a plan to pick and choose. A recordkeeper doesn't have to offer that choice to plans it administers.

**Q.** What if you are the employer - dentist - not essential, loss of income, delay loan payments? EE has \$300,000 balance. Can the ee take a \$100,000 covid loan, \$100,000 covid distribution, and a \$100,000 regular hardship distribution assuming the ee can substantiate the \$100,000 regular hardship (like in the middle of purchasing a primary residence)? Thanks

Good example. Yes. Normal hardship rules would apply to the hardship portion of the distribution.

**Q.** If a plan does not currently allow for loans, in-service distributions or hardships, it sounds like they do NOT need to make an immediate amendment to allow for them because the COVID loans and distributions are totally different and subject to different limitations etc. They just need to amend the doc to include COVID specific loans and distributions by the end of the 2022 plan year correct?????

I concur on distributions. Loans are different. CARES simply amends the maximum amount of the loan. It doesn't "turn loans on."

**Q.** what if I was laid off 3/1 and no repayments made between 3/1 and 3/27?

If there was a repayment due 3/15, it is not extended. The plan would need to offset the loan by June 30. Since you are a qualified individual (assuming the layoff was coronavirus related), the distribution could be a CRD.

**Q.** So can a participant take a loan under new limits AND postpone the payments for a year?

Yes.

**Q.** I thought the delay in loan payments due during the 3/27-12/31 period are for ANY loans to ANY participants (not just Qualified Individuals)?

"There are more things in heaven and earth, Horatio, Than are dreamt of in your philosophy." Hamlet (1.5.167-8). More to the point "In the case of a qualified individual with an outstanding loan (on or after the date of the enactment of this Act) from a qualified employer plan..." CARES Act §2202(b)(2).

**Q.** If I suspend loan repayments for only 6 months, I assume the repayment period is extended only by 6 months? rather than 1 year?

The plan can do what the sponsor wishes to do. If the plan wants to demand full payment after 6 months, it can. But the tax consequences are set by statute. The plan cannot subject a participant to taxation by its choice.

**Q.** Qual Indiv loan: Payments due 3/27 to 12/31 can be delayed one year. So they still have to start regular pymts 1/1/21, but the payment due 9/30/20 doesn't have to be made until 9/30/21? Or can they just not make payments for a year starting at any point in the 3/27 to 12/31/20 period?

You've put your thumb squarely on one of the more challenging aspects of the Act. I agree payments restart 1/1/21 (unless the last payment was due in 2020). At that point, you probably extend the loan for one full year and reamortize the payments of the extended term.

**Q.** If CARES Act provision is adopted are you saying that ALL loan payments are suspended? Can a participant continue to make their loan payments if they choose?

Yes.

**Q.** What if the participant is laid off so there is no pay to withhold loan payment from? Would the delay apply or default?

Let's start with the notion that the law doesn't require that payroll be the only source of repayments. But let's suppose you have a due on termination clause. You could enforce it, which means there is a loan offset in 2020, which is probably a CRD (and the participant would have the normal loan rollover rules in any event). You could use the statutory extension to delay the offset until 2021, but that loses the possibility to treat it as a CRD.

**Q.** Is there a penalty for an "early" loan payoff?

I've never heard of a retirement plan imposing such a penalty.

**Q.** Thoughts on DOL requirement that plan loans be secured by no more than half of the account balance - prohibited transaction?

They affirmatively waived that requirement with Katrina. I expect they will here also.

**Q.** A loan taken out on July 1, 2019 has a June 30, 2024 due date. The employee does not pay any installment from 4/1/20 - 12/1/20. Is the end of the term extended by 9 months, or must the delayed repayments be reamortized over the original term?

I'd say the term can be extended a full year.

**Q.** Why would you want to amend to allow terminated participants to take a loan, when they could take a full distribution from the Plan due to a distributable event?

This is a design question and opinions will differ. My response: Loans get repaid and the funds are then available for retirement. And, consider this: Today your plan loan is likely the best performing asset in the plan!

**Q.** If a qualifying participant takes out a CARES Act related loan in September 2020, and they want to suspend payments for a year, when is their first payment due?

1/1/21.

**Q.** Safe Harbor plan participant has a loan and would like to take advantage of 1 year delay of loan repayments. Am I understanding that this is not available under COVID-19 for a safe harbor plan?

False. A safe harbor plan can use the delay in loan extension rules.

**Q.** Can the loan 1 year extension apply to terminated participants too? I assume so.

Yes.

**Q.** Can the COVID-19 withdrawal provisions be added to limit the withdrawal to only allow for like safe harbor reasons

Yes. Why? I've been furloughed. Why should it matter that I am (or more likely am not) about to go into foreclosure.

**Q.** If a participant loan is defaulted, can that be spread over the 3 tax years too?

If it is a loan offset, yes.

**Q.** But are you amortizing with basically 2 payments for each period given that April thru Dec are delayed the full year? So May 2020 and May 2021 payments are due at same time?

Payments begin in January 2021 and you essentially reamortize the note at that point, with an additional year tacked onto the end.

**Q.** If there are missed loan payments from March 1st before the CARES Act relief becomes effective 3/27, do those repayments need to be made in order to prevent default or could the EPCRS correction for the default be used to keep the loan in good standing even if those earlier missed payments are not made up until after the 1-year CARES Act relief is over? Thanks!

The EPCRS rules still apply, in addition to the CARES rules.

**Q.** A participant has a plan loan and losses job due to business closing. The loan will be become immediately due. Does the CARES Act provisions apply to this defaulted loan? No 10% penalty and pay tax over three years?

Yes.

**Q.** For new loans in the next 180 days, with the one year delay of payments I take it, it makes the loan a 6 year loan?

Yes.

**Q.** To confirm, your stance is to postpone payments for the full year? You are not allowing participants to choose how long they wish to defer payments?

You can let participants choose. Why not?

**Q.** For the loan suspension provision under the CARES Act can the plan sponsor enact this provision immediately for all loans with payments currently due?

Yes, for qualified individuals. However, for employees that aren't qualified individuals, no.

**Q.** Do the Plan's current loan provisions still apply (i.e. loans for hardship necessity only, medical bills, etc.)?

Yes. Only the amounts differ. If you want to change the loan policy, I recommend you do so before the end of the 2020 plan year.

**Q.** Once the participant reaches the 1-year loan repayment delay and continues not to make a payment, can the loan be offset immediately or do we have to wait for a cure period?

Follow the terms of the plan loan policy, including your normal cure period rules.

**Q.** Are principal residence loans also allowed to be extended one year?

CARES does not deal with that explicitly, but I think that would be a reasonable interpretation, especially given the fact that the only limitation is that the loan be commercially reasonable.

**Q.** If a furloughed employee, is rehired do they have to restart loan repayments?

No. Not until January 1, 2021.

### **Qualified Individual/Certification - [Top](#)**

**Q.** As a record keeper is it safe to rely on the self certification for a COVID distribution or is it best practice to have the plan sponsor approve these distribution?

I'd rely on employee certification because the law allows it, and does not require you to double check.

**Q.** What about a Participant that terminated a while back, say 2 years ago, and left their balance in the plan? Can they now, if COVID "eligible," request and receive their account balance as a "Coronavirus-related Distribution?" (no 10% excise tax)

Yes.

**Q.** I understand that employer may rely on employee's self-certification, but if the employee is self-certifying they've been impacted by the reduced hours & the employer knows how many hours they have been reduced by (for example, a full-time employee is only reduced by 4 hours/week), should the employer consider the fact in this case & still deny it if they don't think the self-certification is valid?

I think the employer is rewriting the law. Read what it says: "[the employee] experiences adverse financial consequences as a result of . . . having work hours reduced due to such virus or disease." It doesn't say having your hours cut in half. It says having hours reduced. A full-time employee having 4 hours/week reduced is losing 10% of their pay, and they still need to pay 100% of their bills. We don't need to be looking for opportunities to make this difficult for people. It's difficult enough as it is.

**Q.** regarding an employee being qualified - supposed to take the "word" of the individual through certification.... what if the employer knows the employee doesn't qualify (they are still working - haven't missed a day because of the pandemic for example)

Here's the statute: "The administrator of an eligible retirement plan may rely on an employee's certification that the employee satisfies the conditions of subparagraph (A)(ii) in determining whether any distribution is a coronavirus-related distribution." You may rely. You don't have to. That said, compare that with the regulatory employee certification for hardships, which requires not only that the employee make certain representations, but that "The plan administrator does not have actual knowledge that is contrary to the representation." That actual knowledge clause is not in CARES.

**Q.** For the loan changes due to coronavirus, can a "qualified individual" self-certify like with the coronavirus-related distributions or is more stringent documentation required?

Self-certification is available.

**Q.** Do you believe that a participant who is requesting a Loan Repayment Delay should certify/attest that they are a Qualified Individual in some documented way?

Yes, for the protection of the plan on audit.

**Q.** Just to confirm on Covid Distributions. Suppose a person is "fired" or they just "quit" and covid is not the reason... Are they eligible for the special covid distribution?

The termination must be "due to such virus." If I'm fired because I'm stealing the company's money, I am not a qualified individual.

**Q.** Our employees are furloughed 1 day per week, or 20% in hours and a 20% reduction in pay. It sounds like you stated that they are not entitled to CAREs Act relief in terms of delaying loan payments. Is my understanding correct?

No. They've had a reduction in hours.

**Q.** Is a Plan Termination participant due to the plan being terminated due to COVID considered a Qualified Individual?

A plan termination distribution can be a CRD to someone who is otherwise a qualified individual, but the plan termination doesn't, by itself, make you a qualified individual.

**Q.** Would participants that terminated before the Corona virus and not due to the Corona Virus have the same benefit of a penalty free distribution?

If they are a qualified individual, yes. Suppose I terminated from the employer maintaining the plan in 2015 but left my money in the plan. Now in 2020 I'm laid off from a different employer, due to the virus. I'm a qualified individual and distributions in 2020 can be penalty-free CRDs, including distributions from the former employer's plan.

**Q.** If an employee is furloughed with pay are they eligible to defer loan payments if they have another qualifying condition other than financial needs.

The participant, the participant's spouse, or the participant's dependent must be diagnosed or the participant must be adversely economically impacted by the disease, in one of the ways mentioned in the statute.

**Q.** Am I right in thinking that if a participant is not a Qualified Individual, they cannot take advantage of these benefits, i.e. delay of loan payments, Corona Virus distributions, etc.

Yes.

**Q.** You mentioned that an employee who had his/her salary reduced would not be a qualified individual? Is that correct? Why would somebody working less hours be qualified but not someone who had salary reduced?

That is what the statute says.

**Q.** If the Plan chooses not to adopt the Cares act distributions, then can you please explain again what tax benefits a participant has per slide 14?

The participant can still qualify for the favorable tax treatment for CRDs, and for the deemed distribution relief.

**Q.** Even though Plan Sponsors must rely on employee certification that they qualify for a distribution is there any documentation they can require, legally...without violating HIPPA?

We are not asking about treatment. We are asking if people have been diagnosed. I'm not a HIPPA expert but I don't think that HIPPA is implicated. Of course, I would keep participant information confidential.

**Q.** What would be the definition of being quarantined?

In Derrin's First International Dictionary, being quarantined is a more serious form of the social distancing we are being encouraged to do. I'm allowed under current restrictions to go to a grocery store. If my doctor suspected I had COVID-19, I would be instructed to stay home and stay away from others at all costs. That's quarantine.

**Q.** Can employer request CARES distribution proof?

What proof do you want besides the employee certification? Why do you want it? Yes, you can impose whatever policies you wish in a nondiscriminatory manner, but why?

**Q.** CARES 2202(a) provides that a plan administrator may rely on an employee's certification that they are an individual with regard to a coronavirus-related distribution. There is no corresponding provision in 2202(b) with regard to the increased loan limits. How should a plan administrator determine if an individual is qualified for increased loan limits?

I read it differently. The loan limits reference 2202(a) to determine if an individual is a qualified individual. I think the reliance provision applies to both.

**Q.** I'm aware that the employer can rely on the participant certification, but what documentation should the employee keep for audit purposes?

I don't know that there is any further documentation needed.

**Q.** Self-employed individual has loans. He is in tourist industry and lost most of his income. He wants to stop paying his loans for the year period. Is there any self-certification required to stop the loan payments? Or does he stop the loan payments?

Self-certification applies. A qualified individual includes someone who "who experiences adverse financial consequences as a result of . . . closing or reducing hours of a business owned or operated by the individual due to such virus or disease."

### **Spousal Consent - [Top](#)**

**Q.** If the plan requires spousal consent for normal distributions, is spousal consent required for Corvid distributions?



If it is subject to QJSA rules, yes.

**Q.** Suggestions or alternatives to how to get spousal consent notarized when notary is closed

It can be witnessed by a plan representative. I suppose that can be done over the internet. That said, give a call to mobile notaries in your area.

**Safe Harbor/QACA 401(k) Suspensions - [Top](#)**

**Q.** Have we heard of any relief for Top Heavy Minimums for clients that were meeting that via Safe Harbor Match but now need to suspend the match?

No.

**Q.** Can a SH plan with an accelerated SH Match formula be amended to the basic SH match formula during 2020 and maintain their SH status?

No. That is a suspension or reduction and the full consequences of suspension apply.

**Q.** Can a plan suspend temporarily in hopes that they can restart after crisis?

Can you freeze temporarily? Yes. Can you suspend a safe harbor temporarily? No. if you suspend during the year, safe harbor match is shot, and the conservative view is that safe harbor nonelective is as well. You can restart safe harbor next year if you choose.

**Q.** on Exiting a Safe Harbor, if #1 operating at a loss, then the ER does NOT have to give 30-day notice? and can you explain more the pro-rating compensation line?

If you are suspending, as opposed to terminating, you MUST give 30 days notice. If the suspension occurs April 30, 2020, in a calendar year plan, the compensation limit used in computing the safe harbor contribution is \$285,000/3, or \$95,000.

**Q.** Do you think the IRS is going to remove the 30 days notice requirement to stop safe harbor contributions?

They've never done so in the past.

**Q.** If the Covid-19 situation causes a plan sponsor to operate at an economic loss, what potentially would a plan sponsor use to prove such in the event of an audit?

The books of the employer. That said, I doubt many auditors are going to be disputing that point.

**Q.** How does plan suspension work for a plan that is Top heavy? Will the plan end up owing a top heavy minimum if the key employees were deferring?

Yes. The safe harbor contribution owed before the suspension takes effect would count towards satisfying top heavy.

**Q.** Can you provide the 30-day notice and amend the plan at a later date?

Yes, but the suspension cannot be retroactively effective. In other words, the obligation to pay the safe harbor contribution continues until the latest of (1) 30 days after the notice, (2) the day the amendment is signed, or (3) the day the amendment is effective.

**Q.** What about plan that calls for flexible safe harbor that already started contributing but stops contributing and lets participants know they stopped. There never was a promise - only a maybe notice to participants originally given. Would 30 days notice be required? They know testing is required.

If there was a maybe notice, but the plan provided for the ADP test (i.e., the plan had not been amended for safe harbor), then you don't have to give any notice at all. The nonelective already made is simply a nonelective contribution.

**Q.** What about changing from a per payroll SH match to an annual match? 30 day notice?

Follow the procedures in Notice 2016-16 (which require a notice and opportunity to change deferral elections; the amendment would be retroactively effective to the beginning of the year).

**Q.** The new SECURE Act will allow a plan to amend to a Safe Harbor Non-Elective by 12/31 for the current year. If the plan is currently a Safe Harbor Basic Match and they are removing this due to financial difficulties resulting from COVID-19, can they amend to the SH Non-Elective in December?

No.

**Q.** The ADP/ACP testing after suspension is for full yr or only the part they are nonsh?

Test for the full year using current year testing.

**Q.** Is there an exemption from the ADP/ACP/top heavy for an employer who is experiencing an economic loss?

No. The economic loss lets you suspend. It doesn't relieve you from the consequences of suspension. If you'd like to keep safe harbor status, terminate the plan altogether as a result of substantial economic hardship.

**Q.** What about just eliminating the SH match for HCEs or a subset of HCEs?

That's a suspension. The NHCEs will thank you but it earns no brownie points with the regulations. However, the NHCE contributions will count towards the top heavy minimum, and QNECs (alias safe harbor nonelective contributions) can be used to satisfy the current-year ADP test.

**Q.** Can a safe harbor nonelective plan be frozen? Also, no successor K plan for 12 months.

You can freeze it. That's a suspension. You could restate it January 1, 2021 if you'd like.

**Q.** I thought You cannot start a new plan after terminating a 401(k) Plan for 12 months after the final payout has been processed?

True. So, alternatively, you transfer to the new plan. But you can't do that if you've made in-service plan termination distributions.

**Q.** And you have to 100% vest with a terminated plan.

Yes.

**Q.** Please confirm in the example you gave where employer didn't give out the 30 day notice so doesn't have a suspended safe harbor. That was a case in which the employer was not operating at an economic loss, correct?

I'm going to repeat myself here because a lot of people are making this mistake. Suppose the employer is in dire financial straits. Employer chooses to suspend (not terminate) the safe harbor plan midyear. The employer can do so because it is operating at a financial loss. Treas. Reg. §1.401(k)-3(g). The employer **MUST** give a 30 day notice before the suspension takes effect. Steve and I agree that if the employer does not do so, the suspension is ineffective and the obligation to make the safe harbor contribution continues until the end of the year. If the employer weren't operating at a loss, it wouldn't be able to suspend unless it have included the "maybe not" notice as part of the safe harbor notice. But economic losses do not allow a suspension to avoid the 30 day notice requirement. By contrast, a substantial business hardship will permit **termination**, as opposed to suspension, without a notice and without losing safe harbor status.

**Q.** Confused....Safe Harbor EXIT deals with terminating just required ER SH Contribution...? Whereas SH Term of Plan for cause or not is an entire PLAN Termination? and without term entire plan?

Suspension (the regulatory term) or exiting (our term) refers to the safe harbor contribution. Participants can continue to defer to a suspended safe harbor plan. Termination refers to killing the entire plan. You must distribute 100% of the plan assets (or otherwise transfer them to another plan) ASAP, generally within 12 months after the effective date of the termination.

**Q.** If a SHNE plan amends to cease SH mid-year, there is no requirement for a 30-day advance notice to participants under SECURE Act, correct?

Unless and until the IRS amends the 401(k) regulations, I wouldn't bet my client's money or my malpractice insurance on that conclusion.

**Q.** What if the SH match is calculated annually but is paid more frequently (per payroll). Can the stop making the per payroll SH match at the end of the year?

You could stop contributing the match with each payroll. It would be an operational failure if you do not contribute it within 12 months after the end of the plan year.

**Q.** If your match is calculated and paid per payroll period, and is suspended, can you be exempt from true-up?

Yes.

**Q.** What's the difference between the reinstatement of the safe harbor QNEC and 3% maybe where the SH notice states that a 3% maybe made and then amend the plan to make the contribution. Seems like the same thing.

Commitment. You promised 3% and now you're going back. With the maybe notice, you promised nothing.

**Q.** An employer has a safe harbor match on a per payroll basis. Employer does not want to reduce or remove safe harbor match, they want to continue to accrue but not make the match contribution for a few months. What is the safe harbor match contribution deposit deadline?

The last day of the following plan year quarter. For a calendar year plan, 2<sup>nd</sup> quarter 2020 contributions are due September 30, 2020.

**Q.** What about Section 4003 of the CARES Act that requires 90% of the workforce be kept at "full benefits and compensation" if accepting Federal benefits under CARES Act? Does this prevent a suspension of safe harbor contribution?

The Treasury hasn't issued guidance, but I would interpret that as a requirement for industries taking advantage of that program.

**Q.** Safe Harbor QACA match plan being suspended, what about the auto enrollment part of the plan, can employer remove the auto enrollment or leave it in? Any issues regarding this. Our plan doc have a specific section for QACA auto enrollment that would need to be changed if suspending QACA safe harbor.

Suspending the employer contributions doesn't necessary suspend the deferral provisions. If you want to shut off future automatic enrollment or increase, you will likely need an amendment to do so.

**Q.** What happens if the SH Match calculated per payroll is not deposited by the end of the following plan quarter? Is there a correction?

Deposit the money plus earnings.

**Q.** So if a participant is owed a \$1000 SH contribution for 2019 that has not been funded and the employer waits to fund it. If the ER waits so long as to trigger EPCRS, does EPCRS permit the funding of only \$800 if the plan had a 20% loss during the period of the failure?

Yes.

#### **Required Minimum Distribution Relief - [Top](#)**

**Q.** Is the RMD relief for 2020 OPTIONAL? In other words, is it in effect, by default, or should the Plan Sponsor make an election to include that in their eventual plan amendment?

A plan can choose not to implement the RMD relief. For many defined contribution plans, the RMD relief will be irrelevant because nobody will receive RMDs in 2020.

**Q.** Can RMDs taken in early Jan. be rolled back w/o regard to 60-day limit?

Only if the individual is a qualified individual. The 60-day limit was not extended. It is possible the IRS may address this in the future.

**Q.** Is CARES Act distribution/RMD Available for DB plans?

RMD relief is not available in defined benefit plans. Pension plans can make CRDs but are subject to normal distribution restrictions. An in-service participant cannot receive a CRD before the earlier of 59 ½ or normal retirement age. Normal spousal consent rules would apply. The same would be true for a money purchase plan or for pension money transferred to a profit sharing or 401(k) plan.

**Q.** Can a distribution in 2020 that would otherwise be an RMD be rolled to an IRA?

Yes, if it is rolled within 60 days or the recipient is a qualified individual.

**Q.** Will the waiver of RMD also apply to inherited RMD's?

Yes.

**Q.** Can you still take an RMD or are all RMD's now distributions?

The plan could be amended to eliminate RMDs unless the participant requests one, to provide RMDs unless the participant declines, or simply to follow the rules before the CARES Act.

**Q.** Are you saying if we find someone who forgot to take their 2019 RMD in a DC Plan in 2020, they are not exempt?

The law allows waiver of 2020 RMDs in DC plans. It also allows waiver of 2019 RMDs for participants who have a required beginning date of April 1, 2020, if the RMD wasn't previously paid in 2019.

**Q.** If 2020 RMD due 4/1/2021 does the participant have to take the 2020 RMD?

No, because that is an RMD for 2020.

**Q.** Will the items in the CARES Act apply to Beneficiaries?

Yes.

**Q.** Will this RMD 2020 abatement require a plan amendment?

Yes, if the plan chooses to implement it.

**Q.** Does the forgo of 2019 and 2020 RMD apply to IRA?

Yes.

**Q.** What if the plan only permits partial distributions for RMDs. No RMD in 2020, then no partial distribution?

This is a matter of interpreting the plan document and the wording of the CARES amendment. That said, if a person elected to take the RMD, using language similar to that in Notice 2009-82, I'd argue that the plan could make the partial distribution.

**Q.** What happens if taxes were withheld on an RMD that was taken in the last 60 days?

Based on 2009 guidance, the plan does not have an issue. The participant should claim the withholding on the return and use it to reduce the taxes owed or to increase a refund.

**Q.** What about the RMD code on the 1099-R? How will taxpayer correctly report rollover of monies not eligible for rollover?

There isn't an RMD code. It is simply code 7 (normal distribution) or code 4 (death). I don't see that changing.

**Q.** What about those that have monthly RMD payments and have already received a portion of the RMD. Would you recommend discontinuing remaining payments or continuing to send these? Also, for rollover distributions, if we do not send the RMD prior to processing the payment, is any notice required for this?

I recommend talking to the participant and finding out what he or she wants. Someone taking monthly payments likely has that figured into the household budget. There is no special notice.

**Q.** If a terminated participant wants to roll the 4.1.2020 payment back to the plan would the plan need to be amended to permit rollovers by former participants

That depends on plan terms. Remember, that in most plans a participant remains a participant until the plan has distributed 100% of the participant's account.

**Q.** On RMDs Other ERISA Attorneys have stated that the Law was written to state Section 401(a)(9) SHALL NOT APPLY thus eliminating RMDs for 2020. You said participants could still take it?????

Read Notice 2009-82, which was issued the last time we had an RMD holiday, o ye of little faith and many question marks. You can permit employees to take RMDs and, in my view, should give them that option.

**Q.** Employee is 70.5 in 2019, but is non-owner and still employed on 12/31/2019, so no 2019 RMD required. Laid off in 2020. RMD requirements kick in, but waived for 2020. Do you think the first RMD is now for 2021 and due by 12/31/2021 (not 4/1/2022)?

Great SECURE/CARES question. And I read it as you do. Yes.

**Q.** IRA owner takes first RMD before April 1, 2020, has 20% Federal tax withheld by the custodian and sent directly to treasury. If she wants to pay the amount back to her IRA she must deposit the total gross amount into the IRA account, correct? What happens with the 1099 that the custodian will issue next year?

It will reflect the distribution and the withholding. (Incidentally, why was the plan withholding 20% on what it thought was an RMD?) You are correct on the amount of the rollover.

**Q.** Can a Qualified Individual who has already taken an RMD applicable to 2019 Plan Year roll the money back into the plan using the 3 year limit?

Providing the distribution was made in 2020, yes.

**Q.** RMD if a participant wants to take, is it now subject to 20% withholding

No. Code §402(c)(4) after amendment by CARES.

**Q.** Can refund of 2020 RMD be done at any time during 2020? The person doesn't meet the "eligible for COVID 19 distribution and loan".

For participants who aren't qualified individuals, at present the rollover period is the normal 60 days.

#### **Plan Amendments - CARES and Other - [Top](#)**

**Q.** Clients have started asking by what date does the Plan Sponsor have to state they are adopting CARES Act provisions for each provisions. By what date do EEs have to use the provision. What about timing of informing participants. When is an SMM due?

Adoption deadline is last day of 2022 plan year (2024 for governments). See the slides for employee deadlines. Informing participants is sooner rather than later. SMM deadline is after the provisions are obsolete, 210 days after the end of the 2020 plan year.

**Q.** Since we do not have interim amendment guidelines at this point nor do we know what will be automatic versus elective, do we just manually track client's elections until those guidelines are released?

That is a good approach.

**Q.** Can we amend a plan to exclude comp paid while on furlough due to COVID-19 going forward?

Yes, unless you are using the revised definition to compute safe harbor contributions. That that this would be an alternative definition of compensation which might not pass the compensation ratio test and hence could not be used for nondiscrimination testing.

**Q.** Does the 2022 amendment deadline also apply to amending the loan policy to include loans and/or increase the number of loans permitted at one time?

Conservatively, I'd say no.

**Q.** Do you need to adopt a board resolution before amending to track usage of CARES Act options?

No, although it should be in place by the last day of the plan year.

**Q.** I have a Profit Sharing plan terminated 4/1/2020.... How do I adopt the CARES Act provisions when no amendment information available?

I think you just ignore CARES and make your distributions. If you don't implement the provisions, you don't need the amendment.

**Q.** We have had a client ask if they can suspend their annual auto deferral increases scheduled for April 1. 1) most of the employees are furloughed and not getting paid anyway and 2) the employer is too busy handling other things and cannot get the increase implemented in time for 4/1. What should they do? They can't do a retroactive amendment at this point, right? Could they provide notice to employees that the increase will be delayed or hope for any official relief on this so they don't have to make up missed deferrals?

If we are talking about the April 1 paycheck, at this point (April 3) you are stuck. If you are talking about the April 15 paycheck, you can act. Let people know, and amend your plan (and/or your salary reduction agreement policy) accordingly. Warning: If the participant affirmatively elected the increase, you are stuck.

**Q.** what about an additional discretionary match in a 401k plan. Can the employer suspend without notice and amendment? The employer is keeping the SH match.

Discretionary match is ..... discretionary. You don't have to contribute.

**Q.** If plan has a calendar year plan year and a 4% fixed profit sharing, and if the plan stops profit sharing for compensation after July 1, in determining the 4% contribution through June 30 does the 401(a)(17) limit get prorated (so 4% time (285,000 X 6/12))

Yes.

**Q.** If a plan has a discretionary match which was partially funded during the year, but they do not want to fund the remainder, can they do that? Can they reverse the partial match and apply it against safe harbor required contributions?

They can stop funding. Can they apply it against future contributions? I'm concerned about the match timing rules in Treas. Reg. §1.401(m)-1(a)(2)(iii) which generally prohibit depositing matching contributions prior to the period when the work is done.

**Q.** Steve said a fixed non-SH match with no allocation requirements may be frozen mid-year. Is this true if the plan document defines the match computation period as the full year?

Yes. Our take is that you can freeze it with regard to compensation that has not been paid.

**Q.** If a plan wants to "temporarily freeze" during this COVID emergency but intends to unfreeze the plan later this year, would that still result in full vesting?

A freeze for several months would likely not constitute a complete discontinuance of contributions.

**Q.** If you have a plan with after end of year distributions- can terminated participants be paid out before the end of the year? If they qualify for COVID19 distribution rules.

You need to follow plan terms. You may wish to consider amending the plan (before the end of the plan year)

**Q.** discretionary match with board reso: what about a 'contract' enforcement (not plan document)

That's much more difficult for the participant because you likely need to show detrimental reliance.

**Q.** How would you advise plan sponsors asking whether they should not process force-out distributions because of the market? Do you have a different opinion for under \$1,000 cash-outs and \$5,000 auto ROs?

The plan administrator has remarkably little discretion regarding distributions. Follow plan terms. If you don't like what the accomplishes, consider amending the plan. Remember, for some participants that \$2,000 may be just what they need.

**Q.** Do I understand this correctly - that we have until 2022 to amend the Plan for CARES - but if we use any of the SECURE act provisions we need to amend the plan by the end of the year?

No. The deadline for both is the last day of the 2022 plan year.

**Q.** Do you feel TPA should automatically default to allowing the Coronavirus distributions and Coronavirus loans or is it better to let the Plan sponsor elect it since it is optional? A lot of vendors are just automatically defaulting it.

I can easily see either approach.

**Q.** Do you have to amend the plan to allow participants to waive the 2020 RMDs?



The plan document requires you to distribute the 2020 RMDs. If you want to do something different, as authorized by CARES, an amendment will be required.

#### **Defined Benefit Funding Relief - [Top](#)**

**Q.** Does the funding target attainment percentage mean that companies will have the same Minimum/Target/Max funding range as last year (or potentially lower minimum if they max funded last year)?

That's the way I read it.

**Q.** If the 2019 contribution, due in 2020, does not need to be funded until 12/31/2020, what needs to be done about signing Schedule SBs and submitting 5500s for 2019? On a more extreme note, we have a client with a 9/30/2019 year end. That contribution is due 6/15/2020. Do they also have all the way until 12/31/2020 to deposit (and file)?

"In the case of any minimum required contribution . . . which (but for this section) would otherwise be due under section 430(j) of such Code (including quarterly contributions under paragraph (3) thereof) . . . during calendar year 2020—(1) the due date for such contributions shall be January 1, 2021." I think that's pretty clear. We will have to see what the agencies do with the instructions.

**Q.** Deadline to make minimum funding contributions to CB/DB plan for calendar year plan is extended to Dec 31, 2020. When is that contribution deducted if contribution is made in November 2020 but employer files its tax return on Oct 15?

It is deductible on the 2020 return.

**Q.** Wouldn't an interim valuation be 'prudent'?

Yes, but it needs to be consistent with plan terms and conducted in a fair manner.

**Q.** Does the minimum funding contribution extension apply to Money Purchase Plans? If so, how is the accrued interest requirement determined?

The funding relief is for defined benefit plans, not for money purchase plans.

#### **Deadline Extensions - [Top](#)**

**Q.** Is the 402(g) refund deadline extended due to the extension of the 2019 individual income tax returns?

No.

**Q.** If employers deposit the minimum by 1/1/21 can they still write it off on their 2019 taxes or is it still due by tax extension deadline to be able to do that?

CARES extended the minimum funding deadline. It did not extend the deduction deadline.

**Q.** What about Excess Contributions for off calendar plans? Is there any relief on not needing to distribute during this market downturn?

No.

**Q.** Any relief for SH contribution for 2019 PY that is required employer funding this year?

Not yet.

**Q.** Were the 6/30/19 5500s and 8955s that were on extension until 4/15/2020 delayed to be filed with the coronavirus?

No. Form 5500 has not yet been extended.

**Q.** What's the extended deadline for DB cycle 3?

The third six-year remedial amendment cycle for pre-approved defined benefit plans now will begin on August 1, 2020 (and will still end on January 31, 2025). The on-cycle submission period for pre-approved defined benefit plan providers to submit opinion letter applications for the third six-year remedial amendment cycle will still begin on August 1, 2020, and end on July 31, 2021.

**Q.** Any changes, guidance and/or thoughts on participant notice delivery in terms of required notice timing/deadlines and/or delivery methods?

Thoughts? Look carefully at electronic delivery options.

**Q.** Any relaxation of electronic notices from the DOL?

We have their proposed regulations but they have not been finalized. No, there is no other relaxation.

#### **Partial Plan Terminations - [Top](#)**

**Q.** Is an amendment required for a partial plan termination?

Generally, that is already in your document. However, if you wanted to bypass the issue and make people fully vested, that would require an amendment.

**Q.** Please confirm if everyone who terminated in the year of a separation (even if their term didn't factor into the 20% calculation) must be 100% vested if a partial plan term

That is what Rev. Rul. 2007-43 says. "If a partial termination occurs on account of turnover during an applicable period, *all participating employees who had a severance from employment* during the period must be fully vested in their accrued benefits, to the extent funded on that date, or in the amounts credited to their accounts."

**Q.** Could a Plan Sponsor fully vest only participants who are laid off /terminated and have a rebuttable presumption for a partial plan termination? Those who were terminated or quit for other reasons would not be vested. Does this help in refuting the presumption of a partial plan termination?

I don't think so, and I'm not sure it corresponds to the partial termination rules. See the previous question.

**Q.** Isn't the applicable period the plan year?

Generally, yes, but it can be longer.

**Q.** What is your opinion of a scenario where a partial plan determination is deemed to have occurred and some of the impacted employees are paid out at 100% vesting (as per their election to be paid out) and

then you hire all of the employees back and decide to overturn the partial plan termination? Would you be creating a discriminatory situation for the rehired employees who did not take a distribution while out of work?

Maybe, but maybe not. Take a look at Treas. Reg. §1.401(a)(4)-11(c), and particularly examples 3 and 4.

**Q.** For Plan Terminations, are the rules different for Qualified Individuals for those that terminated versus those still employed?

No.

#### **Interim Valuations - [Top](#)**

**Q.** Can you establish a distribution policy for interim valuation after you have received a distribution form?

Yes. Adding an interim valuation provision to a plan that doesn't have one, however, would be problematic.

**Q.** Interim valuations - when do you determine the date of the interim valuation and how do you treat prior terminated participants that request their benefits now?

These are fiduciary decisions to be made in light of the plan document, plan policies, and the ERISA rules regarding exercise of fiduciary responsibility.

**Q.** Would interim valuation issues also apply to ESOPs?

To the best of my knowledge, yes.

**Q.** Balance Forward Plan - Owners took RMDs plus extra based on 12/31/2019 Value - now wishes to terminate the plan - Any special earnings considerations?

There is the real possibility of a fiduciary breach depending on circumstances. Legal counsel should review the specifics of the situation.

#### **Termination/Severance/Separation - [Top](#)**

**Q.** In CA, a furlough without a date ending triggers final payment rules (in other words no difference between furlough and termination). Is that Calif. "fact" applicable to our Federal factual determination?

State law does not dictate federal tax law consequences.

**Q.** If a person is laid off or furloughed at year end are they required to get TH if remove SH?

If employment terminates prior to the last day of the plan year, they are not required to receive the top heavy minimum.

**Q.** What is the cite for "termination for cause?"

Treas. Reg. §1.401(k)-3(e)(4)(ii).

**Q.** You have referred to a layoff as a termination. The elapsed time regulations state "The date the employee severs from service is the earlier of the date the employee quits, is discharged, retires or dies,

or the first anniversary of the date the employee is absent from service for any other reason (e.g., disability, vacation, leave of absence, layoff, etc.)." Layoff is in the etc. list so it seems it a layoff is not always a termination/severance of employment, correct?

Different people use the word layoff to mean different things. It's still a facts and circumstances situation.

### **Treatment of Furloughed Employees/Service Crediting - [Top](#)**

**Q.** Is there anything in this act that says if you furlough an hourly employee you have to continue to pay them?

No.

**Q.** Unpaid LOA: Does a plan have to credit hours for vesting for an employee on an unpaid LOA furlough situation? The plan uses hours of service method (1,000 hours in a plan year) If so, does the 501 hours cap on time for which an employee is paid but does not actually perform services comes into play?

No. You are credited with hours of service for paid leave; not for unpaid leave.

**Q.** How is vesting determined for a furloughed worker

The same as you would if the participant were on vacation; adjusted for partial terminations if necessary.

**Q.** What if someone was going to earn their number of hours worked to enter on the 7/1 entry date, but since they have been laid-off/furlough they are not going to actually make the hours requirement. They will be coming back. How does their loss of hours from lay-off effect their 7/1 entry date.

There are currently no relief provisions for counting hours of service. If you have a plan which requires 1,000 hours of service, and an employee doesn't make it because he or she was on unpaid leave, wait for the next eligibility computation period. The alternative is to amend the plan to require a lower number of hours.

### **SIMPLE Plans - [Top](#)**

**Q.** Suppose a company has a SIMPLE where the 5305 says the match for 2020 will be 3%. All employees still contribute 3% or more. Can employer drop match?

No. SIMPLEs have no midyear suspension or termination flexibility.

**Q.** What is the deadline for SIMPLE ER contributions?

12 months after the end of the plan year.

### **Regular Hardship Distributions - [Top](#)**

**Q.** What kind of certification do you need from the participant for the safe harbor disaster reason?

We don't have formal guidance. However, the preamble to the 2019 hardship regulations states "it is expected that plan administrators will be flexible in interpreting plan terms requiring documentation relating to the hardship when processing hardship distribution requests during the difficult circumstances following a disaster."

## Families First Coronavirus Response Act - Compensation - [Top](#)

**Q.** Under the Families First Act, there is certain sick, and medical leave payments, should we consider such ER payments as Plan Compensation for K deferrals and ER contributions?

Yes. I would treat it the same as any other paid leave.

**Q.** If qualified sick wages under Families First Coronavirus Response Act are excluded under a 401(k) plan, what date should be used as an effective date of an amendment? 03/25/2020 or beginning of plan year?

The anti-cutback rule or safe harbor plan provisions may impact this issue. Otherwise, it is a plan design consideration.

## PPP Forgivable Small Business Loans - [Top](#)

**Q.** Can the PPP forgivable loan money be applied to matches, non-elective contributions, profit sharing contributions?

See Marty Pippin's excellent article at <https://www.asppa-net.org/news/retirement-contributions-and-paycheck-protection-program>. The SBA has just released interim final rules which do not particularly make things clearer:

f. What qualifies as "payroll costs?" Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; **payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement**; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

## Miscellaneous - [Top](#)

**Q.** I have seen some information on student loan debt repayments. Is that related to 401k plans?

No.

**Q.** Are 401(a) plans considered qualified plans, or pension plans?

A 401(a) plan is a qualified plan. Pension plans subject to Code §412 are a type of 401(a) qualified plan.

**Q.** What should Plan Sponsors do if their provider cannot produce distribution forms with these new distribution provisions? What is a reasonable timeframe to provide these new forms?

I can tell you the demand is amazing right now. Everybody is digesting this and working on it. Different firms will work at different speeds. One of the many things this situation should teach us is the value of a little patience.

**Q.** If the COVID distribution counts for top heavy, does it still count if repaid to the plan thus doubling up or would it no longer count?

That would be logical. I just wish the top heavy regulations (written in the 1980s) said something like that.