Chimento & Webb, P.C.

MEMORANDUM

To: Clients and Colleagues
From: Chimento & Webb, P.C.
Date: April 1, 2020 **[Updated as of July 2, 2020]**
Re: CARES Act / Benefit Plan Changes

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1. Background

The CARES Act[1] became law on March 27. Much of its $2.2 trillion cost is meant to help individuals and their employers through the next several months. It also includes helpful features (some optional) for retirement plans and individuals who participate in them.

Unlike the Families First Coronavirus Response Act ("Families First Act"), which was passed on March 18, the CARES Act is not limited to employers with fewer than 500 employees. The SECURE Act, enacted on December 20 with even more changes, seems like old news.

To help clients keep these three laws straight, our website is a work in progress, with special pages for these new laws, our guidance, and links to important government sources. We will be updating, but strongly recommend individual consultation.

[1] The Coronavirus, Aid, Relief, and Economic Security Act.

2. Coronavirus-Related Distribution ("CRD")

The CARES Act allows a "Qualified Individual" to take a CRD from an eligible retirement plan on or after January 1, 2020, and before December 31, 2020. Eligible retirement plans include IRAs under IRC § 408 (including SEP IRAs and SIMPLE IRAs), qualified plans under Internal Revenue Code ("IRC") § 401(a), annuity plans under IRC § 403(a), employer-sponsored plans under IRC § 403(b), and governmental deferred compensation plans under IRC § 457(b). CRDs get special tax treatment and increased distribution limits, described in sections B and E.

Employers have the option of adding this CRD feature to their retirement plans, but are not obligated to do so. If deciding to allow participants to take advantage of CRDs, employers may immediately begin administering their plans accordingly, provided that the necessary amendment(s) is adopted by the extended deadline described in Section 10.

The IRS recently clarified that even if a plan chooses not to allow CRDs, a recipient may generally still treat a distribution from an eligible plan as a CRD as long as it meets the eligibility requirements for CRDs and is taken between January 1, 2020 and December 31, 2020. For example, a participant may take a distribution that the plan considers a required minimum distribution. That participant may choose to treat the distribution as a CRD, as long as it meets the eligibility rules. However, there are some exceptions to this. Examples of distributions that may not be treated as CRDs include:

- Corrective distributions of elective deferrals and employee contributions that are returned to the employee to comply with IRC § 415;
- Excess elective deferrals under IRC § 402(g);
- Excess contributions under IRC § 401(k) and excess aggregate contributions under IRC § 401(m);
- Loans that are treated as deemed distributions pursuant to IRC § 72(p); and
- Distributions that are permissible withdrawals from an eligible automatic contribution arrangement within the meaning of IRC § 414(w).[2]

A. Qualified Individual defined

A Qualified Individual for purposes of a CRD is an individual:

[2] IRS Notice 2020-50. See page 6 for the full list.

- Who is diagnosed with COVID-19, meaning either the virus, SARS-CoV-2, or its disease, Coronavirus Disease 2019, by a test approved by the Centers for Disease Control and Prevention ("CDC");
- Whose spouse or dependent is diagnosed with COVID-19 by a CDC-approved test;
- Who experiences adverse financial consequences as a result of:
    - The individual or the individual's spouse or member of the individual's household[3] being quarantined, furloughed, laid off, or having hours reduced due to COVID-19;
    - The individual or the individual's spouse or member of the individual's household being unable to work because of lack of child care due to COVID-19;
    - Closing or reducing hours of a business owned or operated by the individual or the individual's spouse or member of the household due to COVID-19;
    - The individual or the individual's spouse or member of the individual's household having a reduction in pay (or self-employment income), or having a job offer rescinded or start date for a job delayed due to COVID-19; or
- Who satisfies other requirements as the IRS may designate.

B. CRDs may not exceed $100,000 in the aggregate for all of an employer's plans

C. There is no need for a demonstration of financial incapacity

A plan administrator may rely on a Qualified Individual's certification that the requested distribution is a valid CRD, with no additional documentation required. However, if an employer has actual knowledge that the individual is not a Qualified Individual, no CRD is permitted.

In addition, a Qualified Individual may receive a CRD in an amount unrelated to financial need; the CRD is not required to correspond to the extent of the adverse financial consequences experienced by the Qualified Individual.

[3] *Id.*, A "member of the individual's household" is someone who share a residence with a Qualified Individual.

D. Plan administrators will not be required to withhold income taxes, unless elected by the employee

E. Special tax rules for CRDs

- There is no 10 percent tax (or the 25 percent tax for certain distributions from SIMPLE IRAs) assessed on a CRD that occurs prior to a participant reaching age 59 ½.
- Qualified Individuals have the choice of including CRD amounts in income ratably over three years or including the full amount in the year in which it is received. This election cannot be changed after the filing of the Qualified Individual's federal tax return for the year of distribution.
- The CRD amount can be repaid through a rollover, in whole or in part and with taxes avoided, in the three years starting with the distribution date. Rollover can be back to the plan, if it allows for that, or to another eligible retirement plan, including an IRA.
- Qualified Individuals receiving a CRD will be issued a Form 1099-R, even if repaying the CRD amount in full in the same plan year. CRDs must be reported on the Qualified Individual's federal tax return, as well as Form 8915-E, Qualified 2020 Disaster Retirement Plan Distributions and Repayments.
- Qualified Individuals must file a Form 8915-E even if repaying a CRD in full in the same year it is received. If repayment occurs in a year other than in which it was received, the CRD recipient must file an amended federal tax return and a revised Form 8915-E and should reduce the amount of gross income reported by the amount of the recontribution.
- If a Qualified Individual includes a CRD in income ratably over a three-year period and recontributes any portion at any date prior to the filing of a federal tax return and Form 8915-E, the amount of the recontribution will reduce the ratable portion of the CRD that is includible in income for that tax year. If recontributing an amount that is greater than the ratable portion included in income for that tax year, a Qualified Individual may carry back or forward any excess amount of the recontribution. However, if carrying back, the individual will need to file an amended federal tax return and a revised Form 8915-E.
- If a Qualified Individual chooses to include a CRD in income ratably over three years and dies before the full taxable amount of the CRD has been included in income, the remainder must be included in income for the taxable year in which the Qualified Individual died.

— The overall CRD individual limit for these special tax rules is $100,000. An individual cannot double-dip, for example, by taking $100,000 from a qualified plan and $100,000 from the plan of another employer or an IRA.

3. CRD Loans

Qualified plans, including 403(b) plans, may provide for higher loan limits and easier repayment rules for CRD Loans.

A. CRD Loans defined

— A CRD Loan must be granted under the same conditions as apply for CRDs described in Section 2. In other words, they must be to a Qualified Individual who meets the COVID-19 and employee certification conditions.

— A plan loan is a CRD Loan only if granted in the period between March 27, 2020 and September 23, 2020.

— Employer-sponsored eligible retirement plans must be amended by the deadline in Section 10 in order to offer CRD Loans to Qualified Individuals

— Loans from individual 403(b)s – but not IRAs – would also qualify if permitted by the 403(b) sponsor.

B. Expanded CRD Loan limit

A CRD Loan will be allowed even if it exceeds the general IRS limit. Loans for other purposes are still subject to the general limit.

General loan limit	50% of vested account, but not more than $50,000 reduced by the highest loan balance in previous 12 months
Special CRD Loan Limit	Taking other loans into account, 100% of vested account, but not more than $100,000 reduced by the highest loan balance in the previous 12 months

C. Easier payment terms for CRD individuals for all loans

An individual who meets the requirements for a CRD Loan gets a longer period to repay all loans, including loans that are not CRD Loans.

Any payment that comes due from March 27, 2020 to December 31, 2020 (the "Suspension Period") can be delayed for up to one year. If delayed, the term of the loan is extended by the Suspension Period. The interest that accrues during the Suspension Period is added to the outstanding principal of the loan and then reamortized over the extended loan period. A loan will not be deemed distributed if, due to the Suspension Period, its term extends beyond the maximum five-year period typically imposed by IRS rules.

D. Safe harbor for employer-sponsored plans

A plan that allows for suspension of loan repayments can use the CARES Act safe harbor to remain in compliance with IRC §72(p) and the CARES Act. Under the safe harbor, suspending a participant's loan repayments will not cause the loan to be deemed distributed even if the loan period extends beyond 5 years.

A qualified employer plan satisfies the safe harbor if a Qualified Individual's obligation to repay a plan loan (including a CRD Loan) is suspended for any portion of the Suspension Period (the employer may end the period prior to December 31, 2020, if it chooses). The loan repayments must resume after the end of this period, and the term of the loan may be extended by up to one year from the date the loan was originally due to be repaid. Interest accruing during the suspension must be added to the remaining principal of the loan, which is then reamortized. Thus, a qualified employer plan may allow Qualified Individuals to cease temporarily making loan repayments during the Suspension Period (or a portion thereof) and repay the loan within six years of the original loan date. A loan will not be deemed distributed if its term extends beyond the maximum five-year period as a result of compliance with this safe harbor.[4]

> Example: On April 1, 2020, a Qualified Individual borrows $20,000 from an employer-sponsored plan to be repaid over five years. The Qualified Individual makes payments through June 30, 2020. As of July 1, the Qualified Individual's employer suspends loan repayments through December 31, 2020. No further payments are required until January 1, 2021. As of that date, repayments must resume, with the amount of the loan reamortized (based on remaining principal and interest accrued between July 1 and December 31) with a final payment date of March 31, 2026 (six years from the loan origination date).

[4] *Id.*

4. Required Minimum Distributions: Some are Suspended

Required minimum distributions ("RMDs") owed for 2020 may be suspended for some, but not all, tax favored vehicles that are subject to RMD rules. This is similar to the relief granted in 2009 after the last market crash.

A. Which employer plans are allowed to suspend?

- All defined contribution plans, including 403(b) plans.
- SEP IRAs and SIMPLE IRAs.
- Defined benefit plans are not eligible.
- 457(f) plans sponsored by non-profit organizations are not eligible.

B. This is optional for employer plans

A plan can continue to pay RMDs without suspension. However, employers may amend to suspend the payments, under the extended amendment deadline of Section 10. A sample plan amendment may be found in IRS Notice 2020-51, which provides participants the choice between receiving and not receiving RMDs.

C. This applies to all individual arrangements

This includes IRAs, 403(b) contracts, and government sponsored 457(b)s. Individuals who are able to control payments without employer involvement can call the vendors now to suspend further 2020 RMDs.

D. This will apply to RMDs already paid in calendar year 2020

In 2009, the IRS allowed persons who had received RMDs to roll them over without regard to the normal 60-day rollover deadline, or the rule that generally prevents rollovers of RMDs. The IRS has issued guidance extending this policy to COVID-19, granting relief to 2019 RMDs payable by April 1, 2020 (and not paid in 2019), as well as 2020 RMDs paid earlier this year. Participants receiving RMDs in 2020 are excused from the typical 60-day rollover window and will instead be permitted to rollover 2020 RMDs until August 31, 2020.[5]

E. Rollover relief for RMDs payable in 2020 (and, in certain cases, 2021)

The following RMDs may be rolled over into an eligible retirement plan:

- Distributions to a plan participant paid in 2020 (or paid in 2021 for the 2020 calendar year in the case of a participant with a required beginning

[5] IRS Notice 2020-51. IRS indicates that it may extend the rollover deadline beyond August 31, 2020.

date of April 1, 2021) if the payments equal amounts that would have been RMDs in 2020 (or for 2020) but for the CARES Act suspension; and

— For a plan participant with a required beginning date of April 1, 2021, distributions that are paid in 2021 that would have been an RMD for 2021 but for the CARES Act suspension.[6]

F. Transition guidance and relief to plan sponsors relating to the SECURE Act

Effective December 31, 2019, the SECURE Act changed the age threshold for the RMD required beginning date from 70 ½ to 72. IRS guidance provides that if a participant who turns 70 ½ in 2020 receives a distribution that would have been a RMD but for the change in the law, he or she is not required to treat the distribution as an RMD and may repay the distribution as described above (although such participant may choose to treat the distribution as a RMD). This provides flexibility for plan sponsors and administrators in the wake of the SECURE Act and, now, the CARES Act.[7]

5. Delayed Pension Plan Contributions

Single-employer defined benefit plan sponsors will be able to delay their minimum required contribution until January 1, 2021.

Plan sponsors are generally required to make a contribution to satisfy minimum funding standards within 8 ½ months after the close of the plan year. For sponsors who had a funding shortfall in the prior year, contributions must be made quarterly during the plan year. The CARES Act change applies to either type of payment, as long as the payment was otherwise required to be made in the 2020 calendar year. For a calendar year plan that had a funding shortfall and has to make quarterly payments in 2020 that would mean the first three payments (April 15, July 15, and October 15, 2020) could be made on January 1, 2021. The delayed payments must be increased to include interest at the plan's effective rate of interest for the plan year.

In calculating the Adjusted Funded Target Attainment Percentage ("AFTAP") for IRC § 436 funding-based benefit restrictions, a plan sponsor can elect to use the AFTAP for the plan year that ended before January 1, 2020.

[6] *Id.*, Q&A-5 provides further explanation regarding the treatment of 2021 RMDs for participants with a required beginning date of April 1, 2020.
[7] *Id.*

6. Relief for Mid-Year Reductions or Suspensions of Contributions to Safe Harbor Plans

Under current law, 401(k) and 401(m) plans may reduce or suspend mid-year safe harbor matching or nonelective contributions under specific circumstances.[8] In order for an employer to suspend or reduce such contributions, it must:

- Be operating at an "economic loss" (as described in IRC § 412(c)(2)(A)) for the plan year; or
- Have included in the plan's annual safe harbor notice a statement that the plan may be amended during the plan year to reduce or suspend safe harbor contributions and that the reduction or suspension will not apply earlier than 30 days after all eligible employees are provided notice of the reduction or suspension. In addition, eligible employees must be given a reasonable opportunity prior to the reduction or suspension to change their cash or deferred elections and, if applicable, their employee contribution elections.

A. Reductions or suspensions for only highly compensation employees ("HCEs")

Recent IRS guidance makes clear that employer contributions on behalf of HCEs are not included in the definition of safe harbor contributions.[9] Accordingly, a mid-year change that reduces or suspends safe harbor matching or nonelective contributions only on behalf of HCEs is not considered a reduction or suspension of safe harbor contributions for purposes of IRC §§ 401(k) and 401(m). However, HCEs must still be provided with an updated safe harbor notice and an opportunity to modify elections, as described above.

B. Simplified requirements for reductions or suspensions for non-HCEs

Due to the economic downturn caused by COVID-19, the IRS is waiving the requirements for mid-year changes in order to make it easier for employers to suspend or reduce safe harbor contributions it makes to all plan participants. As long as the employer adopts an amendment between March 13, 2020, and August 31, 2020, it may reduce or suspend safe harbor matching or nonelective contributions for the plan year even if it is not operating at an economic loss, and without having included the appropriate language in its annual safe harbor notice.

C. Relaxed notice requirements for reduction or suspension of safe harbor nonelective contributions

For plans adopting an amendment between March 13, 2020, and August 31, 2020, the supplemental safe harbor notice requirements are modified. Employers are not required to

[8] 26 CFR §§ 1.401(k)-3 and 1.401(m)-3.

[9] IRS Notice 2020-52.

provide participants with the supplemental notice at least 30 days prior to the suspension or reduction of safe harbor nonelective contributions, provided that (i) the supplemental notice is provided to participants no later than August 31, 2020, and (ii) the plan amendment that reduces or suspends safe harbor nonelective contributions is adopted no later than the effective date of the reduction or suspension.

Note: The change in notice requirement applies only to safe harbor *nonelective* contributions; it does not provide relief with respect to the supplemental safe harbor notice required for a mid-year reduction or suspension of safe harbor *matching* contributions.

7. Group and Individual Health Insurance Coverage

A. Mandates apply to group health plans and health insurance issuers

Section 6001 of the Families First Act, as amended by section 3201 of the CARES Act, applies to group health plans[10] and health insurance issuers offering group or individual health insurance coverage.[11] Effective March 18, 2020, plans and health insurance issuers must provide coverage for the items and services described in the Families First Act (as amended by the CARES Act). Such items and services include:

- Eligible in vitro diagnostic tests,[12] which includes "serological tests" used to detect antibodies against the SARS-CoV-2 virus, for the detection of SARS-CoV-2 or the diagnosis of COVID-19, and the administration of such a test; and
- Other "items and services" furnished to an individual during healthcare provider visits (including both in-person and telehealth visits), urgent care center visits, and emergency room visits that result in an order for, or administration of, an in vitro diagnostic product, but only to the extent the items and services relate to the furnishing or administration of the product, or to the evaluation of the individual, for purposes of determining the need of the individual for such product.

A group health plan or health insurance issuer must provide the above coverage without imposing any cost-sharing requirements (including deductibles, copayments, and coinsurance) or

[10] "Group Health Plan" includes both insured and self-insured group health plans.

[11] "Individual Health Insurance Coverage" includes coverage offered in the individual market through or outside of an Exchange.

[12] 21 CFR § 809.3. An "in vitro diagnostic product" means those reagents, instruments, and systems intended for use in the diagnosis of disease or other conditions, including a determination of the state of health, in order to cure, mitigate, treat, or prevent disease.

requiring prior authorization or other medical management requirements. In addition, plans and issuers must provide coverage for items and services furnished by out-of-network providers. See below for more information on provider reimbursements.

The Departments of Labor, Health and Human Services, and the Treasury (collectively, the "Departments") have issued guidance indicating that an individual's attending health care provider has discretion in the course of treatment regarding a patient showing signs and symptoms compatible with COVID-19, and that all such tests and treatments performed are considered either to relate to the "furnishing or administration" of COVID-19 diagnostic testing or to the "evaluation of such individual for purposes of determining the need" for COVID-19 diagnostic testing.[13] In addition, the Departments note that the Centers for Disease Control and Prevention ("CDC") strongly encourages testing for other causes of respiratory illness prior to testing for COVID-19.

> For example: If an attending health care provider determines that other tests (e.g., blood work, flu tests, etc.) should be performed to determine the need for COVID-19 diagnostic testing, and such tests demonstrate the need for COVID-19 diagnostic testing, the health plan or health insurance issuer must provide coverage for all treatment without imposing cost sharing on the covered individual.

Group health plans and health insurance issuers must comply with the mandates imposed by the Families First Act and CARES Act for all applicable claims relating to coverage provided during the Public Health Emergency related to COVID-19. As of now, the Public Health Emergency, declared as of January 27, 2020, is effective through April 25, 2020.[14]

B. Providers must be reimbursed

The Families First Act requires that a group health plan or health insurance issuer providing coverage of items and services (as described above) reimburse the provider of the diagnostic testing, even if such provider is out-of-network.

If the plan or issuer has a negotiated rate with the provider in effect before the Public Health Emergency, such negotiated rate applies. If, however, the plan or issuer does not have a negotiated rate with the provider, the plan or issuer will reimburse the provider in an amount that

[13] "FAQs About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Implementation Part 42," April 11, 2020.

[14] A "Public Health Emergency" declaration lasts until the Secretary of HHS declares that the Public Health Emergency no longer exists, or upon the expiration of the 90-day period beginning on the date the Secretary declared a Public Health Emergency exists, whichever occurs first.

equals that cash price for such service as listed by the provider on a "public internet website," or the plan or issuer may negotiate a rate with the provider for less than such cash price.[15]

C. Flexibility for high deductible health plans

The Families First Act allowed high deductible health plans (HDHPs) to cover diagnostic testing and treatment of COVID-19 without a deductible, and now the CARES Act adds telehealth and "other remote care services" to the list of acceptable no-deductible services for HDHPs. The telehealth care does not have to relate to COVID-19 treatment. Plans that provide these health services prior to application of a deductible will not lose their qualified status. This provision expires for plan years beginning on and after December 31, 2021. In addition, Health Savings Accounts and Health Flexible Spending Accounts may allow for payment of over the counter menstrual products after December 31, 2019.

D. Waiver of certain requirements for changes in health insurance coverage

The Departments have announced a temporary period of non-enforcement in order to permit group health plans and health insurance issuers to take otherwise prohibited action to comply with both the Families First Act and the CARES Act.

Typically, plans and issuers may not modify health insurance coverage mid-year, subject to certain exceptions.[16] However, the Departments will allow health insurance issuers to change the benefits or cost-sharing structure of its plans mid-year to provide increased coverage for services related to the diagnosis and/or treatment of COVID-19. The Departments have also waived the 60-day advance notice requirement prior to a mid-year "material modification" to any of the terms of the plan or coverage that would affect the content of the most recently provided Summary of Benefits and Coverage (SBC). The Departments note that plans and issuers must provide notice of changes "as soon as readily practicable."

These non-enforcement policies apply with respect to changes made during the period of the Public Health Emergency related to COVID-19. To the extent a plan or issuer maintains any of the changes described above beyond the period of the Public Health Emergency, plans and issuers must comply with all applicable statutes and regulations regarding requirements to update plan documents or terms of coverage.

The Departments will take, however, enforcement action against any plan or issuer that attempts to limit or eliminate other benefits, or to increase cost sharing, to offset the costs of increasing the generosity of benefits related to the diagnosis and/or treatment of COVID-19.

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[15] § 3202(b) of the CARES Act requires providers of diagnostic tests for COVID-19 to make public the cash price of such diagnostic testing on the provider's "public internet website."

[16] 42 USC § 300gg-2.

E. States may impose further regulations

Nothing in either the Families First Act or the CARES Act prevents any state from imposing additional standards or requirements on health insurance issuers with respect to the diagnosis or treatment of COVID-19, to the extent that such standards or requirements do not prevent the application of a federal requirement. Accordingly, employers must always stay current on the latest guidance from their respective states, as it may be more comprehensive than that at the Federal level.[17]

8. Employer Payment of Student Loans

The CARES Act has added a temporary feature to IRC § 127 education assistance plans. Ordinarily, these plans allow employers to pay or reimburse employees for certain education expenses, such as tuition, fees, and course materials. The education does not have to be job-related or for the employer's benefit, but is limited to $5,250 per year and cover a group that does not discriminate in favor of highly compensate employees.

The CARES Act adds student loan payments as an eligible expense that can be paid through these plans, either directly to the lender or as reimbursement to the employee. The overall annual benefit limit of $5,250 remains, and payments may be made only for the employee (not a spouse or dependent) and only between March 27, 2020 and December 31, 2020.

These reimbursements are in lieu of any deduction of student loan interest the employee would otherwise be able to claim on a tax return.

9. Extended Deadlines for Plans, Participants, and Qualified Beneficiaries

The DOL has announced the extension of certain deadlines under ERISA and the IRC as related to participants, qualified beneficiaries, and beneficiaries of pension plans, group health plans, and other welfare benefit plans.[18]

All pension plans, group health plans, and other welfare benefit plans must disregard the period beginning March 1, 2020 and ending 60 days after the end of the National Emergency (the "Outbreak Period") for all plan participants, beneficiaries, and qualified beneficiaries in determining the following periods and dates:[19]

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[17] "FAQs About Families First Coronavirus Response Act and Coronavirus Aid, Relief, and Economic Security Implementation Part 42," April 11, 2020.
[18] 85 FR 26351, May 4, 2020.

[19] On March 13, President Trump issued the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, establishing the National Emergency.

- The 30-day period (or 60-day period if loss of coverage relates to Medicaid or CHIP) under HIPAA to request special enrollment in a group health plan;
- The 60-day period to elect COBRA continuation coverage under a group health plan;
- Deadlines to pay COBRA premiums, including the initial premium payment;
- The date to notify a plan of a qualifying event or determination of disability;
- Deadlines related to filing and appealing a claim under a plan's internal procedures; and
- Deadlines related to filing a request for an external review of a benefit claim.

In addition, group health plans must disregard the Outbreak Period when determining the date for providing a COBRA election notice to qualified beneficiaries.

The DOL may provide additional relief "as warranted," as ERISA and the CARES Act give it authority to extend the deadline for a variety of plan sponsor and administrator actions for sponsors and plans "affected by …a public health emergency declared by the Secretary of Health and Human Services." This would include the current coronavirus crisis, as well as any future public health crisis.

10. Required Amendments

Plan sponsors may administer their plans according to the new hardship, loan, and RMD rules before amending their plans. The amendment deadline is the last day of the first plan year beginning on or after January 1, 2022, and the amendments will be retroactive provided the affected plans have been administered throughout the period as if the amendment were in effect.

11. Future Guidance and Legislation

The IRS and DOL have been busy issuing and revising guidance over the past few months. We expect this trend to continue, as there are talks in Congress of additional relief that will undoubtedly add more complexity. We are here to help our clients navigate through this.

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