

## COVID-19 SPECIAL EDITION #2



### **CARES Act Provides Early Access to Retirement Funds and Other Retirement Plan Relief Due to COVID-19**

The much-awaited phase three of coronavirus-related legislation passed the House and was signed into law the afternoon of March 27, 2020.

Known as the Coronavirus, Aid, Relief and Economic Security (“CARES”) Act, the almost 1,000-page stimulus package contains several provisions impacting retirement plan access and operation.



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To aid employees struggling financially due to COVID-19, the CARES Act provides easy access to retirement funds through coronavirus-related distributions and loans.

To aid plan participants who are subject to required minimum distributions (“RMDs”) and who would prefer to avoid distributions at a time the market is significantly down, the Act waives RMD requirements for 2020. We have summarized these and other relief provisions below.

#### **Distributions**

The CARES Act creates a new type of hardship distribution called a “coronavirus-related distribution,” which is available to plan participants who:

- (1) are diagnosed with COVID-19;
- (2) have a spouse or dependent diagnosed with COVID-19; or
- (3) experience adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, or being unable to work due to lack of childcare resulting from COVID-19.

If coronavirus-related distributions are added to a plan, qualifying individuals may take a distribution in an amount up to \$100,000, which is exempt from the 10% early withdrawal penalty. Participants taking a distribution may spread the income tax liability over a three-year period, as well as repay the distribution tax free over the next three years.

These provisions may be added to “eligible retirement plans,” which include qualified plans (including both defined contribution and defined benefit plans), 403(b) plans, governmental 457(b) plans, and individual retirement accounts (“IRAs”). Plans may adopt coronavirus-related distributions even if they do not otherwise permit hardship distributions.

All coronavirus-related distributions must be taken before December 31, 2020.

### **Plan Loans**

The CARES Act also increases the loan limits to the lesser of \$100,000 or 100% of a participant’s vested account balance—raised from the lesser of \$50,000 or 50% of a participant’s vested account balance—for any participant who meets the eligibility conditions described above for a coronavirus-related distribution.

Additionally, any qualified participant meeting the criteria described above with an outstanding loan during the period beginning on enactment and ending December 31, 2020, may delay repayment for one year.

### **Waiver of Required Minimum Distributions (“RMDs”)**

Not all CARES Act provisions take money out of participants’ retirement accounts. For participants who are concerned about the volatile stock market and who would prefer to keep funds in their accounts to give the market time to improve, the Act waives RMDs for 2020 for participants over the age of 72. The waiver applies to distributions from defined contributions plans, including 401(k), 403(b), and governmental 457(b) plans, as well as IRAs.

### **Amendments**

The Act permits a retirement plan to implement these changes immediately, so long as the plan is amended to incorporate the changes on or before the last day of the first plan year beginning on or after January 1, 2022 (i.e., before December 31, 2022 for a calendar year plan). Governmental plans have an additional two years to adopt an amendment.

### **Funding Delay for Defined Benefit Plans**

Employers facing minimum funding deadlines for their defined benefit pension plans while suffering from reduced income due to COVID-19 also see some relief. The CARES Act delays 2020 minimum funding deadlines for plans subject to the Employee Retirement Income Security Act (“ERISA”) to January 1, 2021.

Generally, employers must contribute the minimum required contribution no later than 9 ½ months following the end of a plan year, which is September 15 for a calendar year plan. The Act delays the due date for any minimum funding due during 2020 to January 1, 2021. The required contribution must be contributed by January 1, 2021, with interest calculated from the original due date.

### **Expansion of DOL Authority to Delay Deadlines**

Finally, the CARES Act expands the authority of the DOL to delay certain deadlines under

Our attorneys are continuing to monitor the impact of the ever-changing COVID-19 landscape to employers. If you have questions, please reach out to us at 865-546-7311.

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## **DOL Provides Limited Guidance on New Families First Coronavirus Response Act**

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Although formal regulations will not be released until sometime in April, the DOL issued some guidance this week in the form of frequently asked questions (“FAQs”), providing answers to at least some of the questions arising from the Families First Coronavirus Response Act (“FFCRA”) passed last week. Here are some highlights of what we learned:

- (1) The paid leave provisions apply only to leave taken between April 1, 2020, and December 31, 2020. Any leave taken before April 1 will not be covered by the FFCRA. Thus, if an employer voluntarily provided paid leave prior to April 1 for reasons that are covered by the FFCRA, it may not take a tax credit for that paid leave.
- (2) Employers with common ownership may be joined for purposes of determining the 500-employee threshold if their businesses are interrelated. Two separate rules come into play in determining whether each corporation or business entity is treated as a single employer.
  - a. If two or more employers meet the integrated employer test under the Family and Medical Leave Act (“FMLA”), then the combined companies will be treated as a single employer for purposes of the emergency family and medical leave expansion.
  - b. If two or more employers are considered joint employers under the Fair Labor Standards Act (“FLSA”), then they will be treated as a single employer for purposes of the emergency paid sick leave. Controlled groups and affiliated service groups should carefully review these rules to determine whether they will be combined for purposes of the FFCRA.
- (3) Employers with less than 50 employees may be eligible to request an exemption from providing child-care related sick leave and expanded family and medical leave if providing the leave would jeopardize the viability of the business as a going concern. The DOL intends to establish criteria for such an exemption in the coming regulations. Currently, it does not appear that the DOL is providing an exemption to small employers for other types of sick leave covered by the FFCRA.
- (4) If an employee normally works overtime, that overtime must be included in the paid leave calculation under the FFCRA.
- (5) The rate of pay for purposes of determining paid leave under the FFCRA is the regular rate over a period of up to six months prior to the date an employee takes leave, and it includes commissions, tips, etc. paid over that time period.
- (6) Paid sick leave is capped at 80 hours, even if an employee has more than one qualifying reason for the leave. For example, if an employee takes 80 hours of paid sick leave to care for a child whose school is closed, that employee cannot take an additional 80 hours for his own self-quarantine that occurs after the original leave.
- (7) Paid sick leave and paid expanded family and medical leave may be stacked, such that an employee who takes time off to care for a child whose school or place of care is closed due to COVID-19 may receive a total of twelve weeks of paid leave (at 2/3 of the regular rate of pay).

You can read the full FAQs [here](#). Please feel free to reach out to us at 865-546-7311 if you have questions about how your business is impacted by these new rules.

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# A Summary of the Families First Coronavirus Response Act for Employers and Employees

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At Kennerly Montgomery, we're watching the unfolding events around the COVID-19 outbreak just as closely as you are. We know you have questions and our attorneys are looking for the answers. On March 6, phase one of a multi-phase coronavirus relief package, known as the Coronavirus Preparedness and Response Supplemental Appropriations Act, became law offering \$8.3 billion in emergency funds for federal agencies as they respond to the crisis.

On March 19, phase two, the Families First Coronavirus Response Act (the "Act"), was signed into law. Of the chief inclusions, Congress made testing for the coronavirus free without deductibles or copayments under group health plans and governmental insurance programs, and it also provided waivers for certain programs relating to school lunch programs and SNAP benefits.

However, the most important codifications for both employers and employees are the introduction of mandatory paid sick leave and an emergency expansion of the Family and Medical Leave Act ("FMLA"). These new requirements are effective April 2, 2020, and they automatically expire December 31, 2020.

Pursuant to the Act, employers with less than 500 employees must provide FMLA leave to an employee who is unable to work (including telework) due to a need to care for a child (under 18) if his/her school or place of care has been closed due to COVID-19. The first 10 days of this leave is unpaid. After the first 10 days, the leave is paid at 2/3 of the employee's regular rate of pay, not to exceed \$200 per day or \$10,000 in the aggregate. Because this leave is under the FMLA, the employee's job is protected and guaranteed upon return.

The emergency paid sick leave provisions apply to employers with less than 500 employees and to all public agencies. Such employers must provide employees two weeks of paid sick leave for specified purposes. Two-weeks means 80 hours for full time employees and the average number of hours generally worked in a two-week period for part-time employees. An employee is entitled to paid sick leave if:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and is seeking medical diagnosis;
4. The employee is caring for an individual who is subject to an order described in (1) or has been advised as described in (2);
5. The employee is caring for a child if the school or place of care of the child has been closed or is unavailable due to COVID-19 precautions; or
6. The employee is experiencing any other substantially similar conditions specified by the Secretary of Labor or Health and Human Services.

The required rate of compensation is generally the employee's regular rate of pay. However, for uses described in (4), (5) or (6) above, the employee's required rate of compensation shall generally be 2/3 of the employee's regular rate of pay. Paid sick leave under the Act shall not exceed \$511 per day (\$5,110 in the aggregate) for uses described in (1), (2), or (3) above or \$200 per day (\$2,000 in the aggregate) for uses described in (4), (5), or (6) above.

Leave is available to all employees, regardless of tenure, and employers cannot require an employee to use other paid leave provided (e.g., PTO) before the employee uses the emergency leave provided under the Act.

Employers must provide notice of the new leave rules. The Act directed the Department of Labor ("DOL") to publish a model notice within seven days. The DOL is also allowed in

the Act to regulate whether or not these new leave rules will apply to employers with 50 or less employees; however, no timeline has been introduced on whether or not they will exempt these employers. As of right now, they do apply—we will keep you informed if this changes.

In the broadest of terms, employers are entitled to a payroll tax credit against the employer portion of the tax imposed by IRC § 3111—old age, survivors, and disability insurance (“social security”) taxes—for each calendar quarter in an amount equal to 100% of the qualified sick leave wages paid with respect to such calendar quarter. Sick leave provided to employees under the Act shall not be considered wages for social security tax (IRC § 3111) purposes.

Congress is currently considering additional legislation to provide relief to individuals impacted by the pandemic. We will continue to provide updates as more information becomes available regarding phase three and the aforementioned DOL forthcoming models and regulatory updates.

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## **Leave Policy Review: Coronavirus (COVID-19)**

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Here are six points you need to consider in reviewing your sick, annual, PTO, or unpaid leave policies as COVID-19 continues to spread:

1) Review your worker’s compensation rules on occupational illness.

- Did one of your employees recently travel to a highly concentrated area, foreign or domestic, for business reasons? You may be on the hook.
- If one of your public-facing employees receives the virus through community exposure—whether they’re cashiers, healthcare workers, or in hospitality and food service—what happens next?

2) Leave Policy for those with symptoms.

- The Centers for Disease Control and Prevention has encouraged employers to establish “non-punitive” policies that allow employees to self-quarantine instead of powering through their symptoms.
- Your policy should include whether or not to ask people with common symptoms of similar diseases (e.g. the common cold, allergies, or the flu) to self-quarantine.
- Will you require employees to use and/or exhaust accrued PTO if they are unable to work due to illness or are unable to work remotely?

3) Leave Policy for those exposed without symptoms, either through the diagnosis of a relative, friend, co-worker, or attendance at an event or through domestic or foreign travel.

- Will you require employees to use and/or exhaust accrued PTO if they are unable to work remotely?

4) Leave Policy for those who have not been directly exposed but wish to stay home.

- Employees affected by school closures, etc.
  - Will you require employees to use and/or exhaust accrued PTO if they are unable to work remotely?
- Employee is simply worried about potential exposure at work.
  - How will your policy address this in a clear way?

5) Do policies apply differently for higher-risk employees (e.g. the elderly, pregnant, or already sick)?

6) How will office closure due to COVID-19 affect pay for hourly and salaried employees?

We at Kennerly Montgomery are here to help you as you assess and address this pressing issue. Please contact Kathy Aslinger, Ashley Trotto, or myself for any needs you may have in reviewing current or applying new employer leave policies at (865) 546-7311.

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