June 25, 2020

IRS Provides Guidance Helpful to Employers Administering COVID-19-Related Distributions and Plan Loans Under the CARES Act

On June 19, the IRS released Notice 2020-50 (the Notice) clarifying the rules for Coronavirus-Related Distributions (CRDs) and the liberalized plan loan provisions for eligible retirement plans enacted as part of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). While the Notice provides information helpful to a variety of interested parties, including plan administrators, trustees, custodians and individuals, this alert summarizes the key items in the Notice that are of particular interest to employers sponsoring retirement plans, such as 401(k) or 403(b) plans, or nonqualified deferred compensation plans subject to Section 409A of the Code.

Clarification and expansion of definition of "Qualified Individuals"

As described in our earlier advisory, CRDs and the liberalized plan loan provisions are available only to Qualified Individuals. Broadly speaking, a Qualified Individual includes an individual or his/her spouse or dependent who has received a diagnosis of SARS-CoV-2 or COVID-19 or who has experienced adverse financial consequences for a reason related to COVID-19. Notice 2020-50 clarifies that for purposes of the adverse financial consequences element, a Qualified Individual includes the individual's spouse or member of the individual's household, i.e., someone who shares the individual's primary residence. Additionally, the Notice expands the factors that will constitute an adverse financial consequence due to COVID-19 to include reduction in pay (or self-employment income) or having a job offer rescinded or the start date delayed.

Guidance with respect to the administration of CRDs

The Notice confirms that employers are not obligated to offer CRDs. However, to the extent employers decide to do so, the Notice provides the following helpful guidance:

- CRDs are not permitted from pension plans, such as money purchase plans or defined benefit plans, before an otherwise distributable event, such as termination of employment.
- If a plan is subject to the qualified joint and survivor rules, CRDs in an optional form, e.g. a lump sum, cannot be made without the spouse's consent.
- If a plan treats a distribution as a CRD, then the plan is not required to offer the Qualified Individual a direct rollover, and the plan administrator is not required to provide a 402(f) notice or apply the mandatory 20 percent withholding to the distribution (though voluntary withholding requirements still apply).
- A plan is not required to accept recontributions of CRDs if, for example, the plan does not accept rollover contributions.

Additionally, the Notice provides a template that can be used to certify eligibility for a CRD and recontribution of the CRD. The certification may be relied on by the plan administrator unless it has actual knowledge to the contrary.

Safe harbor for administering the liberalized plan loan provisions

The Notice confirms that employers are not required to provide for the liberalized loan provisions. Additionally, the model template used to certify eligibility for CRDs can be used to certify eligibility for the liberalized plan loan provisions. Most significantly, the Notice announces a safe harbor under which loan suspensions and extensions of loan terms will be treated as satisfying the CARES Act requirements. Under the safe harbor:

- the suspension of repayments must begin no earlier than March 27, 2020 and end no later than December 31, 2020;
- loan repayments must resume as of January 1, 2021;
- the loan must be reamortized to include interest accruing during the suspension period; and
- the loan term may be extended by up to one year from the date the loan was originally due to be paid off.

The Notice makes clear that the safe harbor is not the exclusive method to administer the liberalized loan provisions. For example, suspended loan repayments are not required to resume until the one-year anniversary of the date the repayments were first suspended.

Deferral elections under a nonqualified deferred compensation plan may be canceled

In general, annual deferral elections under a nonqualified deferred compensation plan subject to Section 409A cannot be canceled, unless the plan provides for such cancellation due to an unforeseeable emergency or hardship distribution from a 401(k) plan. The Notice confirms that a deferral election under a nonqualified deferred compensation plan may be canceled (but not postponed or delayed) if the individual takes a CRD from an eligible retirement plan.

If you have any questions regarding the CARES Act, Section 409A or any other employee benefits matters, please reach out to any of the attorneys in Day Pitney's Employee Benefits and Executive Compensation practice group.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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