

BENEFITS BRIEF

COVID-19 RELATED EMPLOYEE BENEFIT PLAN RELIEF: A RECAP (Part 3 of 3)

December 2020

This is the final installment of our overview of the key changes in the law and agency guidance affecting benefit plans brought about by the COVID-19 pandemic. In Parts 1 and 2, we covered the key changes affecting health and welfare benefit plans. In this *Benefits Brief*, we will provide an overview of the key changes affecting ERISA-covered¹ 401(k) and other defined contribution retirement plans.

401(k) and Tax-Qualified Defined Contribution Retirement Plans

CARES Act Retirement Plan Distributions and Loans

The CARES Act enacted on March 27, 2020 authorized a new distribution plan sponsors can add to their plans for distributions to qualifying individuals affected by the COVID-19 pandemic made by December 30, 2020. The CARES Act also added plan sponsor-optional participant loan changes for qualifying individuals, including an increased limit on the maximum loan amount and a limited ability to defer loan repayments. Many retirement plan recordkeepers implemented these changes operationally for the plans they serviced, often with little advance notice to “opt-out” of these changes. These distribution and loan changes are summarized in our August 2020 *Benefits Brief*, which can be accessed [here](#).

Suspension of Required Minimum Distributions for 2020

The CARES Act also suspended required minimum distributions for tax-qualified defined contribution plans for calendar year 2020, although plan sponsors may, however, continue to permit 2020 required minimum distributions. The changes to the required minimum distribution rules made by the CARES Act and the SECURE Act (which was enacted in December 2019) are explained in our September 2020 *Benefits Brief*, which can be accessed [here](#).

Deadline Extensions for Administrator-Required Notices

The extension of the health and welfare benefit plans notice distribution deadlines described in Part 2 of this series of *Benefits Briefs* (accessed [here](#)) also applies to most notices applicable to tax-qualified defined contribution retirement plans. Thus, for these plans the extension

¹ ERISA-covered plans are employee benefit plans subject to the labor code provisions of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). This generally includes plans of for-profit and tax exempt employers but excludes plans of governmental entities and churches that have not affirmatively elected to be subject to ERISA.

applies to summary plan descriptions, summary annual reports, periodic benefit statements, and fee disclosures subject to the requirement that the plan administrator act in good faith and furnish the notice/disclosure as soon as administratively practicable under the circumstances. The relaxed electronic disclosure requirements likewise apply to tax-qualified defined contribution plans. Limited relief is also provided for “blackout notices” applicable to temporary restrictions on investment election changes, distributions, and loans from a tax-qualified defined contribution plan.

- Plan sponsors and administrators should contemporaneously document (in writing or electronically), the date and manner disclosures are made, the recipients, and the underlying facts as necessary to support the manner of distribution. To the extent administratively feasible, the disclosures should be made without regard to the relaxed requirements.

Extension of Claims Procedure Deadlines

Like health and welfare benefit plans, tax-qualified defined contribution plans are required to have a fair and reasonable claims procedure. The extension of the deadlines for making an initial claim for benefits and for appeal of an adverse benefit determination under the DOL-mandated claims procedure described in Part 1 of this series of *Benefits Briefs* (accessed [here](#)) also applies to tax-qualified defined contribution plans.

Remote Notarization for Beneficiary Designations and Other Spousal Consents and Elections

Under the Internal Revenue Code and Treasury Regulations, a married participant cannot name a primary beneficiary of a portion of his or her account in a tax-qualified defined contribution plan unless the spouse consents in a prescribed manner. The portion of the account subject to the mandatory spousal benefit depends upon the type of plan, whether the plan is subject to the mandatory survivor annuity rules, and the plan terms. Among the requirements for a valid spousal consent is the requirement that the consent be made in the physical presence of a plan representative or a notary public. Similar consent requirements apply to certain other spousal elections.

In recognition of the social distancing protocols for COVID-19, the IRS has relaxed the physical presence requirements for spousal consent elections made through June 30, 2021. In the case of consent before a notary public, a consent executed using live audiovisual technology that otherwise satisfies the spousal consent requirements and complies with the remote notarization requirements under applicable State law will be acceptable.

With respect to consents witnessed by a plan representative, spousal consent during a remote conference using live audiovisual technology with direct interaction between the spouse and the plan representative is permitted so long as (i) the spouse presents a valid photo ID during the live audiovisual conference and transmits electronically (via PDF or facsimile) a legible copy of the signed document on the same day it was signed and (ii) the plan representative acknowledges he or she witnessed the execution in accordance with the IRS relief and transmits the signed document and acknowledgement to the spouse using the IRS-approved electronic notice requirements.

Deposit of Participant Contributions and Loan Payments

The Department of Labor is maintaining a temporary nonenforcement policy with respect to the late deposit of participant contributions and loan payments which arise “solely on the basis of a failure attributable to the COVID-19 outbreak” (emphasis added). This policy applies beginning March 1, 2020 and ends on the sixtieth day following the announced end of the COVID-19 National Emergency (*i.e.*, the same period applicable to the extension of the participant election deadlines described in Part 1 of this series of *Benefits Briefs*, which can be accessed [here](#)).

This relief is quite limited, as the employer has the burden to establish the delay was due “solely” to the COVID-19 outbreak and the employer and its service providers must act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances. This relief does not foreclose participant claims but such claims are unlikely.

Nonqualified Plans

Extension of Claims Procedure Deadlines

Nonqualified retirement plans, such as “top hat” and “SERP” plans, are exempt from most ERISA requirements applicable to retirement plans, but those plans must include a fair and reasonable claims procedure. The extension of the claims filing deadlines described above for tax-qualified defined contribution retirement plans also applies to nonqualified plans of ERISA-covered² plan sponsors.

Gilbert C. Van Loon is an attorney in the Ridgeland office of Butler Snow LLP. He has represented clients in all aspects of retirement and health and welfare benefit plans – design, administration, compliance, taxation, employee communications, fiduciary responsibility, defense of benefit claims, examinations, ruling applications, correction program filings, and merger and acquisition transactions. Gilbert can be contacted by phone at 601.985.4556 or via email at gilbert.vanloon@butlersnow.com.

Copyright © 2020 Butler Snow LLP. All Rights Reserved.

Benefits Brief is published by the Business Services Group of Butler Snow LLP on selected developments in employee benefits law. The content of *Benefits Brief* is intended for general informational purposes only, is not intended to be comprehensive with respect to the subject matter, and is not intended to create an attorney-client relationship with any reader. *Benefits Brief* is not designed nor intended to provide legal or other professional advice, as any such advice requires the consideration of the facts of a specific situation. For further information or specific questions relating to this article, please contact the author at 601.985.4556 or gilbert.vanloon@butlersnow.com. The invitation to contact the author is not a solicitation to provide professional services and should not be construed as a statement as to any availability to perform legal services in any jurisdiction in which he is not permitted to practice. This publication may be considered ADVERTISING MATERIAL in some jurisdictions and is authorized by Chris Maddux, Chairman, 1020 Highland Colony Parkway, Suite 1400, Ridgeland, MS 39157.

² See footnote 1.