

EB Flash: IRS Issues Awaited Guidance on CARES Act Retirement Plan Provisions

Employee Benefits Alert

06.22.2020

On June 19, 2020, the Internal Revenue Service (IRS) issued [Notice 2020-50](#), providing further guidance related to the coronavirus-related distribution (CRD) and loan provisions under [section 2202 of the CARES Act](#). As expected, in many respects Notice 2020-50 borrows heavily from Notice 2005-92, which addressed similar distribution and loan provisions in the Katrina Emergency Tax Relief Act of 2005.

In other respects, Notice 2020-50 includes new and important guidance. It expands access to retirement savings under the CARES Act provisions by broadening the definition of "qualified individual" and provides a sample certification with respect to such status. It also provides guidance – and a safe harbor – for the administration of loan repayment suspensions. And for nonqualified deferred compensation plans, it allows for the cancellation of deferral elections under Code section 409A for recipients of CRDs.

The following provides an overview of these and other important provisions in Notice 2020-50:

New "qualified individual" criteria

Very generally, a qualified individual, for purposes of section 2202 of the CARES Act, is an individual (1) who has been diagnosed, or whose spouse or Code section 152 tax dependent has been diagnosed, with COVID-19 by a Centers for Disease Control and Prevention-approved test, or (2) who experiences adverse financial consequences on account of specified COVID-19 related reasons. In addition, pursuant to the Notice:

- A Centers for Disease Control and Prevention-approved test includes a test authorized by the Federal Food, Drug, and Cosmetic Act.
- "Adverse financial consequences" now include:
 - Adverse financial consequences incurred as a result of having a reduction in pay (or self-employment income) due to COVID-19, or having a job offer rescinded or the start date delayed due to COVID-19, and
 - Adverse financial consequences (the same as those applicable to the individual) incurred by the individual's spouse or a household member. A household member is broadly defined as "someone who shares the individual's principal residence." Note that "someone" need not be a Code section 152 dependent standard as is the case with the COVID-19 diagnosis provision.

"Qualified individual" certification

- Notice 2020-50 includes sample certification language regarding an individual's "qualified individual" status. Plan administrators may rely on an individual's certification for purposes of determining CRD or coronavirus-related loan eligibility (absent actual knowledge to the contrary, without further inquiry). However, for purposes of the CRD, the Notice makes clear that it is ultimately the individual's responsibility to ensure that he or she meets the qualified individual requirements in order to treat the distribution as a CRD on his or her federal income tax return.

Distributions that may (and may not) be treated as CRDs

- A qualified individual may designate any distribution from an eligible retirement plan that meets the requirements of a CRD (i.e.,

any distribution on or after January 1, 2020 and before December 31, 2020, up to the aggregate limit of \$100,000) as a CRD.

- Accordingly, CRDs may include 2020 required minimum distributions that would otherwise be waived under the CARES Act, distributions received as a beneficiary, and the amount of a reduction or offset of the individual's account balance due to repay a defaulted plan loan.
- In contrast, corrective distributions, such as those necessary to comply with Code section 415, 402(g), or ACP/ADP testing limits, loans treated as deemed distributions under Code section 72(p), etc., may not be treated as CRDs.
- Unlike hardship distributions, CRDs are not limited to amounts necessary to meet a financial need arising from COVID-19. A qualified individual may take a CRD regardless of his or her need for funds or the extent of his or her adverse financial consequences.

Recontribution (repayment) of CRDs

- A qualified individual who receives a CRD may recontribute, within the three-year period beginning the day after the date of the CRD, any portion of the CRD to an eligible retirement plan, provided that the CRD is otherwise eligible for tax-free rollover. Thus, a non-spouse beneficiary would not be able to repay his or her CRD. However, a hardship distribution that otherwise satisfies the requirements of a CRD may be repaid.
- Plan administrators must comply with Q&A-14 of Treas. Reg. § 1.401(a)(31)-1, which would generally require them to reasonably conclude that a recontribution is eligible for direct rollover treatment under section 2202(a)(3) of the CARES Act (and return such amounts if this later turns out not to be the case). Plan administrators generally may rely on the individual's certification as to his or her status as a qualified individual. However, it would appear that the date of the CRD would be required to demonstrate satisfaction of the three-year rule, in addition to information otherwise required regarding eligibility for direct rollover treatment.
- If plans do not accept any rollover contributions, plan sponsors are not required to change their terms or procedures to accept recontributions of CRDs. The Notice does not shed any light on whether plans that otherwise allow for rollover contributions may prohibit CRDs.

Loan repayment suspensions

- Among other coronavirus-related provisions, the CARES Act allows qualified individuals (who certify their status) with outstanding plan loans to suspend repayments due from March 27, 2020 to December 31, 2020 for up to one year. Plan sponsors are not required to offer the suspensions, but have some flexibility in implementation if they do.
- Notice 2020-50 includes a safe harbor suspension method that aligns with the method for suspending loan repayments during periods of qualified military service. Under the safe harbor, loan repayments from March 27, 2020 through December 31, 2020 may be suspended (suspension period). Loan repayments must resume after the end of the suspension period, and the term of the loan may be extended by up to one year from the date the loan was originally due to be repaid, even if this results in the loan exceeding the otherwise allowable loan term. Interest accruing during the suspension period must be added to the remaining principal of the loan and repaid over the remaining loan term, as extended.
- Plans may use other reasonable methods to suspend loan repayments, although doing so may add administrative complexity. For example, all loan repayments due during a suspension period that begins April 1, 2020 could be delayed to April 1, 2021 (the one-year anniversary of the beginning of the suspension period). After originally scheduled repayments for January through March of 2021 are made, the outstanding balance of the loan on April 1, 2021, including the delayed repayments with interest, may be reamortized over a period that is up to one year longer than the original term of the loan. As another possibility, the loan could be serially reamortized as the one-year period for each suspended repayment expires.

Section 409A relief for NQDC deferral elections

- Notice 2020-50 provides that a CRD will be considered a hardship distribution for purposes of the Code section 409A rule (see Treas. Reg. § 1.409A-3(j)(4)(viii)) that allows for the cancellation of a deferral election on account of a hardship distribution pursuant to Treas. Reg. § 1.401(k)-1(d)(3), if the plan so provides. The deferral election must be cancelled, not merely postponed or otherwise delayed.

Plan amendments

- Notice 2020-50 confirms that plan sponsors have discretion over the extent to which they allow CRDs and the coronavirus-related loan provisions under their plans. It further confirms that an individual's designation of a CRD on his or her federal income tax return may differ from the plan's treatment of the distribution.
- Plan sponsors who choose to make the CRD and coronavirus-related loan provisions available have until that last day of the first plan year beginning on or after January 1, 2022 (January 1, 2024 for governmental plans) to retroactively amend their plan documents to reflect these provisions, although these deadlines may be extended in future guidance.

Tax reporting

- Notice 2020-50 provides guidance for the reporting of CRDs on Form 1099-R and confirms that this reporting is required even if the CRD is recontributed within the same year. The Notice further provides detailed information on the individual income tax reporting by CRD recipients.

The 19-page text of Notice 2020-50 is [posted here](#).

The information contained in this communication is not intended as legal advice or as an opinion on specific facts. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. For more information, please contact one of the senders or your existing Miller & Chevalier lawyer contact. The invitation to contact the firm and its lawyers is not to be construed as a solicitation for legal work. Any new lawyer-client relationship will be confirmed in writing.

This, and related communications, are protected by copyright laws and treaties. You may make a single copy for personal use. You may make copies for others, but not for commercial purposes. If you give a copy to anyone else, it must be in its original, unmodified form, and must include all attributions of authorship, copyright notices, and republication notices. Except as described above, it is unlawful to copy, republish, redistribute, and/or alter this presentation without prior written consent of the copyright holder.