



Your Retirement Plan and the Coronavirus

The COVID-19 pandemic has affected hundreds of millions of people across the globe. Here in the United States, participants and plan sponsors alike may face tough financial times in the short-term or possibly longer. This article attempts to answer some common questions relating to retirement plans from the standpoint of both plan sponsors and participants.

These answers are current as of the date of publication, March 27, 2020, and are subject to change due to legislative updates. MassMutual will update or replace this article as often as circumstances warrant.



What should a plan sponsor (or a participating employer) do with contributions and loan repayments deducted from participants' paychecks?

Any contributions or loan repayments that were withheld according to a contribution election or loan repayment schedule must be remitted to the plan according to the normal time frames. For the small plan filers (typically those with 100 or fewer participants as of the first day of the plan year), remission must be made within seven business days. For all other plan sponsors, the contributions should be remitted to the plan according to the employer's normal practice. A slight delay of a day or two might be explained by a change in the employer's circumstances, such as having payroll staff working from home or using different workflows.

It's critically important to meet these timing obligations. Failing to do so may constitute a fiduciary breach and result in several prohibited transactions which bring the likelihood of financial sanctions levied by the regulators. Additionally, intentionally failing to meet these rules or diverting withheld amounts to satisfy other purposes (such as using employee 401(k) deferrals to pay the employer's bills) can result in criminal charges against the plan fiduciaries as well.



Does the employer have to keep making the matching contribution?

That depends on what your plan document says and any other written agreements (such as collective bargaining agreements) that govern those contributions.

If your plan document says that the match is “discretionary,” you likely have the option to temporarily stop making those contributions without amending your plan. You’ll want to notify the participants that you’re suspending the match to help them understand what’s going on.

Without trying to get too technical here, you also should consider the definition of “compensation” in your plan document that is used to compute the match.

If the plan document says the match is based on compensation for the full plan year while you make the match each pay period, “skipping” the match for several pay periods may require you to make a “true-up” matching contribution at the end of the plan year. You’d be used to doing that even under normal business conditions. In that case, you may want to amend your plan to indicate that the match is based on compensation each pay period.

If your plan already states you’ll calculate the match based on compensation for each pay period; or if you make the match annually, you don’t have to worry about the potential of a forced “true-up” later.

If your plan document says that the match is “fixed” or “required,” you’ll need to explore the reasons for that treatment. If the match is “fixed” only because you thought it was the right

thing to do, realize that you likely can amend your plan to either make the match discretionary, or to suspend the match temporarily. You may need to make the matching contribution through the date of the amendment. Talk to your MassMutual service team if you need to initiate an amendment.

If the match is “required” due to collective bargaining agreements, you should contact the applicable collective bargaining unit(s)* to evaluate how to proceed.

If you use a matching contribution to satisfy an ADP or ACP Safe Harbor, you may be more restricted in what you can do.

Generally speaking, a “safe harbor match” only may be suspended or reduced under limited circumstances. If the employer is operating at an economic loss as defined in Internal Revenue Code Section 412(c)(2)(A); they may suspend a safe harbor match. Consult with your tax advisor or legal counsel to determine whether you meet these criteria. Alternately, it may be possible to suspend or reduce the safe harbor match mid-year if the sponsor included certain non-standard language in the notice that was provided to participants before the start of the plan year.

Please refer to MassMutual’s publication entitled “Reducing or Suspending a Safe Harbor Contribution Mid-Year” for more technical details; this publication is available through the plan sponsor and advisor internet portals.

* You should ensure any contact with a collective bargaining unit is made according to your organization’s collective bargaining process.



Does the employer have to keep making non-matching contributions?

Once again, the answer depends on your circumstances. Realize that many contributions that have already accrued (such as a required contribution attributable to a prior plan year) **must** be made since the participants already have a right to that contribution.

Additionally, certain types of plans or contributions may bring potential complications.

If the contribution is “discretionary,” you can likely suspend or reduce the contribution without amending the plan. For example, if your profit-sharing contribution is discretionary, you may be able to choose not to make a contribution even if it’s for a prior plan year, such as 2019. Simply, you can use your “discretion” to decline contributing for that year.

Be careful to examine your plan document to determine whether any language in it (such as saying what level of organizational profits will trigger a contribution for a plan year or a commitment to making a contribution based on a participant’s years of service) may require you to make a contribution.

If the contribution is “fixed” or “required,” you should determine why. If it’s “fixed” simply because the employer thought that was a good idea, you may be able to amend the plan to suspend the contribution or to recast it as discretionary.

If the contribution satisfies a commitment made in a collective bargaining agreement, you may want to contact the collective bargaining unit* to determine how to proceed. You should contact your legal counsel with any questions.

Regardless, a “fixed” or “required” contribution typically can only be changed prospectively; employees have accrued the right to a contribution attributable to the time before the amendment, and that a contribution generally must be made.

If you use a non-matching contribution to satisfy an ADP Safe Harbor, you may have some limited options.

Generally speaking, this type of safe harbor contribution only may be suspended or reduced under limited circumstances. Typically, the

change is allowed only if the employer is operating at an economic loss or if specific language was contained in the notice provided to employees before the start of the plan year. Some detail is provided in the prior section relating to safe harbor matching contributions.

Also, refer to MassMutual’s publication entitled “Reducing or Suspending a Safe Harbor Contribution Mid-Year” which is available through the plan sponsor and advisor internet portals.

If the contribution is a money purchase pension contribution to a defined contribution plan, you may be able to suspend or reduce the contribution, but only prospectively. You’ll need to provide employees with a “204(h) Notice” notifying them of the reduction in future benefit accruals. And, you’ll need to provide the non-matching contribution through the date the plan can be amended, bearing in mind the minimum thirty-day notice requirement for the 204(h) Notice.

You’ll also want to determine whether employment contracts, collective bargaining agreements, or other agreements require these contributions and if so, work with legal counsel to determine how you want to proceed.

If the contribution is made to meet the requirements of the Davis-Bacon Act, the Service Contract Act, or a similar law, you’ll want to speak with legal counsel. If you use the MassMutual Volume Submitter plan document, these types of contributions will be shown as “prevailing wage contributions” in your adoption agreement.

These terms generally apply to employers with government contracts to ensure the labor for those contracts are provided with total compensation that’s typical for the labor force in that geographic region. If your plan provides for prevailing wage contributions, you’re likely already very familiar with this topic.

If you want to stop contributions or accruals under a defined benefit plan, contact your actuary to examine the potential ramifications.

* You should ensure any contact with a collective bargaining unit is made according to your organization’s collective bargaining process.



Can a participant stop repaying on a loan from the plan?

Yes, under certain circumstances. There are several ways this might be done.

CARES Act

The CARES Act allows certain participants to suspend loan payments that were scheduled to occur between the effective date of the Act and December 31, 2020. These repayments may be suspended for one year.

In order to qualify for suspension, the participant must be a person who:

- Was diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the Centers for Disease Control and Prevention.
- Whose spouse or dependent is so diagnosed by such a test.
- Who experiences adverse financial consequences as a result of
 - Being quarantined.
 - Being laid off or furloughed or having work hours reduced due to the virus.
 - Being unable to work due to lack of child care due to the virus.
 - Closing or reducing hours of a business owned or operated by the individual due to the virus.
 - Other factors as determined by the Secretary of the Treasury.

When payments resume, the loan must be re-amortized to reflect the interest that accrued during the suspension period. All subsequent loan repayments will also be “backed up” a year so that participants won’t be simultaneously paying the regularly-scheduled payment and a payment that was postponed under CARES.

A plan may start taking advantage of this provision immediately and defer amending the plan until a later date. See “Does CARES offer a delayed date for amending plans?” below.

Authorized Leave of Absence

Existing law and MassMutual’s Volume Submitter plan document allows a participant to stop repaying on a loan when the participant is on

an authorized leave of absence **and** he or she is either paid at a rate less than the scheduled repayment amount or is unpaid. Under those circumstances, the plan sponsor can suspend the participant’s loan repayments for a period of up to twelve months or until the leave ends, whichever is earlier.

When the leave ends, repayments must resume. The existing loan must be re-amortized over its remaining period to make up for the missed payments. The re-amortized loan may extend beyond the loan’s original term as long as it is paid in full by the earlier of (1) the date five years from the date the loan was originally taken or (2) the original loan repayment deadline plus the length of the suspension period.

Generally, the participant also must pay any interest on the loan that accrued during the LOA. The re-amortization will account for that interest amount.

Military Leave

It’s possible some of your participants will be activated to serve in the National Guard or other military organizations during this pandemic.

Realize a participant may be allowed to suspend loan repayments for any period he or she is on military leave. This suspension generally follows the rules for an LOA suspension with two important distinctions. First, suspension for military leave is allowed for up to five years instead of the twelve months allowed under an LOA suspension. Additionally, once the leave ends and the loan is re-amortized, the re-amortization doesn’t need to take into account the five-year restriction applicable to LOA suspensions.

Please realize that other rules apply to participants on military leave as well. Those rules are too lengthy to detail here so be sure to refer to your plan document or the plan sponsor internet portal or contact your MassMutual service team with additional questions.



Is it possible for a participant to qualify for a hardship withdrawal to pay necessary expenses?

If the employer allows hardship withdrawals, a participant could qualify if he or she meets some relatively stringent criteria. Currently, those criteria have not changed from what existed before the COVID-19 outbreak.

However, we anticipate additional guidance from the regulators and possible changes or additions to these criteria. We'll update this article if and when that guidance is released.



Can a participant receive a Coronavirus-related Distribution from the plan?

Possibly yes. The CARES Act created a new category of withdrawal called a "Coronavirus-related distribution" for 401(k), 403(b) and governmental 457(b) plans. While certain 401(a) plans (such as profit sharing plans) also may allow these distributions, the distribution restrictions for money purchase pension assets and defined benefit plans prevent these distributions from those assets and plans. These withdrawals can only be made on or after January 1, 2020, and before December 31, 2020.

To qualify, the participant must be a person who:

- Was diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the Centers for Disease Control and Prevention.
- Whose spouse or dependent is so diagnosed by such a test.
- Who experiences adverse financial consequences as a result of
 - Being quarantined.
 - Being laid off or furloughed or having work hours reduced due to the virus.
 - Being unable to work due to lack of child care due to the virus.

- Closing or reducing hours of a business owned or operated by the individual due to the virus.
- Other factors as determined by the Secretary of the Treasury.

A participant may withdraw up to \$100,000 as a Coronavirus-related distribution. And, the plan sponsor may rely on the participant's representation that he or she is entitled to receive the distribution; no further documentation is necessary.

These distributions are exempt from the 10% penalty tax on premature distributions regardless of the participant's age. While the distribution is subject to ordinary income tax, the participant can choose to include one-third of the taxable amount in their income each year for three consecutive years in order to spread the tax burden over a longer period of time.

The participant has the option, but is not required, to repay the distribution within three years.

A plan may start taking advantage of this provision immediately and defer amending the plan until a later date. See "Does CARES offer a delayed date for amending plans?" below.



Does CARES offer a delayed date for amending plans?

Yes. The plan sponsor can start operating the plan to allow the loan repayment suspensions and coronavirus-related distributions immediately upon the enactment of CARES. They can amend the plan retroactively to include these provisions in their written document at a later date. For most plans, the

plan must be amended by the last day of the first plan year beginning on or after January 1, 2022. Governmental plans have a later date; they must amend by the last day of the first plan year beginning on or after January 1, 2024.



What is the difference between “furloughed,” “laid off,” and “terminated?”

These terms can mean different things to different people. A good general rule of thumb is that those employees who have been “furloughed” or “laid off” are intended to be recalled to work at some point, even if that’s an undetermined point in the future. “Terminated” employees are not expected to return to work and their employment is considered to be severed.

When deciding whether a “furlough” or “lay off” results in a true termination, you should consider a variety of factors, including your past practices and the likelihood the employees will be recalled. You may also wish to consider whether the employees continue to be covered by your group healthcare coverage. If the employees continue on your healthcare coverage and didn’t have to use COBRA to retain that coverage, it’s logical to conclude that they’re still employed and that termination hasn’t occurred. It’s possible that no one factor determines the outcome and that multiple factors must be considered

simultaneously when evaluating your situation. You should speak with legal counsel to help you make your decisions.

From a retirement plan perspective, the ramifications are significant. “Termination” is a distributable event while “furlough” and “layoff” are not. In other words, a true termination of employment can result in a participant having the right to receive a distribution of his or her account balance.

Outstanding loans generally become due and payable upon termination of employment. If unpaid, the outstanding balance is treated as a taxable distribution to the participant irrespective of whether he or she rolls over the rest of his or her account.

As you can see, the distinctions and potential outcomes are meaningful. You should consult with legal counsel to determine how to best proceed for your circumstances and your organization.

FOR PLAN SPONSOR AND FINANCIAL PROFESSIONAL USE ONLY. NOT FOR USE WITH THE PUBLIC.

This article is intended to provide timely information to a large number of plan sponsors and therefore, cannot be specific to your plan and should not be regarded as legal advice. Also, please realize that CARES is a massive bill with economic benefits exceeding \$2 trillion. It contains other provisions that we could not include here in the interests of brevity.

While we’re always willing to share with you the benefit of our experience, you should be sure to direct any requests for legal guidance or opinions to your legal counsel.

