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THOUGHT LEADERSHIP

LEGAL UPDATES

PUBLISHED: MARCH 25, 2020

COVID-19-Related Issues for 401(k) Plan Sponsors

Services

Employee Benefits & Executive Compensation

Retirement, Health, & Welfare Plans

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The current COVID-19 public health crisis raises important issues in connection with 401(k) retirement plans that plan sponsored need to consider carefully. Below, we have outlined some of the issues that might arise from the crisis itself or its aftermath.

Partial plan termination. Generally, if the number of participants declines by at least 20% during a plan year, the plan has a “partial termination” and you must 100% vest affected participants. Typically, a furlough does not result in a termination of employment or decrease in the number of participants.

Suspending contributions. Suspending employer contributions to your plan depends on the plan terms. If your plan is a safe harbor plan, you can suspend contributions in one of two scenarios:

The employer is operating at an “economic loss for the plan year”, or

You stated in the annual safe harbor notice that you retained the right to terminate contributions.

You have to amend your plan and provide employees with at least 30 days’ notice.

If your plan is not a safe harbor plan, there are several some variables to consider:

If the contribution is discretionary, you do not have to make a contribution for the plan year.

If the contribution is fixed and your plan requires 1,000 hours of service to receive an allocation, you can suspend the contribution at any point before an employee earns 1,000 hours for the plan year. After that, you would have to make a contribution on compensation earned to date.

If the contribution is fixed and your plan requires employment on the last day of the plan year, you can suspend the contribution at any point; however, you may have to make a contribution for anyone who retired or died prior to suspending the contribution.

You will need to amend your plan.

Hardships and loans. As of right now, the COVID-19 pandemic is not an independent reason to request a hardship in most states; however, medical expenses, etc., related to the pandemic are permitted reasons for a hardship distribution. If your plan requires a terminated participant to repay plan loans at termination, you should consider whether to amend your plan to permit repayment over time.

Deadlines. The IRS has not yet pushed back deadlines for plan compliance, such as filings and contribution due dates.

Fiduciary duties. We recommend your plan committee meet with your investment advisor (virtually or by email) to consider whether to stay the course with respect to the plan's investment lineup.
Leave of absence. Some plans have express language regarding crediting service and/or compensation during paid and unpaid leaves.

Contact us

If you have questions, please feel free to reach out to Patricia Martin, Craig Kovarik, Alan Kandel, or your Husch Blackwell lawyer. We expect legislation or other guidance on some of these issues, and we will update as it happens.

Additionally, Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and employment, retailing, and supply chain management, among others.