LABOR AND EMPLOYEE BENEFIT PLAN GUIDANCE: FURLOUGHS, LAYOFFS AND YOUR RETIREMENT PLANS

Attendee Questions

1. For RMDs already taken in early 2020, we are past the 60 days for an eligible rollover. Can distributions previously taken be returned to the IRA, even if it is past the 60 days?

ANSWER: Probably not. It appears that participants who received a 2020 RMD within the previous 60 days will be able to recontribute that amount to a plan or IRA. However, additional guidance from the IRS is expected for clarification.

2. Can an employer temporarily lay off employees if there is not a furlough policy in place?

ANSWER: Yes. So long as the workforce is at-will, employers may develop furlough policies in response to the COVID-19 pandemic. If the workforce is unionized, then the terms of the relevant collective bargaining agreement ("CBA") must be applied.

3. If we have both an IRC 401(a) and IRC 457(b) governmental plan, are we responsible for ensuring that the participant doesn't exceed $100,000 for both plans combined?

ANSWER: Yes. An employer is responsible for ensuring compliance with the $100,000 limit for Coronavirus-Related Distributions (CRDs).

4. Does the elimination of overtime constitute a financial impact?

ANSWER: No. Under the federal Fair Labor Standards Act ("FLSA"), employers are required to pay employees who are not exempt from overtime (e.g., employees paid hourly or otherwise entitled to overtime pay) only for hours they actually work. If hours have decreased due to a COVID-related business downturn, and employees are not engaged to work more than 40 hours per week, then the employee has not earned overtime.

5. Can a member of a pension plan withdraw or retire his or her account if there is a furlough? Would this be considered an in-service distribution? What if furlough goes longer than anticipated?

ANSWER: Probably not. Plans typically cannot allow furloughed employees to receive distributions of their plan benefits unless they formally terminate employment. Furloughed employees typically remain active employees of the employer and are ineligible for distributions that are only available upon termination of employment. However, in-service withdrawals (such as hardship withdrawals, age 59-1/2 distributions or loans) may be available to furloughed employees for as long as the employee is in furlough status.

Frequently Asked Questions and Answers (from slides)

1. Can a furlough trigger the WARN Act?

ANSWER: Possibly. An employer must give a 60-day notice under the federal WARN Act where the employer: (a) has 100 or more full-time employees, or 100 or more employees, including part-time employees, who work at least a combined 4,000 hours per week; (b) furloughs at least 50 employees which comprise at least thirty-three percent (33%) of the total active workforce (excluding any part-time employees) or 500 or more employees (excluding any part-time employees); (c) keeps employees on furlough for at least six months; and (d) has no applicable exception to the WARN Act.

2. How do I take advantage of an exception under the WARN Act?

ANSWER: There are four potential exceptions under the WARN Act, including: (1) the reduction of seasonal or project-based workforce; (2) faltering company exception; (3) unforeseeable business circumstances; and (4) natural disaster. If the employer is simply reducing its seasonal workforce, then no notice is required. However, if the employer is reducing its workforce due to a business interruption-related exception (i.e. faltering company, unforeseeable business circumstances or national disaster), then the employer must give notice *as soon as practicable* and explain the reason for the delay in the Notice.

3. Can individuals be laid-off while they are on FMLA or other job-protected leave?

ANSWER: Yes. So long as the employer applies objective factors in making the layoff decision. The determination cannot be based in any part on the fact the employee is on job-protected leave.

4. Where can I find Department of Labor resources on the WARN Act?

ANSWER:

https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/_EmployerWARN2003.pdf

5. Can I force employees to use their accrued leave benefits during furlough?

ANSWER: It depends. Employers should act consistent with their written leave policies. If the policies need amending given the impact of COVID-19, employers should make the appropriate amendments. However, where an employer is covered under the Families First Coronavirus Response Act ("FFCRA") (fewer than 500 employees), the FFCRA prohibits employers from requiring employees to use vacation or other paid time off before using the additional FMLA or paid sick leave benefits afforded by the FFCRA. Employers may permit, but may not require employees, to choose between using their existing accrued leave and FFCRA leave. Employers may also permit, but may not require, employees to supplement any partially paid sick leave or expanded family and medical leave under the FFCRA with existing accrued paid leave in order to receive their full compensation. If an employee prefers not to use existing accrued paid leave, employers cannot require the employee to do so.

6. Can I convert a furlough into a permanent layoff?

ANSWER: Yes. So long as the employer applies objective factors in making the layoff decision. The determination cannot be based in any part on the fact the employee is on job-protected leave.

7. Do I need to pay Exempt Employees who are furloughed?

ANSWER: Generally, no. An employer must pay an exempt employee the full predetermined salary amount "free and clear" for any week in which the employee performs any work without regard to the number of days or hours worked. However, there is no requirement that the predetermined salary be paid if the employee performs no work for an entire workweek.

8. Can I furlough an employee in lieu of certifying them for FMLA leave?

ANSWER: No. Such action would be construed as FMLA interference and/or retaliation. The FMLA prohibits employers from interfering with, restraining or denying an employee's exercise of FMLA rights. The FMLA also prohibits employers from retaliating against an employee for exercising his or her FMLA rights. This is a non-waivable right. An employer may be liable for compensation lost by the employee and potentially equitable relief because of the employer's interference with the employee's FMLA rights.

9. Do I have to offer CARES Act distributions?

ANSWER: No. The CARES Act permits, but does not require, the plan sponsor to offer: (i) Coronavirus-Related Distributions (CRD), (ii) Increased Loan Limits and/or (iii) Required Minimum Distributions (RMD) Waiver. However, some record-keepers may dictate the administrative requirements for these provisions.

10. Is there a risk to the plan in offering (or not) CARES Act distributions?

ANSWER: Technically, no. The decision whether or not to provide CARES Act distributions is a plan design (settlor) function and does not create a fiduciary risk for the plan trustees. However, the plan trustees should weigh the financial burdens that COVID-19 may create for its employees versus the long-term impact on retirement readiness of allowing increased access to retirement funds.

11. Which provisions are mandatory and which are optional?

ANSWER: It appears that the provisions for Loans, Required Minimum Distributions and Coronavirus-Related Distributions are optional. Additional IRS guidance is very likely. At this time, many record-keepers are automatically adopting these provisions on behalf of plan sponsors and will require a plan sponsor to opt-out of implementing some or all of these provisions.

12. Can we wait and add the provisions later if there is more demand/need?

ANSWER: Yes. A plan sponsor can add optional CARES Act provisions any time, while these benefits remain available. For instance, the increased loan amounts are currently only available until September 23, 2020.

13. How are the CARES Act early withdrawals taxed?

ANSWER: An individual receiving a CRD can spread the income tax equally over three calendar years or may elect to have the entire amount included in income in the year of distribution.

14. How does the loan repayment extension and re-amortization work?

ANSWER: Additional guidance is required to clarify if repayments will start on, for example, January 1, 2021, or April 1, 2021, or another start date. When loan repayments do begin, the delayed amounts will be added to the end of the loan similar to the process for military loan repayments.

15. Does the $100,000 limit apply separately to CRDs and loans?

ANSWER: Yes. A plan participant could take advantage of both the new CRD and loan provisions. However, loans cannot be "stacked." For instance, if a participant currently has a $50,000 outstanding loan, an additional loan of $100,000 is not available and the current loan rules and limits would still apply.

16. Is self-certification allowed for loan relief?

ANSWER: Probably, yes. Specific language was not included in the CARES Act and will require additional IRS guidance.

17. Will a participant receive a new Form 1099-R each year if they decide to pay the income tax on a CRD over a three-year period?

ANSWER: No. Record-keepers will provide one Form 1099-R for the year of distribution. The participant must then report the income tax on his or her personal tax return over a three-year period using the forms and procedures that will be established by the IRS.

18. When will we have additional guidance on CARES Act distributions and loan relief?

ANSWER: Congress has not indicated when additional guidance will be provided. Ice Miller continues to monitor and post any developments on its COVID-19 website resource page.

19. Will 2020 RMDs have to be made up in 2021?

ANSWER: No. RMDs for 2020 will not have to be made up in 2021. This approach is similar to what was done during the 2009 economic crisis.

20. Which plans are eligible for the RMD waiver?

ANSWER: Defined contributions plans are eligible for the RMD waiver. Defined Benefit Plans are still subject to the old RMD rules, subject to any new guidance.

21. Is an RMD in 2020 optional or required?

ANSWER: RMDs in 2020 appear optional, which is similar to the IRS' treatment of RMDs during the 2009 economic crisis. The operational question is whether the plan sponsor should stop all RMDs in 2020 or give participants an option. Some participants rely on RMD distributions for income. For this reason, some record-keepers are suspending RMDs and allowing participants the option to request non-RMD distributions.

22. Can payments already taken be rolled over or recontributed under CRD rules?

ANSWER: Yes. The CARES Act relief allows a CRD to be recontributed to any qualified retirement plan (if it accepts rollover contributions) or IRA within a three-year period that starts on the day the distribution is received by the employee. The CARES Act does not require the recontributed amount to go back to the same plan, although it is unlikely an employee will want it to go to a different plan. If an employer will not take the funds back into the plan, an employee may need to find an IRA provider who will do so as a rollover contribution.