

CREATIVE PENSION CONSULTANTS, INC.

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UPDATE REGARDING THE CARES ACT AND YOUR PLAN

We hope that you, your staff, and your families have been well during this health crisis. When we sent out our last update in April, many rules had just been issued and there were a lot of open questions about them. We've gotten more information recently, and while some of it is still not perfectly clear, we want to get it to you so you can properly administer your plan. Please review this notice, and if applicable, share it with the people in your organization who help administer your plan (payroll, human resources, etc.)

EXPANSION OF "QUALIFIED INDIVIDUAL"

If you did not elect to allow any of the special coronavirus-related transactions, this section does not apply to your plan. Please also disregard the attached draft memo for participant communication.

The term "qualified individual" describes who was eligible to get special treatment under the new distribution and loan rules. Almost immediately, people started finding the gaps, most notably, where a spouse was laid off due to COVID-19 and therefore the household was experiencing a financial hardship. Under the initial definition, this was not a valid reason for your employee to take a coronavirus-related distribution ("CRD") from your plan as a qualified individual. The IRS has expanded the definition in response.

First, the IRS took the "qualified individual" definition and added more reasons to allow a participant to take a CRD or expanded loan. In addition to the previous conditions of quarantined, furloughed, laid off, had their work hours reduced, or unable to work due to lack of childcare, now a participant is a "qualified individual" if they had one of the following financial consequences due to COVID-19:

- had a reduction in pay;
- had a reduction in self-employment income;
- had a job offer rescinded; or
- had a start date for a job delayed.

Second, the term "qualified individual" was expanded so that a participant is a qualified individual if they are experiencing adverse financial consequences as a result of COVID-19 due to their **spouse** or a **member of their household** meeting any of the "qualified individual" conditions*. What is a "member of their household"? It's defined as "someone who shares the individual's principal residence", which can include children, other family members, partners, roommates, and boarders. The situation may be unique to each person. Luckily, the plan can still rely on the participant's self-certification with no obligation to inquire or investigate, unless you have pre-existing knowledge that you are being given false information. This means that if a participant tells you that they qualify for a CRD (and you previously chose to allow these distributions from your plan!) and you don't know of any reason why they wouldn't, you can accept their word (via a form that we'll discuss in a moment). Any potential issue from them misrepresenting the situation will fall on them, not you or the plan.

* as before, a participant can also be a "qualified individual" if they, their spouse, or their dependent is diagnosed with COVID-19.

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This expansion might mean that participants, who came to you earlier and had to be rejected due to the narrower standards, may now be able to get a CRD under the new guidelines. Legally, you are not obligated to track them down specifically and offer the distribution to them. However, there is nothing wrong with reaching out to those participants and asking if they now want to re-apply for the distribution. Similarly, if you allow plan loans and expanded loan options due to the coronavirus, participants could be entitled to options that weren't previously available, and you may want to revisit those requests.

For those plans that allowed these CRDs and expanded loans to Qualified Individuals, attached is an updated certification form. Also attached is an updated draft memo to complete and distribute to tell your participants about the expanded Qualified Individual definition. Again, if you aren't allowing any of the coronavirus-related transactions, then you don't have to worry about this.

PLAN LOANS

If your plan doesn't allow loans, this section doesn't apply to you.

There are two different loan updates:

Non-Qualified Individuals: For any participant who stopped repayments for any length of time through July 15, 2020, payments need to start up with the first payroll that they are back to work starting July 15, 2020. Interest should be accrued on the missed repayments. If you're working with a fund custodian platform (like American Funds, Nationwide, Principal, Empower, etc.), they will probably have accrued this interest and will likely help you reamortize the loan so that it still gets paid off on time. We don't know which of your loans have had missed repayments, because there was a pause on loan delinquencies leading to defaults through July 15; so you should contact the fund custodian directly if you have any loans that did this (or let us know if you need assistance). If you get a new amortization schedule or payment information, please forward it to us. For loans not on platforms, please contact us directly to discuss which loans need reamortization. This loan pause was not technically part of the CARES Act, but it overlapped with other loan actions. The loan in this situation does not get any extension and still must be repaid by the original ending date.

Qualified Individuals: If a participant met the guidelines to be a "qualified individual" (including the expanded definition discussed above), the IRS has put out a "safe harbor" standard for the loan suspension:

- Suspensions were valid starting with loan repayments due after March 27, 2020;
- Only 2020 repayments are suspended; 2021 repayments start with the first payroll in January 2021;
- Interest accrues during the suspension and the loan gets reamortized once payments restart; and
- One year is added to the length of the loan.

The IRS has said that other ways of dealing with the suspension could be valid as long as they meet the standards of the CARES Act, but this is going to be the easiest way. And, if your plan is on a fund platform, it is likely that they will use the safe harbor for ease. As with the non-qualified individual loan suspensions, we don't know which of your participant loans were suspended; so your most efficient route would be to contact the fund custodian directly for a new amortization schedule and send us a copy of the new information; or, if your plan is not on a custodian platform, contact us for help with the reamortization. If the loan would have been paid off during the suspension period, the repayments must start with the first payroll in January 2021.

In either case, participants who want to catch up their loans or pay their loans off faster may make multiple repayments per pay period; these **MUST** be full repayments, not just arbitrary additional amounts.

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REQUIRED MINIMUM DISTRIBUTIONS (RMDs)

This section is only applicable to your plan if you have participants who are age 70 or older. Note that the SECURE Act changed the starting age for those not yet taking RMDs from 70½ to 72, if they had not attained age 70 ½ as of December 31, 2019.

While the official required minimum distribution language in the CARES Act said that all “2020 RMDs” (which included both those RMDs for the 2019 calendar year that were due to be paid up until April 1, 2020 and the RMDs for the 2020 calendar year itself whether due by December 31, 2020 or April 1, 2021) were waived, the regulations from the IRS make it a little more complicated. The plan will have to be amended to waive the 2020 RMD, but participants will still have the right to take it if they request it. You may want to take the conservative step of actually getting something from each affected participant as to whether they want to take the RMD or not; it’s not clear how the IRS will interpret this in the future. We will expect to write the amendment to waive the 2020 RMD as the default, unless we discuss otherwise with you.

If we have already prepared your 2019 annual report and discussed the waiver of the 2020 RMD, we will contact you directly with more information if needed.

Also, if the 2020 RMD is taken, it may be allowed to be treated as a distribution eligible for rollover (usually, RMDs are taxable cash distributions). This will also have to be in the plan amendment. For simplicity, we recommend that the plan not allow them to be allowed to be eligible for rollover. We will assume this as the default, unless we discuss otherwise with you.

Any other taxation issues regarding the RMD should be discussed between the participant and their tax professional and/or financial advisor.

Note that the plan amendment is not due until the last day of the first plan year beginning on or after January 1, 2022, but it must be administered consistently now so that the amendment can be written properly.

SAFE HARBOR CONTRIBUTION RELIEF

If your plan is not a safe harbor 401(k) plan, this section doesn’t apply to you.

The IRS has relaxed some of the requirements to suspend the safe harbor contribution for the remainder of 2020; but you still have to make it on compensation and deferrals already made so far this year. However, in many plans, a suspension is not actually a benefit, because the safe harbor contribution also covers the top-heavy minimum contribution. If the safe harbor contribution is suspended, the top-heavy minimum would still have to be made (in most cases it is equivalent to the safe harbor allocation), plus you lose the automatic pass on the 401k nondiscrimination test and Highly Compensated Employees could face taxable refunds of their deferrals. The plan must be amended by August 31, 2020 to take advantage of the eased restrictions. If you feel that you would benefit from suspending your safe harbor contribution, we recommend contacting us to discuss this further.