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IRS Issues FAQs Regarding CARES Act Distributions and Loans from Employee Benefit Plans

Working Together

05.07.2020
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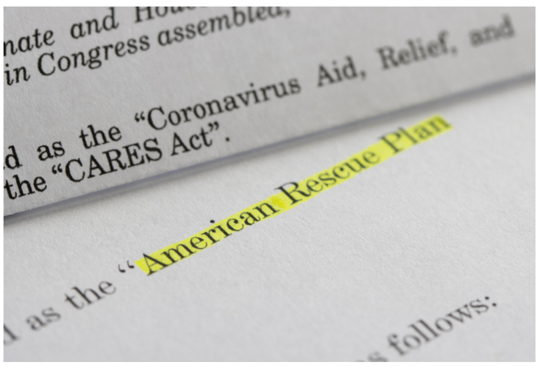

On May 4, 2020, the IRS issued new questions and answers regarding coronavirus-related relief for participants in retirement plans and IRAs (the "FAQs"). (IRS FAQs May 2020) For the most part, the FAQs reiterate the language of Section 2202 of the Cares Act which authorizes the temporary availability of (i) coronavirus-related distributions of up to $100,000; (ii) an increase in the amount a participant may borrow from an employer retirement plan to $100,000; and (iii) the deferment of certain participant loan repayments (the "Section 2022 Transactions"). The IRS indicates that additional guidance regarding Section 2022 Transactions is under consideration.

The FAQs provide the following clarifications and new guidance regarding Section 2022 Transactions:

- In describing the conditions that make an individual a "qualified individual" eligible to apply for a Section 2022 Transaction, the IRS emphasizes that the specific factors listed in Section 2202 triggering adverse financial consequences (i.e., being quarantined, being furloughed or laid off, having work hours reduced, or being unable to work due to lack of child care) must be experienced *by the participant*.
  - For example, Individual A will be a qualified individual if Individual A is put on a coronavirus-related furlough and experiences adverse financial consequence as a result of the furlough. But if Individual A's spouse is on a coronavirus-related furlough and the spouse's furlough causes the family to experience adverse financial consequences, the qualified individual is the spouse. In that circumstance, Individual A is not eligible to request a Section 2022 Transaction.
- The IRS is actively considering comments it received requesting that the list of factors triggering adverse financial consequences be expanded. The IRS *may* issue guidance expanding the list of factors taken into account to determine whether an individual is a qualified individual as a result of experiencing adverse financial consequences.

  - *Until the IRS authorizes an expanded list of factors, individuals should only certify that they are qualified individuals due to experiencing adverse financial consequences if the statutory factors directly apply to them.*
- Loan repayments due between March 27, 2020 and December 31, 2020 may be delayed for up to one year, but the deferment period *may* be less than one year.
  - Several vendors have taken the approach of only permitting deferred loan repayment through the end of 2020. The deferred loans will be reamortized as of January 1, 2021 and repayments will begin again in January 2021.
  - *If you are not a qualified individual and you request deferral of your loan repayments, the deferral may trigger a deemed (taxable) distribution of the balance due on the loan*.
- Making the Section 2022 Transactions available to retirement plan participants is optional. Employers may choose to add all, some or none of the Section 2022 Transactions to their Section 401(k) plans, Section 403 (b) plans, or governmental Section 457(b) plans.
  - Even if an employer does not treat a distribution as a coronavirus-related distribution, a qualified individual may treat a distribution that meets the requirements as a coronavirus-related distribution on the individual's federal income tax return.
- A pension plan (such as a money purchase pension plan) is not permitted to make a distribution before an otherwise permitted distributable event merely because the distribution, if made, would qualify as a coronavirus-related distribution.
- A pension plan is not permitted to make a distribution in a form other than a qualified joint and survivor annuity without spousal consent merely because the distribution, if made, could be treated as a coronavirus-related distribution.
- An administrator may rely on an individual's certification that the individual satisfies the conditions to be a qualified individual, *unless* the administrator has *actual knowledge* to the contrary.
  - The actual knowledge exception to relying on an individual's certification is not in Section 2022 but is an exception applicable to other hardship distributions from employee retirement plans under current IRS guidance regarding the same.
- The individual requesting a Section 2022 Transaction will be entitled to treat the Section 2022 Transaction as coronavirus-related for purposes of the individual's federal income tax return *only if* the individual *meets* the eligibility requirements.
  - *Consultation with a tax advisor is prudent before certifying that one is a qualified individual due to experiencing coronavirus-related adverse financial consequences. In the absence of further IRS guidance, being wrong about one's eligibility could trigger expensive tax consequences.*

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- While it is anticipated that employer-sponsored retirement plans will accept repayments of coronavirus-related distributions and treat them as rollover contributions to the plan, a plan is not required to do so.
  - For example, if the retirement plan does not currently accept rollover contributions there is no requirement that the plan be amended to accept rollover contributions in respect of repayment of coronavirus-related distributions.
  - Repayments of coronavirus-related distributions may be made to individual retirement accounts.
- A coronavirus-related distribution is to be reported on the individual's federal income tax return for 2020 even if the individual intends to spread the taxation of the coronavirus-related distribution ratably over 2020, 2021 and 2022.
  - A new Form 8915-E is to be used by all individuals who take a coronavirus-related distribution in 2020 (even if they are not otherwise required to file a federal income tax return) to report any repayment of a coronavirus-related distribution and to determine the amount of any coronavirus-related distribution includible in income for the year. Form 8915-E should be available by the end of 2020.
- Plans and IRAs must report coronavirus-related distributions to qualified individuals on Form 1099-R. This reporting is required even if the individual repays the coronavirus-related distribution in 2020. The IRS expects to provide more information on how to report these distributions later this year.

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