

## Congress CARES About Employee Benefits

April 3, 2020

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### KEY POINTS

On March 27, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act, or CARES Act. Among its many provisions providing financial relief to businesses and individual taxpayers, the CARES Act relaxes various rules applicable to employee benefit plans, and enhances others, to provide greater access to benefits and more flexibility for individuals directly affected by the Coronavirus 2019 (COVID-19). The CARES Act also places restrictions on executive compensation paid by businesses that accept financial assistance from the federal government and by air carriers and contractors. This advisory summarizes key elements of these provisions of the Act relating to employee benefit plans and executive compensation, including:

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- Early retirement distributions up to \$100,000 without penalty.
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- 401(k) loans up to 100 percent of a participant's vested account balance or \$100,000.
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- Temporary suspension of required minimum distributions from retirement plans.
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- Relaxed funding requirements for certain retirement plans.
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- Required coverage without cost-sharing for preventative items and services related to COVID-19, and COVID-19 testing.
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- Required reimbursement rates for COVID-19 diagnostic testing.
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- Inclusion of new over-the-counter medical products as qualified medical expenses under account-based medical plans.
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- Telehealth exemption from high deductible health plan deductible requirements.
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- Exclusion from income for employer student loan repayment benefits.
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- Restrictions on the amount of compensation that can be paid by businesses that accept loans or loan guarantees from the federal government, and on air carriers and contractors.
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## New retirement plan rules

### *Special rules for retirement funds*

The rules governing tax-qualified retirement plans are generally designed to limit access to retirement savings until participants reach retirement age (or satisfy certain limited exceptions, such as death or disability). The CARES Act makes temporary amendments to the Internal Revenue Code (Code) to provide individuals who have been adversely affected by COVID-19 greater access to their retirement accounts, as well as alleviate the requirements that plan participants and Individual Retirement Account (IRA) owners receive certain required minimum distributions (RMDs) from their accounts, beginning after age 72.

### *Tax-favored withdrawals*

Typically, a 10 percent penalty is imposed on early distributions from tax-qualified retirement plans and accounts (including IRAs and Section 403(b) annuities and plans) unless the distributions fall within certain limited exceptions (e.g., occurring after the date an employee reaches age 59½). Under the CARES Act, the 10 percent penalty does not apply to “coronavirus-related distributions” (CVR distributions) from a tax-qualified plan in amounts up to \$100,000 for any taxable year. CVR distributions must be made prior to December 31, 2020 to be eligible for this special tax treatment.

To qualify as a CVR distribution, the distribution must be made to an individual:

- diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the Centers for Disease Control and Prevention (CDC); or
- whose spouse or dependent is diagnosed with such virus or disease by such a test; or
- who experiences adverse financial consequences as a result of the following events related to such virus or disease: (1) being quarantined; (2) being furloughed or laid off or having working hours reduced; (3) being unable to work due to lack of child care; (4) closing or reduced hours of a business owned or operated by the individual; or (5) other factors as determined by the Secretary of the Treasury.

The following rules also apply to a CVR distribution:

- Unless otherwise elected by the participant, the amount of the CVR distribution will be taken into account as income on a ratable basis over a three-year period.
- The distribution is deemed to satisfy the specific distribution rules for plans subject to Code Sections 401(k), 403(b) and 457(d)(1)(A).
- Individuals receiving a CVR distribution may, at any time during the three-year period following the distribution, choose to repay the amount of the distribution to the plan or IRA. Such repayments are treated similarly to “rollover” contributions (and thereby retain the characteristic of a tax-qualified contribution).

### *More flexible 401(k) loans*

The CARES Act provides flexibility to plan participants directly affected by COVID-19 to take a comparable 401(k) plan loan rather than a CVR distribution. For 180 days following March 27, a participant can take a loan in an amount equal to 100 percent of the vested 401(k) balance, up to a maximum of \$100,000. Normally, loans are limited to 50 percent of the vested account balance, subject to a maximum loan amount of \$50,000.

Furthermore, participants may delay for one year any existing 401(k) loan repayments that would otherwise be due between March 27 and December 31, 2020. Loan repayment schedules will be adjusted to reflect the delayed payment and interest accruals during the delay.

### ***Required minimum distributions from retirement vehicles***

The RMD rules generally require retirement distributions to begin by April of the year following the year in which a participant turns age 72. The CARES Act provides temporary relief from the RMD rules for IRAs, 401(k) plans, 403(a) and 403(b) plans, and 457(b) plans that are maintained by states and their political subdivisions and agencies (but not those maintained by tax-exempt entities).

There is essentially an RMD hiatus for calendar year 2020, including where the required beginning date of the RMD would occur in 2020. This change helps participants avoid liquidating their investments during the recent down market caused by COVID-19. The Act also makes various adjustments so that the lack of a RMD in 2020 does not adversely affect future payment schedules for the participant or his or her beneficiaries.

### ***Delay in required minimum funding rules***

The CARES Act delays, until January 1, 2021, required minimum funding contributions for single-employer plans that would otherwise be due during the 2020 calendar year. When delayed contributions are eventually made, plan sponsors will be required to pay interest from the date the original contribution was due.

Furthermore, the CARES Act permits plan sponsors to apply the plan's "adjusted funding target attainment percentage" for the most recent plan year ending prior to January 1, 2020, to plan years that include calendar year 2020. This use of the prior year's actuarial funding measurement can help plans avoid benefit accrual and distribution limitations that would be triggered if the plan's funded status decreases due to the market drop triggered by COVID-19.

### **New health and welfare plan rules**

#### ***Items and services required to be covered without cost-sharing***

The CARES Act amends the Families First Coronavirus Response Act, signed into law earlier this March, to expand the items and services required to be covered by group health plans (including grandfathered group health plans) without any: (1) cost sharing (including deductibles, copayments and coinsurance); (2) prior authorization; or (3) other medical management requirements during the "emergency period."

The "emergency period" is defined as the period during which there exists: (1) an emergency or disaster declared by the President pursuant to the National Emergencies or the Robert T. Stafford Disaster Relief and Emergency Assistance Act; and (2) a public health emergency declared by the Secretary of Health and Human Services (the Secretary of HHS). President Trump declared a national emergency beginning on March 1, and the Secretary of HHS declared a public health emergency on January 31 (retroactive to January 27).

Testing and testing-related services required to be covered with no cost-sharing include in vitro diagnostic products (if approved by the Food and Drug Administration, or in some cases where the developer has requested or intends to request FDA approval, and certain other tests), health care provider office visits (in-person and telehealth), urgent care center visits, and emergency department visits that result in an order for or administration of testing.

The Act also directs the Secretaries of HHS, Labor and the Treasury to require health insurers and group health plans to cover any "qualifying coronavirus preventative service." A qualifying coronavirus preventative service is an item, service or immunization that is intended to prevent or mitigate COVID-19 that is either: (1) evidence-based and has a rating of "A" or "B" in the current recommendations of the US Preventive Services Task Force; or (2) an immunization that is recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved.

### ***Required reimbursement rate for COVID-19 diagnostic testing***

Group health plan sponsors also should be aware of the CARES Act's separate requirement to reimburse providers for COVID-19 diagnostic testing. Where the plan has a negotiated rate with a provider that was in place on January 27, the negotiated rate applies throughout the "emergency period" described above. If, on the other hand, the plan has not negotiated a rate, the plan is required to reimburse the cash price for the provider's service as listed by the provider on a public internet website OR the plan must negotiate a lower rate. Providers are required to publicize the cash price of their services, subject to a civil monetary penalty of up to \$300 for failure to do so.

### ***Inclusion of certain over-the-counter medical products as qualified medical expenses***

The CARES Act also expanded the definition of "qualified medical expenses" for purposes of account-based medical plans, including Health Savings Accounts (HSAs), Archer Medical Savings Accounts (Archer MSAs), Health Flexible Spending Accounts (Health FSAs), and Health Reimbursement Arrangements (HRAs), to include menstrual care products and to eliminate the requirement (added by the Affordable Care Act in 2010) that over-the-counter drugs could only be reimbursed with a prescription.

### ***Exemption for telehealth services deductibles under high deductible health plans***

The CARES Act provides a safe harbor for plan years beginning on or before December 31, 2021, permitting high deductible health plans (HDHPs) to waive or reduce the plan deductible for telehealth and other remote care services. Normally, to be compatible with a HSA, any services for diagnosis or treatment covered by a HDHP would need to be subject to a minimum deductible of \$1,400 for self-only coverage or \$2,800 for family coverage.

### ***Exclusion from income of student loan repayment benefits***

The CARES Act enables employers to provide a new student loan repayment benefit to employees up to \$5,250 on a tax-free basis from March 27 to December 31, 2020. The \$5,250 cap for the new student loan repayment benefit is combined with the cap for other educational assistance (e.g., tuition, fees, books) provided by the employer under current law.

## **Executive compensation restrictions**

The CARES Act imposes executive compensation restrictions on employers that receive loans or loan guarantees from the federal government pursuant to the Act's emergency relief rules for eligible businesses. The Act limits compensation of officers and employees for a period beginning on the date the loan agreement is executed, through one year after the agreement is no longer outstanding (the Loan Period).

No officer or employee whose total compensation exceeded \$425,000 in 2019 (other than an employee whose compensation is determined through a collective bargaining agreement entered into prior to March 1, 2020) may receive: (1) total compensation that exceeds, during any 12 consecutive months of such Loan Period, the total compensation received by such officer or employee in 2019; and (2) severance pay or other benefits upon termination of employment that exceed two times the total compensation received in 2019.

No officer or employee whose total compensation exceeded \$3 million in 2019 may, during such period, receive compensation in excess of the sum of: (1) \$3 million and (2) 50 percent of the excess over \$3 million of the total compensation received by such officer or employee in 2019. Total compensation includes salary, bonuses, stock awards and other financial benefits. The CARES Act places similar restrictions on air carriers and contractors, except that the loan period is the two-year period starting on March 24, 2020 and ending on March 24, 2022.

## Conclusion

The new rules for employee benefit plans are designed to mitigate the negative financial consequences suffered by businesses and individuals as result of the COVID-19 pandemic. Plan sponsors, fiduciaries and individuals should consider the scope and timing elements of these new rules as they evaluate the impact on their respective employee benefit plans and individual plan account balances. Plan sponsors should evaluate the extent to which they will amend their employee benefit plans to allow for greater access to accumulated retirement funds, account-based medical plan funds, and student loan repayment benefits. In addition, group health plan sponsors should confirm there is no cost sharing imposed under their plans for the mandated COVID-19 related items and services and review the applicable plan's negotiated reimbursement rates. Moreover, businesses that anticipate accepting financial assistance pursuant to the CARES Act should evaluate current executive compensation arrangements to ensure compliance with the above restrictions.

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## CONTACTS

Contact one of the individuals below, or your regular Katten attorney, with any questions on these rules and for model plan amendments and associated documents.



**Lisa Christensen**  
+1.212.940.6575  
lisa.christensen@katten.com



**Mitch C. Pahl**  
+1.212.940.6527  
mitchel.pahl@katten.com



**Kate Ulrich Saracene**  
+1.212.940.6345  
kate.saracene@katten.com



**Robert A. Stone**  
+1.212.940.6343  
robert.stone@katten.com

# Katten

katten.com

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