CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES ACT) AND FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)

Federal Pension Laws Related to Coronavirus Relief

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CARES ACT

Important Note: Guidance concerning the application of the CARES Act (H.R. 748) (the "Act") is consistency evolving. This memo represents our considered view as of the date issued to the proper application after reviewing the Act and available resources

§2202

- The 10% early distribution penalty under IRC Section 72(t) is waived for the 2020 calendar year for any coronavirus-related distributions which are less than $100,000.

- Coronavirus-related distributions are subject to the voluntary withholding requirements of section 3405(b) and section 35.3405-1T, however a plan administrator is not required to withhold an amount equal to 20% of the coronavirus-related distribution, as is usually required under section 3405(c)(1).

- The amount distributed can be repaid within 3 years from the date of distribution if the member makes contributions in an equal amount to the plan from which the distribution was taken or, for those plans that accept rollovers, to another qualified plan in which the person who received the distribution is a beneficiary. In that case, the amount repaid will be treated as a trustee-to-trustee transfer.

- Plans are required to report all coronavirus-related distributions made on the individual's 1099-R, or other IRS approved form as may be developed, whether or not the individual recontributes the distribution to the same eligible retirement plan in the same year. If the retirement plan treats a distribution as a coronavirus-related distribution and no other appropriate code applies, the retirement plan is permitted to use:

    - distribution code 2 (early distribution, exception applies) in box 7 of Form 1099-R or

- distribution code 1 (early distribution, no known exception) in box 7 of Form 1099-R.

- A coronavirus-related distribution is any distribution made from an eligible retirement plan on or after January 1, 2020, and before December 31, 2020, to an individual who is:

  - diagnosed (including spouse or dependent) with SARS-CoV-2 or COVID 19 by a test approved by the CDC;
  - whose spouse or dependent is diagnosed with COVID 19; or
  - who experiences adverse financial consequences as a result of:

    (1) being quarantined;
    (2) being furloughed;
    (3) having work hours reduced;
    (4) being unable to work due to lack of childcare;
    (5) closing or reduced hours of a business owned or operated by individual due to such virus or disease; or
    (6) having a reduction in pay or having a job offer rescinded or start date delayed due to COVID 19.

  Coronavirus-related distributions are permitted for qualified individuals who experience adverse financial consequences without regard to the individual's need for funds. Additionally, the distributed amount is not required to correspond to the extent of the adverse financial consequences experienced.

  Employee Certification: Plan administrators may rely on an employee's certification that the distribution was coronavirus-related unless the plan administrator has "actual knowledge" that the employee has not, in fact, met the "qualified individual" eligibility requirements.

  An eligible retirement plan includes a governmental defined benefit or defined contribution plan as defined in IRC 408(c)(8)(B):

  If any portion of an eligible rollover distribution is attributable to payments or distributions from a designated Roth account (as defined in section 402A), an eligible retirement plan with respect to such portion shall include only another designated Roth account and a Roth IRA. Coronavirus-related distributions are not rollover eligible and are treated as meeting the distribution requirements of 457 and IRA.

- There are two methods for qualified individuals to include the taxable portion of a coronavirus- related distribution as income, they may:
    - include the taxable portion of the distribution as income ratably over a 3 year period beginning in the year of distribution; or
    - elect out of the 3 year ratable income inclusion and include the entire amount of the taxable portion of the distribution as income in the year of the distribution.

- The Act does not change the spousal consent rules. If benefits under a plan are subject to the spousal consent rules, the fact that a distribution is a coronavirus-related distribution does not eliminate that requirement.

- A retirement plan's plan document must be updated to implement the provisions of section 2202 of the Act by January 1, 2024.

- Loans from Qualified Employer Plans (from plans which permit loans):
    - There is an increase in the amount of permissible loans during the 180 day period beginning with the enactment of CARES (Enacted March 27, 2020 so 180 days is September 23, 2020). The maximum loan is $100,000, instead of $50,000.00. Additionally, the rule regarding the loan not being more than ½ of the non-forfeitable accrued benefit is changed to not more than the present value of the nonforfeitable accrued benefit. All of the other rules still apply (cannot be more than $100,000 out in the last year etc.).
    - Repayment can be delayed for qualified individuals (individuals eligible for a coronavirus-related distribution) with an outstanding loan.
        - If the paid in full due date is between March 27, 2020, and December 31, 2020, the due date is delayed for up to one year.

§2203

The Temporary Waiver of Required Minimum Distribution Rules only applies to defined contribution plans.

- For 403(a), 403(b), 457(b) governmental plans, and IRAs only and only for calendar year 2020. The IRS has made it clear that this provision does not apply to

Governmental Pension Plans.

- Eligible Rollover Distributions are amended to change the dates from 2009 to 2020 for purposes of allowing the required minimum distribution being treated as an eligible rollover distribution.

§3608

The delay in payment of minimum required contributions is applicable only to ERISA plans and not governmental plans.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCA): GROUP HEALTH PLANS AND HEALTH INSURANCE COVERAGE:

§3201(CARES)

- Section 3201 of the CARES Act amended section 6001 of the FFCRA to include a broader range of diagnostic items and services that plans and issuers must cover without any cost-sharing requirements or prior authorization or other medical management requirements.

§6001 (FFCRA)

- Section 6001 of the FFCRA applies to group health plans[1] and health insurance issuers offering group or individual health insurance coverage (including grandfathered health plans as defined in section 1251(e) of the Patient Protection and 2 5 U.S.C. § 553(b)(B) and (d)(3). Does NOT apply to group health plans that do not cover at least two employees who are current employees (such as plans in which only retirees participate).

- Requires group health plans and health insurance issuers offering group or individual health insurance coverage to provide benefits for certain items and services related to diagnostic testing for the detection of SARS-CoV-2 or the diagnosis of COVID-19 (referred to collectively in this document as COVID-19), as determined by the individual's attending healthcare provider in accordance with

[1]The term "group health plan" includes both insured and self-insured group health plans. It includes private employment-based group health plans (ERISA plans), non-federal governmental plans (such as plans sponsored by states and local governments), and church plans.

accepted standards of current medical practice, when those items or services are furnished on or after March 18, 2020, and during the applicable emergency period[2].

- Plans and issuers must provide this coverage without imposing any cost-sharing requirements (including deductibles, copayments, and coinsurance) or prior authorization or other medical management requirements.

- Coverage must be provided for the following items and services:

    - An in vitro diagnostic test as defined in section 809.3 of title 21, Code of Federal Regulations,for the detection of SARS-CoV-2 or the diagnosis of COVID-19, and the administration of such a test, that:

        - Is approved, cleared, or authorized under section 510(k), 513, 515, or 564 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. §§ 360(k), 360c, 360e, 360bbb3);

        - The developer has requested, or intends to request, emergency use authorization under section 564 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360bbb–3), unless and until the emergency use authorization request under such section 564 has been denied or the developer of such test does not submit a request under such section within a reasonable timeframe;

        - Is developed in and authorized by a State that has notified the Secretary of HHS of its intention to review tests intended to diagnose COVID–19; or

        - Other tests that the Secretary of HHS determines appropriate in guidance.

    - Items and services furnished to an individual during healthcare provider

[2] Generally, under section 319 of the Public Health Service (PHS) Act, a public health emergency declaration lasts until the Secretary of HHS declares that the public health emergency no longer exists, or upon the expiration of the 90-day period beginning on the date the Secretary declared a public health emergency exists, whichever occurs first. The Secretary may extend the public health emergency declaration for subsequent 90-day periods for as long as the public health emergency continues to exist, and may terminate the declaration whenever he determines that the public health emergency has ceased to exist. Unless extended or terminated earlier, the public health emergency related to COVID-19 is effective through April 25, 2020.

office visits (which includes in-person visits and telehealth visits), urgent care center visits, and emergency room visits that result in an order for or administration of an in vitro diagnostic product described in paragraph (1), but only to the extent the items and services relate to the furnishing or administration of the product or to the evaluation of the individual for purposes of determining the need of the individual for such product.

- Plans and issuers are required to provide coverage for items and services that are furnished by providers that have not agreed to accept a negotiated rate as payment in full (i.e., out-of-network providers).
    - If the plan or issuer has a negotiated rate with such provider in effect before the public health emergency declared under section 319 of the PHS Act, such negotiated rate shall apply throughout the period of such declaration.
    - If the plan or issuer does not have a negotiated rate with such provider, the plan or issuer shall reimburse the provider in an amount that equals the cash price for such service as listed by the provider on a public internet website, or the plan or issuer may negotiate a rate with the provider for less than such cash price.
- The term “visit” includes both traditional and non-traditional care settings in which a COVID-19 diagnostic test is ordered or administered, including COVID-19 drive-through screening and testing sites where licensed healthcare providers are administering COVID-19 diagnostic testing.
- Plans and issuers are permitted to amend the terms of a plan or coverage to add benefits, or reduce or eliminate cost sharing, for the diagnosis and treatment of COVID-19 prior to satisfying any applicable notice of modification requirements and without regard to otherwise applicable restrictions on mid-year changes to health insurance coverage.
- If a plan or issuer makes a material modification (as defined under section 102 of ERISA) in any of the terms of the plan or coverage, to include telehealth coverage, that would affect the content of the SBC that is not reflected in the most recently provided SBC, and that occurs other than in connection with a renewal or reissuance of coverage, the plan or issuer must provide notice of the modification to enrollees not later than 60 days prior to the date on which the modification will become effective, or as soon as reasonably practicable. They may either provide an updated SBC reflecting the modification or provide a separate notice describing

the material modifications.

- If a plan or issuer maintains any such changes beyond the emergency period, plans and issuers must comply with all other applicable requirements to update plan documents or terms of coverage.

- States may impose additional standards or requirements on health insurance issuers with respect to the the diagnosis or treatment of COVID-19, to the extent that such standards or requirements do nto prevent the application of a federal requirement.

FEDERAL EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The **Families First Coronavirus Response Act (FFCRA or Act)** requires the Federal government to provide all of its employees with paid sick leave and, for employees who are covered under Title I of the Family and Medical Leave Act (FMLA), with expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

▸ PAID LEAVE ENTITLEMENTS

Generally, the Federal government must provide Federal employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to $511 daily and $5,110 total; and
- ⅔ for qualifying reasons #4 and 6 below, up to $200 daily and $2,000 total.

Federal employees including those not covered under Title I of the FMLA can receive either ⅔ of the higher of their regular rate of pay, or the applicable state or Federal minimum wage for the two-week period for qualifying reason #5 below. However, for leave under qualifying reason #5, Federal employees covered under Title I of the FMLA can receive 10 additional weeks of expanded family and medical leave for reason #5 below, up to $200 daily and $12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

▸ ELIGIBLE EMPLOYEES

All Federal employees are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). *Federal employees who are covered under Title I of the FMLA and have been employed for at least 30 days* prior to their leave request are eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.

Most federal employees are not covered under Title I of the FMLA and so would not be eligible for partially paid expanded family and medical leave. Please consult with your agency to determine whether you are covered under Title I of the FMLA. The Office of Personnel and Management will issue guidance on this question.

▸ QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

A Federal employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to **telework**, because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

▸ ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA for Federal employers covered under Title I of the FMLA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Federal employers covered under Title I of the FMLA in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

For additional information or to file a complaint:
1-866-487-9243
TTY: 1-877-889-5627
dol.gov/agencies/whd

WH1423 REV 03/20