Benefits Briefing:
Ask the Experts - Coronavirus and Retirement Plan Issues

Friday, April 10, 2020
2 p.m. ET
Today’s Speakers

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CARES Act
Navigating the Employee Retention Tax Credit

April 10, 2020
Robert J. Neis
Partner, Washington, DC
Introduction

Robert J. Neis
Partner
Washington

Background

Rob Neis advises clients on executive compensation and employee benefits matters. His practice centers largely on the design, implementation and operation of various types of executive compensation arrangements, including nonqualified deferred compensation plans, incentive plans, employment agreements and equity compensation arrangements.

His experience includes working with clients on issues involving their in-house executive compensation arrangements and nonqualified plan products offered to third parties. Rob also has extensive experience working with clients on retirement plans, including qualified retirement plans, section 403(b) plans and 457(b) plans, and on health and welfare plans and various employment tax issues.

Before joining Eversheds Sutherland, Rob spent six years with the US Treasury Department as the Benefits Tax Counsel and Deputy Benefits Tax Counsel. As the Benefits Tax Counsel, Rob managed the Office of the Benefits Tax Counsel and was the principal legal advisor to the Secretary of the Treasury and the Assistant Secretary for Tax Policy on employee benefits matters.
Employee retention tax credit

Eligible employers are allowed a tax credit equal to 50% of qualified wages

- Credit is determined for each calendar quarter

- Eligible employer
  - trade or business is fully or partially suspended due to orders from a governmental authority limiting commerce, travel or group meetings due to COVID-19; or
  - has gross receipts for a calendar quarter that are less than 50% of gross receipts for the same calendar quarter in 2019
    - And for any immediately subsequent calendar quarter has gross receipts that are 80% or less of the gross receipts for the same calendar quarter in 2019
  - Tax exempt organizations can be eligible employers
  - Special controlled group rules apply

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Qualified wages

- **Employers with 100 or fewer full-time employees**
  - Wages paid to all employees during the period that the employer is an eligible employer

- **Employers with more than 100 full-time employees**
  - Wages paid to employees not performing services for the reason that the employer is an eligible employer

- **Qualified wages include health plan expenses allocable to wages**
  - Health plan is broadly defined
  - Health plan expenses are allocated separately for each plan, pro rata among participating employees, and pro rata based on the period to which wages relate

- **Limits on wages apply**
Claiming the credit

– Credit is allowed against employer share of social security taxes (6.2% of wages)

– Credit in excess of employer social security taxes is fully refundable

– Process for claiming credit:
  • Claim on quarterly employment tax return (generally, Form 941)
  • All employment taxes can be retained to claim the credit, including employer’s share of social security and Medicare taxes, employees’ share of social security and Medicare taxes, and employee income tax withholding
    • Employment taxes withheld during a quarter can be retained in anticipation of receiving a credit and used to pay wages
  • If employment taxes are insufficient to pay wages, employer can apply for an advanced payment of the credit on Form 7200
Restrictions, limits and considerations

– Payroll Protection Program
  • Employers that receive Small Business Interruption Loans under the Payroll Protection Program are not eligible for the employee retention tax credit

– FFCRA paid family and medical leave
  • Qualified wages for purposes of the employee retention tax credit do not include qualified sick and family leave wages for which the employer receives a tax credit under the Families First Coronavirus Relief Act

– WOTC
  • Qualified wages do not include the wages of an employee for whom an employer is allowed a work opportunity tax credit for the same period

– TCJA paid family and medical leave
  • Qualified wages do not include wages for which a credit is claimed for paid family and medical leave under IRC section 45S

– Employment Tax Delay
Frequently Asked Questions
Frequently asked questions

— What counts as a partial suspension of an employer’s trade or business for purposes of determining eligible employers?

— What counts as a health plan expense, and how are health plan expenses allocated?

— My company is associated with another company that is applying for a Paycheck Protection Loan. Is my company still eligible for the employee retention tax credit?
Questions?
COVID-19 & CARES Act FAQs
Qualified Plan Issues for Plan Sponsors and Administrators
Deadline Extensions

- Federal Tax Deadline – NOW JULY 15, 2020
- IRA and HSA Contribution Deadline
- Employer Contribution Deadline – 404(a)(6)
- Plan Amendment Deadlines
  - 403(b) plans → March 31 to June 30
  - Pre-approved DB plans → April 30 to July 30
Deadline Extensions

What Else Might Be Extended?

- ERISA deadlines
  - Now extended – Notice 2020-23
  - April 15 deadline for excess deferrals
- Rollover deadlines
- Form 5500
- EPCRS deadlines
- 8/31 deadline for hybrid plans
CARES Act Distribution and Loan Relief

**Coronavirus-Related Distributions**
- Distributions in 2020 only
- Up to $100,000
- 10% penalty waived
- 3-year income inclusion
- 3-year recontribution
- 402(f) and 20% mandatory withholding waived

**Loan Relief**
- Maximum loan limit increased to lesser of $100,000 or 100% of vested account
- Loan repayments between 3/25/20 and 12/31/20 delayed for one year
CRD and Loan Criteria

Eligibility Criteria

Must meet one of the following:

- be diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (COVID-19) by a test approved by the Centers for Disease Control and Prevention

- have spouse or dependent who is diagnosed with such virus or disease by such a test

- experience adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors as determined by the IRS.

Plan permitted to accept self-certification.

Plan need not confirm which criteria applies to participant

Beneficiaries and alternate payees can qualify.
Common Questions – CRDs and Loans

- Are CRDs and loan relief required or optional? Can plans use an amount lower than the maximum?

- When is this relief available (CRDs / Loan Increase / Loan Delay)?
  - What about distributions taken before March 27, 2020?
  - What about distributions taken on December 31, 2020?

- Who is a qualified individual? What about adverse financial consequences resulting from circumstances not described in the CARES Act? Is someone who only has a “reduction in wages” eligible? What about if only the spouse’s income is affected?

- How does self-certification work? For what purposes can it be used?
Common Questions – CRDs

- What plans can offer an in-service distribution right?
- Does spousal consent continue to apply? What about the 411(a)(11) notice?
- How is a CRD supposed to be coded?
- How will recontributed amounts be treated?
Common Questions – Loans

- How does the loan repayment extension work? Will loans be reamortized, and when does repayment start again?

- Is a loan of 100% of a participant’s account a prohibited transaction?

- Does the $100k limit apply to CRDs and loans separately?

- Can plans offer interest rate relief on plan loans?

- Is self-certification allowed for loan relief?
Common Questions – CRDs and Loans

- Will we get guidance on the CARES Act distribution and loan relief? When?

- What is the risk of implementing the new CARES Act features incorrectly?
RMD Waiver for 2020

The CARES Act waives RMDs for 2020

- Is this optional or required?
- What plans are eligible?
- What about RMDs due April 1, 2020?
- What about beneficiaries?
- Can payments that were already taken be rolled over or recontributed under CRD rules?
- Will RMDs have to be made up in 2021?
Plan Amendments

CARES Act provides extra time to adopt any needed amendments

- End of 2022 plan year for most plans
- End of 2024 plan year for governmental plans

Amendment will need to reflect operation of the plan
Defined Benefit Plan Relief

Employers may delay any 2020 funding obligations until January 1, 2021

Plan may use 2019 funded percentage for 2020 benefit restrictions

Common Questions

Application for non-calendar year plans
Other Pressing COVID-19 Issues

- Is physical presence required for spousal consent?

- Has the hardship safe-harbor event for disasters been triggered?

- Can employers suspend safe-harbor contributions? Will IRS provide relief?
  - Relief from 30-day advanced notice requirement
  - Guidance on what it means to operate “at an economic loss”
Other Pressing COVID-19 Issues

- Effect of “furlough” on plan terms
- Partial terminations
- Compensation definition issues
Nonqualified and executive compensation issues in the current business climate

Catherine L. Creech  National Tax Department
Washington DC
Business reaction to the emergency

Common fact patterns

• Compensation reductions
• Ad hoc salary deferrals by management
• Delays in bonus payments
• Delays in deferred compensation payments
Tax questions to consider

• Do voluntary reductions in pay result in constructive receipt?
• Do reductions create potential section 409A “substitutions”?
• Do deferrals of salary and bonus create new deferred compensation arrangements under section 409A?
  • Short term deferral period
  • Delays in payment that risk “going concern”
  • “Refusal to pay” rules
CARES Act compensation limitations

• Loans provided under Title IV of the CARES Act are subject to compensation limits
• Sections 4004 and 4116 of the Act provide for limitations on employee compensation for businesses that avail themselves of Title IV loans or financial support
• If an employee received more than $425,000 in 2019:
  • Total compensation in any 12 months may not exceed 2019 amounts
  • Severance or other termination pay may not exceed 2 times the 2019 compensation amounts
• If an employee received more than $3 million in 2019:
  • Total compensation limited to $3 million plus 50% of the excess over $3 million of compensation received in 2019
  • For example, if an employee received $4 million 2019, the limit for any 12 month period is $3.5 million ($3 million + (50% * $1 million))
CARES Act compensation limitations

- Total compensation is defined to include salary, bonuses, awards of stock, and other financial benefits
- The provisions generally do not apply to collectively bargained agreements
- The limitation period depends upon which program is utilized
  - CARES Act subtitle A (for air carriers and other distressed businesses) -- limits on compensation during the loan period plus 1 year
  - CARES Act subtitle B -- limits on compensation during the 2-year period beginning March 24, 2020 and ending March 24, 2022
CARES Act compensation limitations

Questions

• Definitions of total compensation and calculation methodologies
  • These are not federal income tax rules
• Enforcement through contractual terms
• Modification of employment contracts
  • Will deferral be permitted or forfeitures required?