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CARES ACT

BENEFITS, COMPENSATION, AND PAYROLL TAX CONSIDERATIONS

**Matthew Hawes, Steven Johnson, Mims Maynard Zabriskie,
Jonathan Zimmerman, and Sage Fattahian**

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Agenda

- CARES Act: Retirement Plan Provisions
Matt Hawes
- CARES Act: Health Plan Coverage
Sage Fattahian
- CARES Act: Tax Credits, Payroll Tax Deferral, & Fringe Benefit Relief Provisions
Steve Johnson
- CARES Act: Executive Compensation Limitations
Mims Maynard Zabriskie

CARES ACT: RETIREMENT PLAN PROVISIONS

Coronavirus-Related Distribution (CARES Act § 2202(a))

- Up to \$100,000 (in the aggregate)
- Qualified retirement plans, 403(b) plans, IRAs or eligible 457(b) plans
- Available only between January 1, 2020 and December 31, 2020
- Exempt from:
 - 10% early-distribution penalty
 - mandatory 20% withholding (still subject to 10% withholding or other withholding elected by participant)
- Income from the distributions will be subject to federal income tax ratably over three years (unless participant elects otherwise)
- Repayment/rollover right during the three-year period beginning the day after the distribution date

Coronavirus-Related Distribution (CARES Act § 2202(a))

- A “coronavirus-related distribution” is a distribution to an individual:
 - (1) who is diagnosed, or whose spouse or dependent is diagnosed, with SARS-CoV-2 or COVID-19 using a CDC-approved test; or
 - (2) who experiences adverse financial consequences because of an inability to work due to quarantine, furlough, layoff, reduced hours, loss of childcare, or the closing or reduction of hours of a business owned or operated by the individual because of SARS-CoV-2 or COVID-19
- Plan administrators can rely on an individual’s certification

Retirement Plan Loan Limits Expansion and Repayment Holiday (CARES Act § 2203)

- Coronavirus-related plan loan limit increase from:
 - current limit of the lesser of \$50,000 and 50% of the vested account balance
 - to the lesser of \$100,000 or 100% of the vested account balance for qualified individuals who meet the requirements to receive a coronavirus-related distribution under Section 2202(a) of the CARES Act
- Increase is effective for loans made within 180 days following the passage of the CARES Act (i.e., by September 22, 2020)

Retirement Plan Loan Limits Expansion and Repayment Holiday (CARES Act § 2203)

- Due date for any plan loan repayments otherwise due between the date of enactment and December 31, 2020
 - Extended for qualified individuals (i.e., coronavirus-related distribution eligible) by one year (with interest), and subsequent loan repayments may be “appropriately adjusted” to reflect the delay

2020 RMD Waiver for Defined Contribution Plans and IRAs (CARES Act § 2203)

- Allows qualified defined contribution plans, 403(b) plans, IRAs or eligible 457(b) plans to postpone required minimum distributions (RMDs) by one year
- Applies to:
 - RMDs for 2019 that had not been made as of January 1, 2019
 - RMDs/required beginning dates that arise in 2020
- Similar to 2009 RMD waiver provided by WRERA, which the IRS clarified as optional in Notice 2009-82

2020 RMD Waiver for Defined Contribution Plans and IRAs (CARES Act § 2203)

- Possible required minimum distribution table following the SECURE Act and the CARES Act:

Turn Age 70½	RMDs begin
2018	2019
2019	2021
2020	2022 or 2023 (depending on when age 72)

And nobody gets RMDs in 2020

DOL Ability to Postpone Deadlines for Public Health Emergency (§ 3607)

- Currently, the DOL may extend certain deadlines under ERISA (e.g., for providing required notices) by up to one year in certain circumstances (e.g., terroristic or military action)
- CARES Act expands the list to include a public health emergency, as declared by the Secretary of Health and Human Services

Defined Benefit Plan Relief

- Minimum Contribution Relief (CARES Act § 3608(a))
 - The deadlines for making minimum required contributions under Internal Revenue Code Section 430 for calendar year 2020 (including quarterly contributions) is extended until January 1, 2021
 - Contributions must be made with interest at the plan's interest rate
 - Further guidance will likely be needed to identify the interest rate that should be used for this purpose
- AFTAP Relief (CARES Act § 3608(b))
 - Plans may choose to use the adjusted funding target attainment percentage (AFTAP) for the last plan year ending before January 1, 2020 for plan years that include the calendar year 2020
 - Guidance may be needed to clarify application to fiscal-year plans and anti-cutback rules

CARES ACT: HEALTH PLAN COVERAGE

CARES Act: Diagnostic Testing

- **Requires coverage of diagnostic testing for detection of COVID-19**
 - Health care provider visits (telehealth)
 - Telehealth services are now a safe harbor for purposes of HDHP/HSA
 - Services related to the testing or the evaluation of an individual's need for a test
 - Must be provided at no cost sharing during the period of the public health emergency
 - Negotiated network rate
 - Negotiated rate or published rate with OON
 - Providers that don't publish a rate can be subject to monetary penalties by HHS
 - Includes tests that are approved, cleared, or authorized by FDA
 - Includes tests that are in development under auspices of FDA and HHS

CARES Act: Diagnostic Testing

- **Requires coverage of diagnostic testing for detection of COVID-19**
 - **Employer Questions:**
 - Can an employer cover COVID-19 testing for those employees not in the group health plan?
 - ACA issues
 - May be covered under a spouse's plan
 - Certain (not all) state exchanges opening up special enrollment opportunities
 - Timing issues
 - Perhaps will be extended

CARES Act: Diagnostic Testing

- **What can employer-sponsored group health plans offer? Does it have to be limited to testing only?**
 - Self-insured plan
 - Employers can amend the plan to cover COVID-19 treatment as well
 - Paid from employer general assets
 - Stop-loss considerations
 - Works in a high-deductible health plan
 - IRS Notice 2020-15 (permits coverage for testing as well as treatment)

CARES Act: Coverage of Preventive Services & Vaccines

- **Requires coverage of qualifying coronavirus preventive services as a preventive health service**
 - Items, service, or immunization that is intended to prevent or mitigate COVID-19 that has received an “A” or “B” rating under recommendation of the United States Preventive Service Task Force or has a recommendation from the Advisory Committee on Immunization Practices of the CDC
 - Must be offered by the 15th business day after the recommendation is made

CARES Act: Over-the-Counter Medical Products

- **Eliminates the prescription requirement for medicines and drugs and also allows menstrual-care products to be paid for or reimbursed**
 - Health Flexible Spending Account
 - Health Savings Account
 - Archer MSA
 - Will need some administrative catch-up time for debit cards
 - Expansion of permissible expenses will not trigger change in status

CARES Act: HIPAA

- **Aligns substance abuse disorder confidentiality rules with HIPAA**
- **Requires HHS to issue guidance regarding sharing of PHI during COVID-19 public health emergency**
 - Within 180 days (September 23, 2020)

**CARES ACT:
TAX CREDITS, PAYROLL TAX DEFERRAL,
& FRINGE BENEFIT RELIEF PROVISIONS**

CARES Act: Retention Credit (§ 2301)

- Provides up to \$5,000 in refundable tax credits for qualified wages paid to employees by an eligible employer (1) whose trade or business operations fully or partially suspend due to COVID-19–related government orders, or (2) who experience a +50% decline in gross receipts (or operations, for tax-exempt employers) as compared to the corresponding calendar quarter in 2019.
- The credit applies to 50% of “qualified wages” (capped at \$10,000) paid between March 13, 2020 and Dec. 31, 2020.
 - For employers with more than 100 full-time employees (determined using the ACA's 30-hour/week measure), "qualified wages" available for tax credit include wages paid (including health benefits) to employees who are not providing services due to a shutdown or slowdown.
 - For employers with 100 or fewer full-time employees, "qualified wages" available for a tax credit include wages paid (including health benefits) to employees, whether or not wages are paid due to a shutdown or slowdown.
- The retention credit is a fully refundable credit against the employer share of Social Security tax (6.2%), though it may be claimed through offset of other employment taxes (employer Medicare, employee Medicare, employee Social Security, employee federal income tax withholding) or advanced from the IRS via Form 7200.
- Employers will report retention wages/credit paid during Q1 (March 13–March 31) on the Q2 Form 941.
- Employers taking a CARES Act section 1102 SBA loan are not eligible to claim the CARES retention credit.
- For limited guidance on CARES retention credits, see: <https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>.

CARES Act: Amendments to FFCRA Qualified Sick Leave & Qualified Family Medical Leave Tax Credits (§ 3606)

- The CARES Act amended the FFCRA to make FFCRA 7001 Qualified Sick Leave and FFCRA 7003 Qualified Family Medical Leave credits available on an advanced basis to employers that “anticipate qualifying for the credits.”
- The FFCRA tax credits are fully refundable against the employer share of Social Security tax (6.2%), though the credits may be claimed through offset of other employment taxes (employer Medicare, employee Medicare, employee Social Security, employee federal income tax withholding) or advanced from the IRS via Form 7200.
- Qualifying wages must be paid between April 1, 2020 and December 31, 2020 (inclusive).
- The FFCRA tax credits are still only available to employers with fewer than 500 employees.
- Although not available to be claimed on the same wages, employers with fewer than 500 employees may be able to claim credits for wages paid under FFCRA 7001 (Sick Leave), FFCRA 7003 (Family Medical Leave) and CARES 2301 (Retention).

CARES Act: Amendments to FFCRA Qualified Sick Leave & Qualified Family Medical Leave Tax Credits (§ 3606)

For limited guidance on amended FFCRA Sick & Medical Leave credits, see:

<https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs>

- FAQ 44–45: Substantiation & recordkeeping
- FAQ 49–51: Gross income inclusion of income tax deductibility of FFCRA credits
- FAQ 53: Third-party payroll providers

CARES Act: Payroll Tax Deferral (§ 2302)

- The CARES Act provides that employers may delay payment of 100% of the employer share of Social Security tax (6.2%) on wages where such taxes are due between March 27, 2020 and January 1, 2021.
- The deadline for paying 50% of deferred taxes is December 31, 2021 (21 months), and the deadline for paying the remaining 50% of taxes is delayed until December 31, 2022 (33 months).
- These delay relief provisions are available regardless of workforce size.
- Employers taking a CARES Act section 1102 SBA loan that is forgiven under CARES Act section 1106 or 1109 are not eligible for the 2302 payroll tax deferral holiday.

CARES Act: Expansion of IRC 127 Educational Assistance Exclusion To Cover Preexisting Student Loan Debt (§ 2206)

- The CARES Act expands the IRC 127 educational assistance exclusion to cover certain preexisting student loan debt (principal and interest), whether paid directly to employees or to lenders, to the extent the payments are made between March 27, 2020 and January 1, 2021.
- Qualifying student loans are limited to higher-education expenses that an employee incurred within a reasonable period of taking classes, and provided that the employee carried at least a half-time course load.
- Prior to enactment, employers could only make nontaxable educational assistance payments to defray educational expenses that employees incurred while employed by (or on leave from) the reimbursing employer.
- Relief is available to all employees, regardless of whether an employee's ability to repay student loans has been impacted by COVID-19.

CARES Act: Deferral of Federal Student Loan Repayment (§ 2206)

- The CARES Act directs the Secretary of Education to suspend, through September 30, 2020, all payments due for federal student loans that are held by the US Department of Education.
- The relief is limited to certain federally owned loans.
- During the suspension, no interest will accrue, and the Secretary is directed to suspend all involuntary collection activity on federal student loans, including wage garnishments and reductions of tax refunds and Social Security payments.
- Employers with student-loan wage-garnishment orders for employees who qualify for postponement of collection efforts will be notified by the company that services the loan, per an Education Department news release (March 31).

CARES ACT: EXECUTIVE COMPENSATION LIMITATIONS

Financial Assistance under the CARES Act Limits Executive Compensation

- Section 4003 of the CARES Act authorizes the Treasury Department to offer up to \$500 billion in loans, loan guarantees, and other investments in support of eligible businesses that are impacted by the COVID-19 pandemic (e.g., air carriers, businesses critical to national security, and other businesses that take a loan or guarantee as a direct loan). Section 4116 of the CARES Act allows financial assistance to eligible air carriers and related contractors.
- Businesses that avail themselves of these loans (or loan guarantees) under the CARES Act must comply with a number of restrictions, including limitations on compensation and severance paid to certain officers and employees (Section 4004 of the CARES Act).

Limitation on Executive Compensation

A company that takes a loan (or loan guarantee) under these financial assistance provisions of the CARES Act must agree to limit the total compensation and the severance pay and other benefits upon termination of employment of certain employees during a restriction period.

- **Total Compensation** means “salary, bonuses, awards of stock, and other financial benefits.”
- **Restriction Period** means the period beginning on the date the company executes the applicable loan agreement and ending on the one-year anniversary of the date on which the loan is no longer outstanding.

Application of Compensation Restrictions

- The restrictions apply to employees whose total compensation exceeded \$425,000 in the 2019 calendar year.
- Collectively bargained employees are not subject to the compensation restrictions if their compensation was determined under a collective bargaining agreement that was in place prior to March 1, 2020.
 - A slightly different effective date applies to air carriers and related contractors under Section 4116 of the CARES Act.

Total Compensation Restrictions

Under the restrictions:

- Officers and other employees whose 2019 total compensation **exceeded \$425,000 but was less than \$3 million** are prohibited from receiving total compensation each year during the restriction period in excess of the total compensation such employees received in 2019.
- Officers and other employees whose 2019 total compensation **exceeded \$3 million** are prohibited from receiving total compensation each year during the restriction period in excess of the sum of:
 - \$3 million, plus
 - 50% of the amount by which the employees' 2019 total compensation exceeded \$3 million.

Total Compensation Restrictions

- The annual compensation limitations are applied to total compensation during any 12-consecutive-month period during the restriction period.
- As an example, an employee whose total compensation in 2019 was \$6 million could not receive more than \$4.5 million of total compensation in any 12-consecutive-month period during the restriction period.

“Severance Pay or Other Benefits upon Termination of Employment” Restrictions

- Under the restrictions, officers and employees whose 2019 total compensation **exceeded \$425,000** are prohibited from receiving severance pay or other benefits upon termination of employment that exceeds two times the employees' 2019 total compensation.

Outstanding Questions

- Many important questions are left unanswered by the CARES Act, and will require additional guidance, including:
 - How and when stock awards (restricted stock units, performance units, stock options, etc.) will be valued
 - What constitutes "other financial benefits" in the total compensation definition
 - Whether total compensation is determined before or after deductions, deferrals and other adjustments
 - Whether employees can elect to defer compensation to avoid the limits
 - Whether compensation attributable to past years will be included as total compensation in the year paid
 - How companies will address existing contractual obligations to employees
 - How and whether the limitations apply to employees who were hired during or after the 2019 calendar year
 - What penalties will apply to companies that violate the compensation restrictions

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QUESTIONS?

Biography



Matthew H. Hawes

Pittsburgh, PA

matthew.hawes@morganlewis.com

Matt helps clients navigate every aspect of employee benefits, executive compensation, and equity compensation; including the drafting and design of qualified pension and profit-sharing plans, health and welfare arrangements, deferred compensation plans, and employee agreements. He also performs employee benefits due diligence reviews in the mergers and acquisitions context, and he advises companies on regulatory compliance with the US Internal Revenue Code, ERISA, COBRA, and HIPAA.

Biography



Steven P. Johnson

Washington, D.C.

steven.johnson@morganlewis.com

With experience gained as a trial lawyer in the Tax Division of the US Department of Justice (DOJ), **Steve** advises clients on tax controversies and litigation matters involving complex tax issues. Before joining Morgan Lewis and working for the DOJ, Steve served as a law clerk to Judge Tucker L. Melancon of the US District Court for the Western District of Louisiana. He holds a Masters in Tax Law (LL.M.) from Georgetown Law School.

Biography



Mims Maynard Zabriskie

Philadelphia, PA

mims.zabriskie@morganlewis.com

Mims advises on complex executive compensation and employee benefit plan matters, including the design, negotiation, and implementation of executive compensation, equity compensation, and tax-qualified retirement plans and shareholder approval of equity plans. She counsels large publicly and privately owned businesses, including Fortune 500 enterprises, technology companies, and universities on a range of legal issues related to executive compensation governance, and employee benefit plans. Mims also represents executives in the negotiation of employment agreements and equity compensation, including in connection with transactions. She advises on benefits and executive compensation issues that arise during major corporate transactions, including mergers and acquisitions, sales, IPOs, and spinoffs.

Biography



Jonathan Zimmerman

Washington, D.C.

jonathan.zimmerman@morganlewis.com

Jonathan helps clients design and maintain all types of employee benefit plans and programs. His practice focuses on Internal Revenue Code and Employee Retirement Income Security Act (ERISA) compliance for retirement, health and welfare, and executive compensation plans. He has particular experience with Code Sections 409A, 162(m), and 280G, and with taxes and fees arising under the Affordable Care Act (ACA). Jonathan also devotes a large part of his practice to payroll, withholding, and fringe benefits matters. He works with clients of all sizes and routinely handles matters ranging from large transactions to day-to-day administrative questions.

Biography



Saghi Fattahian

Chicago, IL

sage.fattahian@morganlewis.com

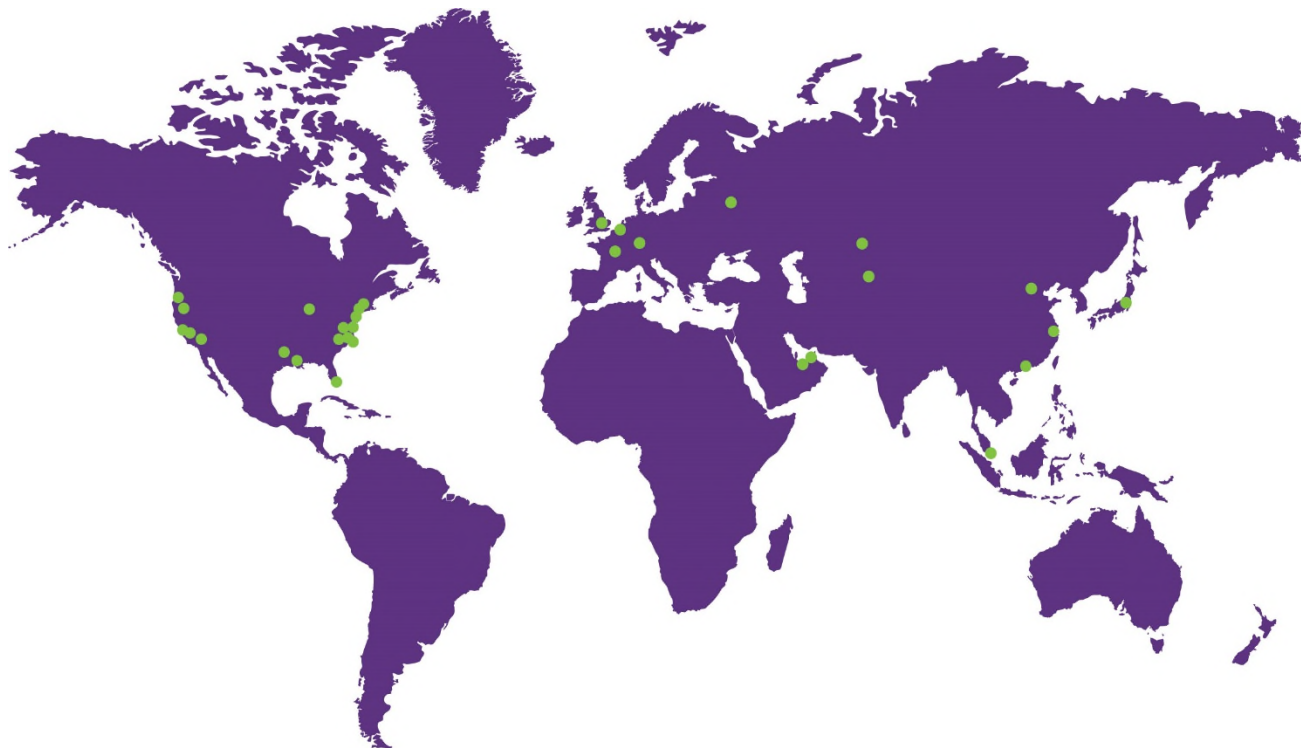
Sage counsels clients on all aspects of health and welfare plans. She works with clients to comply with the complicated, shifting requirements under the US Internal Revenue Code, ERISA, ACA, COBRA, HIPAA, MHPAEA, GINA, and state and local laws. She assists health and welfare plans and their sponsors with daily operations and plan administration, including preparing and maintaining plan documents and related materials; reviewing and negotiating services agreements with third parties; consulting on operational issues; and assisting with claims and appeals.

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