UNCOMMONLY INDEPENDENT

COVID-19 questions and answers for U.S. employers:

Retirement

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With not only the markets but the regulatory environment, as well, in a period of near constant flux, employers have many questions about how their plan should be managed and the best ways to help employees. Here are some of the questions and answers most often heard:

Sections:

Plan distributions

Should we delay distributions until the stock market recovers?

No. Although we understand your concern for your participants, the plan terms specify when participants can take distributions. Most plans allow them as soon as administratively possible following a severance from employment. If a request is intentionally delayed longer than necessary and the market continues to decline, a participant may claim that the decision cost them. In addition, plan sponsors cannot make investment decisions on behalf of participants and delaying investment liquidation is such a decision.

Are plan distributions available to participants impacted by the coronavirus?

Yes. Through the Coronavirus, Aid, Relief and Economic Security (CARES) Act, plans have the option of offering participants a new Coronavirus Related Distribution between Jan. 1, 2020, and Dec. 31, 2020. A plan can make a Coronavirus-Related Distribution when:

1. The participant, or the participant's spouse or dependent is diagnosed with the virus by a CDC approved test, or
2. The participant, the participant's spouse, or someone who shares the participant's principal residence experiences adverse financial consequences due to the virus, such as:
    - Being quarantined.
    - Being furloughed or laid off.
    - Having work hours reduced.
    - Being unable to work due to lack of childcare.
    - Closing or reducing hours of a business owned or operated by the individual.
    - Having pay or self-employment income reduced.
    - Having a job offer rescinded.
    - Having a job start date delayed.

Coronavirus-Related Distributions are not subject to the 10% early withdrawal penalty and are exempt from mandatory 20% income tax withholding. Participants may spread their distributions' tax liability over a three-year period. Alternatively, a participant can avoid the tax liability by recontributing the distributions to a plan or IRA within three years. Distributions are capped at $100,000 or less across all plans in a controlled group. A plan sponsor may rely on a participant's certification that they satisfy the eligibility conditions.

Plans can use this option now so long as they are amended by the last day of the plan year beginning on or after Jan. 1, 2022 (i.e., by Dec. 31, 2022, for calendar year plans).

Can a terminated employee receive a Coronavirus related distribution?

Yes. A coronavirus related distribution is available to a terminated employee who meets the criteria of a qualifying individual and a plan amendment does not carve them out.

Can a participant take a Coronavirus-Related Distribution because her spouse is on furlough?

Yes. Based on IRS guidance included in Notice 2020-50, issued June 19, 2020, a participant is eligible for a Coronavirus-Related Distribution if her spouse is furloughed due to Covid-19.

We may need to temporarily reduce our employee's pay to keep our business afloat. Our employees would continue to work their normal hours. Are these employees eligible for a Coronavirus Related Distribution?

Yes. Based on IRS guidance included in Notice 2020-50, issued June 19, 2020, employees who experience pay reductions as a result of Covid-19 are eligible for a Coronavirus-Related Distribution.

What does self-certification look like for Coronavirus-Related Distribution?

Plan sponsors may rely on plan participants' affirmations that they qualify. Ask your Lockton service team how your service provider is capturing certification.

Under IRS Notice 2020-50, the IRS provided the following sample certification:

> Name: ____________________ (and other identifying information requested by the employer for administrative purposes).
>
> I certify that I meet at least one of the following conditions: (1) I was diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (referred to collectively as COVID-19) by a test approved by the Centers for Disease Control and Prevention (including a test authorized under the Federal Food, Drug, and Cosmetic Act); (2) my spouse or my dependent was diagnosed with COVID-19 by a test approved by the Centers for Disease Control and Prevention (including a test authorized under the Federal Food, Drug, and Cosmetic Act); or (3) I have experienced adverse financial consequences because: (i) I, my spouse, or a member of my household was quarantined, furloughed or laid off, or had work hours reduced due to COVID-19; (ii) I, my spouse, or a member of my household was unable to work due to lack of childcare due to COVID-19; (iii) a business owned or operated by me, my spouse, or a member of my household closed or reduced hours due to COVID-19; or (iv) I, my spouse, or a member of my household had a reduction in pay (or self-employment income) due to COVID-19 or had a job offer rescinded or start date for a job delayed due to COVID-19.
>
> Signature: ____________________

What types of plans can make a Coronavirus-Related Distribution?

Coronavirus-Related Distributions are available to 401(a), 401(k), 403(b) and governmental 457(b) plans. They also are available to IRAs (both Individual Retirement Accounts or Individual Retirement Annuities) and Qualified Annuity Plans.

We are adding Coronavirus-Related Distributions to our safe harbor 401(k) plan. Do we need to send an updated safe harbor notice?

Generally, a midyear change to a safe harbor plan will require updated language to a safe harbor notice. Normally, the plan sponsor must send an updated notice at least 30 days before a change becomes effective, unless there are extraordinary circumstances (e.g., a coronavirus pandemic). To our knowledge, there is no Covid-19 relief excusing plan sponsors from providing an updated safe harbor notice. We do think there is relief on the 30-day advance timing considering the pandemic. If plan sponsors amend their safe harbor 401(k) plans to add the CARES Act distribution and loan provisions, the plan should issue an updated safe harbor notice to participants and beneficiaries as soon as possible.

Are repaid Coronavirus-Related Distributions to the same plan related rollovers for top heavy purposes?

The plan would handle the repayment as though it were a direct rollover. If it is rolled back into the same plan that made the distribution, it is a related rollover (see Treas. Reg. §1.416-1 Q&A T-32).

Are disaster related hardship distributions available?

Yes. Under IRS final regulations published in September 2019 (here), employers could amend their plans to allow employees to take hardship withdrawals for expenses and losses (including loss of income) due to a FEMA declared disaster (see FEMA declarations here).To qualify for this distribution, either the employee's principal residence or place of employment must be in the disaster area. Family members' expenses and losses do not count.

Like other hardship distributions, these withdrawals are subject to the 10% early withdrawal penalty.

What does self-certification look like for disaster related hardship distributions?

You may want to ask what hardship certification procedures your service provider can support. While plans are not required to obtain source documentation under the alternative notice and summary approach, participants must agree to keep and produce records upon request.

Is there relief available if we have not been able to follow our plan's procedural requirements for processing distributions during this time?

Under Notice 2020-01, the Department of Labor (DOL) says that if a plan fails to follow procedural requirements for plan loans or distributions imposed by the plan's terms, relief will be available if:

1. That failure is solely attributable to the COVID-19 outbreak.
2. The plan makes a diligent, good faith effort under the circumstances to comply with those requirements.
3. The plan makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively practicable.

How is spousal consent handled when many notaries are not available?

Under current regulations, spousal consent for certain benefit distributions must be physically witnessed by a plan representative or a notary. This may not be possible due to many states having stay-at-home orders, social distancing rules, or restrictions on essential services. To address this, the IRS issued Notice 2020-42, which provides temporary relief from the physical presence requirements for distributions from January 1 through December 31, 2020. Plans may use either remote electronic notarization or plan representative witnessing via electronic means.

If a state allows remote electronic notarization, the physical presence requirement will be met for an electronic system that uses remote notarization if executed via live audio-video technology that otherwise satisfies the requirements of participant elections under Treas. Reg. §1.401(a)-21(d)(6) and is consistent with state law requirements that apply to the notary public.

To meet the requirements for a plan representative witnessing the election, the physical presence requirement will be met if the electronic system using live audio-video technology satisfies the following requirements:

1. The individual signing the participant election (or spousal waiver) presents a valid photo ID to the plan representative during the live audio-video conference;
2. The live audio-video conference allows for direct interaction between the individual and the plan representative;
3. The individual transmits by fax or electronic means a legible copy of the signed document directly to the plan representative on the same date it was signed; and
4. After receiving the signed document, the plan representative acknowledges that the plan representative witnessed the signature in accordance with the notice and transmits the signed document and the acknowledgement back to the individual under a system that satisfies the applicable notice requirements under §1.401(a)-21(c).

Can we protect RMD participants by delaying their distributions during the market downturn?

Yes. Under the CARES Act, RMDs for 2020 will be waived for all DC plan types – including 401(k), 403(b) and governmental 457(b) plans – and IRAs. This also applies to RMDs due in 2020 but attributable to 2019. Should a participant wish to take an RMD, the plan's service provider should make an accommodation to support that request.

Plans have the option of using this now so long as they are amended by the last day of the plan year beginning on or after Jan. 1, 2022 (i.e., by Dec. 31, 2022, for calendar year plans).

Can participants who received 2020 RMDs roll them over?

Yes. The IRS says participants can rollover the following:

- Distributions that equal the 2020 RMD amount, whether paid in 2020 or in 2021 for an employee who has an April 1, 2021 required beginning date.
- One or more payments (that include the 2020 RMD) as part of a series of substantially equal periodic payments made at least annually and expected to last for the participant's life

expectancy or the joint life expectancy of the participant and the participant's designated beneficiary or for at least a 10-year period.
- Amounts paid to participants with April 1, 2021 required beginning dates – after the 2021 RMD is satisfied – that would otherwise not be rollover eligible.

Can a participant rollover a 2020 RMD if it was paid more than 60 days ago?

Yes. The IRS extended the 60-day rollover period to August 31, 2020, for anyone who received a 2020 RMD payment described in the previous FAQ (See **Can participants who received 2020 RMDs roll them over?**). For example, if a participant received a single-sum distribution in January 2020, and part of it was treated as a non-rollover-eligible RMD, the participant has until August 31, 2020 to rollover the portion of the distribution that was treated as an RMD.

We treated a portion of a 2020 distribution to a participant who reached age 70 ½ in 2020 as an RMD. Is this a problem we need to correct?

No. Under IRS guidance, a 2020 distribution to a participant reaching age 70 ½ in 2020 (that would not be considered an RMD under the SECURE Act change to the RMD age) is not required to be treated as rollover eligible. In these instances, plan sponsors and recordkeepers can keep the initial RMD distribution and withholding treatment without plan qualification, special tax notice, or under-withholding failure concerns.

These distributions are eligible for the rollover deadline extension to August 31, 2020 described in the previous FAQ (See **Can a participant rollover a 2020 RMD if it was paid more than 60 days ago?**).

Must a plan automatically apply the RMD waiver?

Service providers may require plans to automatically apply the waiver. Other vendors may allow plans to opt out. It's likely that RMD participants will have the right to take an RMD if a plan applies the waiver. Ask your Lockton service team how your service provider is supporting RMD waivers.

Under recent guidance, the IRS provided a sample plan amendment for plans that implement the 2020 RMD waiver under the CARES Act. The sample amendment provides one default option to pay the RMD in the absence of a participant's or beneficiary's election to suspend the 2020 RMD and another default option to suspend the 2020 RMD absent a participant or beneficiary election to receive it. The sample RMD amendment also offers employers direct rollover and default distribution rule options.

Does the RMD waiver apply to old fashioned pooled profit-sharing plans that are not "individual" accounts?

Yes. An individual account plan does not mean each participant has a separate account. Rather, it is just referring to whether there is a separate accounting of the plan assets for each participant

Can my plan accept RMD returns?

If RMD-eligible participants already took RMDs in 2020 (either for 2020 or a 2019 initial RMD delayed until 2020), a participant may be able to indirectly roll the RMD back into the plan if plan provisions allow these individuals to make rollovers into the plan. Alternatively, they may be able to rollover these amounts into an IRA or another employer's plan. (See **Can a participant rollover a 2020 RMD if it was paid more 60 days ago?**). You'll want to discuss with your recordkeeper the process they will use to allow rollovers into the plan of RMDs taken in 2020.

Can a participant treat an RMD as a Coronavirus-Related Distribution?

Qualified individuals who receive periodic payments and distributions that would have been required minimum distributions between January 1, 2020, and December 31, 2020, can treat them as Coronavirus-Related Distributions and include the income over three years.

Plan loans

Are special plan loans available to participants impacted by coronavirus?

Yes. The CARES Act gives plans the option to increase the maximum participant loan limit and extend repayment periods when:

1. An individual, or the individual's spouse or dependent is diagnosed with the virus by a CDC approved test, or
2. An individual, the individual's spouse or someone who shares the individual's principal residence experiences adverse financial consequences due to the coronavirus, such as:
   - Being quarantined.
   - Being furloughed or laid off.
   - Having work hours reduced.
   - Being unable to work due to lack of childcare.
   - Closing or reducing hours of a business owned or operated by the individual.
   - Having pay or self-employment income reduced.
   - Having a job offer rescinded
   - Having a job start date delayed.

The increased limit applies is the lesser of:

1. $100,000 (from $50,000); or
2. 100% (from 50%) of the present value of the participant's vested benefit.

The increased amount is available for loans made during the 180-day period after the enactment date – i.e., March 27, 2020 through September 22, 2020. All 2020 loan payments due on these or any outstanding loans as of March 27, 2020, through December 31, 2020, can be delayed by one year. While interest will accrue, the delay is disregarded for purposes of the 5-year limit on participant loan repayments. Theoretically, participants could now have a 6-year loan with no payments due between March 27 and December 31, 2020.

Plans can use this option now so long as they are amended by the last day of the plan year beginning on or after Jan. 1, 2022 (i.e., by Dec. 31, 2022, for calendar year plans).

Can a plan allow new coronavirus related loan payment deferrals but not the increased loan limit? Can they include the loan provisions, but not the Coronavirus Related Distributions?

Under its guidance in Notice 2020-50, the IRS says an employer can choose whether (and to what extent) to treat distributions under its plan(s) as Coronavirus-Related Distributions and whether (and to what extent) to apply plan loan rules. For example, an employer can provide Coronavirus-Related Distributions, but not change its loan provisions or loan repayment schedules. The IRS says the employer can develop any reasonable procedures for identifying which distributions to treat as Coronavirus-Related Distributions, but the employer must treat similar distributions consistently.

Has the IRS provided guidance on applying the suspension of loan repayments otherwise due through the end of 2020?

The IRS will treat a plan as satisfying Section 72(p) if it suspends loan repayments for qualified individuals from March 27, 2020 through December 31, 2020. Loan repayments must resume after December 31, 2020. The plan can extend the loan term for one year from the date the loan was originally due. The plan must add the interest accruing during the suspension period to the remaining loan principal. The plan will reamortize the loan and the participant will repay the loan in substantially level installments over the remaining loan period. Assuming a general-purpose loan, the remaining loan period can be 5 years from the date of the loan plus up to one year from the date when the loan was originally due.

Does the coronavirus loan payment deferral provision apply to terminated employees?

If a plan that permits terminated participants to make loan payments directly to the plan adopts the coronavirus loan payment deferral provision, a terminated participant that meets the qualifying criteria should be able to delay for a year any loan payments due between March 27, 2020 and December 31, 2020. For plans that do not permit a terminated participant to make loan payments, the terminated participant may roll over the loan amount to another plan or IRA by their tax filing deadline or the loan will become a taxable early withdrawal.

Can an employee who was behind on their loan payments before March 27 use this relief to delay their loan going into default?

No. Loan payments that were due before March 27, 2020 must be made current under the loan terms to prevent the loan going into default. Only loan payments due between March 27 and December 31 for an affected participant can be delayed.

Can an employee treat a distribution of a defaulted loan as a Coronavirus-Related Distribution?

Yes. If a participant has a loan being offset and treated as an actual distribution (not a deemed distribution) in 2020, and that individual meets the qualifying criteria, the defaulted loan could be considered a Coronavirus-Related Distribution.

Is there relief available if we have not been able to follow our plan's procedural requirements for processing loans during this time?

Under Notice 2020-01, the Department of Labor (DOL) says that if a plan fails to follow procedural requirements for plan loans or distributions imposed by the plan's terms, relief will be available if:

1. That failure is solely attributable to the COVID-19 outbreak.
2. The plan makes a diligent, good faith effort under the circumstances to comply with those requirements.

3. The plan makes a reasonable attempt to correct any procedural deficiencies, such as assembling any missing documentation, as soon as administratively practicable.

Plan funding

Can I delay the deposit of my safe harbor contribution?

The current safe harbor contribution deadlines still apply. If the plan uses the payroll period method to calculate its safe harbor match, the match for elective deferrals and employee contributions made during a plan year quarter must be deposited no later than the last day of the next quarter. Nonelective safe harbor contributions and annual safe harbor matching contributions must be deposited no later than 12 months after the close of the plan year. To get the deduction for the previous tax year, these safe harbor contributions must be deposited by the due date of the plan sponsor's tax return for that plan year.

My safe harbor plan currently calculates safe harbor matching contributions on a per pay period basis. Can we amend the plan midyear to change the calculation to an annual safe harbor match?

You should ask your plan document provider if this is a midyear safe harbor amendment they can make considering IRS Notice 2016-16 guidance. This guidance, along with a related IRS Issue Snapshot, allows changes from a per pay period to an annual period method for calculating the matching contribution to be made midyear if updated notices and election periods are provided as soon as practical. The link to the IRS Issue Snapshot is here.

Can we amend our plan midyear to remove the required company safe harbor contribution?

Yes. On June 29, the IRS provided some relief to the normal requirements plans must meet to reduce or suspend safe harbor contributions midyear.

Generally, a plan sponsor must meet one of two circumstances to amend the plan midyear to reduce or suspend safe harbor contributions. If the plan's annual safe harbor notice included language describing the employer's option to reduce or suspend contributions midyear, the plan sponsor can amend the plan to do this. If this language was not in the annual notice, the employer must be operating at an economic loss to halt safe harbor contributions midyear.

The June 29 IRS guidance provides temporary relief to meeting the two circumstances described above. A plan sponsor that amends their plan between March 13, 2020, and August 31, 2020, can reduce or suspend the plan's safe harbor match or nonelective contribution without the employer operating at an economic loss or without the plan's annual safe harbor notice including language about the employer's option to reduce or suspend the safe harbor contributions midyear.

If a plan adopts an amendment between March 13, 2020, and August 31, 2020, to reduce or suspend the ***safe harbor nonelective contribution***, the effective date can be tied to the amendment adoption date even if the plan sponsor does not provide the supplemental safe harbor notice 30 days before the effective date of the reduction or suspension. Under this relief, the employer must provide the supplement safe harbor notice no later than August 31, 2020.

The IRS did not extend the above supplemental safe harbor notice timing relief when reducing or suspending ***safe harbor matching contributions***. The IRS says employees make elective deferral decisions based on matching contribution levels communicated to them. Plan sponsors can stop safe harbor matching contributions midyear after providing participants with the supplemental 30-day notice and the opportunity to change their deferral/contribution election before implementing the safe harbor matching contribution reduction or suspension.

The supplemental notice must explain:

- the consequences of the reduced or suspended safe harbor contribution.
- the procedures to change deferral/contribution elections.
- the amendment's effective date.

When a plan reduces or suspends safe harbor contributions midyear, annual ADP/ACP testing must be performed. Testing will be based upon the entire plan year using the current-year testing method. The sponsor also must perform top-heavy testing. An updated summary plan description (SPD) or summary of material modification (SMM) would need to be distributed to all eligible participants.

Can we reduce or suspend midyear the safe harbor contributions we give to HCEs?

Yes. The IRS clarified in its June 29, 2020 guidance that contributions made to highly compensated employees (HCEs) are not included in the definition of safe harbor contributions. Therefore, a midyear change that reduces contributions only to HCEs is not a safe harbor contribution reduction.

The IRS did say that this reduction would require a midyear change to the plan's safe harbor notice. HCEs would need an updated safe harbor notice and deferral election opportunity.

Our plan calculates the safe harbor match annually. How do we address the true up provision when suspending the match midyear?

When suspending the safe harbor match midyear, and that match is normally calculated on a plan year basis, you prorate the annual compensation limit through the effective date of the amendment. For example, if you suspend your match June 1, the maximum compensation taken into account is $142,500, or one-half of the 2020 $285,000 compensation limit.

We suspended our safe harbor nonelective contribution midyear 2020 but are now in a position to begin contributing to our plan again. Is there anyway to be a 2020 safe harbor plan?

The IRS provided guidance in late 2020 clarifying that employers who suspend safe harbor nonelective contributions during the plan year can readopt safe harbor nonelective contributions for the entire plan year and will be deemed to satisfy the ADP and ACP tests (as applicable) and the top heavy rules. As outlined under the SECURE Act, plan sponsors (beginning Jan. 1, 2020) who amend their plans no less than 30 days before the close of the plan year to provide the 3% nonelective 401(k) safe harbor contribution can be safe harbor plans. If a plan provides a 4% or greater nonelective contribution, the plan can be safe harbor if it is amended by the last day for distributing plan year excess contributions (i.e., generally by the close of the following plan year).

The December 2020 IRS guidance did not extend the ability for plan sponsors who suspended safe harbor matching contributions in 2020 to retroactively amend their plans to adopt a safe harbor nonelective contribution for the 2020 plan year, and the SECURE Act prohibits retroactively amending a plan to be a safe harbor nonelection contribution plan if the plan had provided traditional or QACA safe harbor matching contributions at any time during the plan year.

Do we need to amend the plan to discontinue discretionary matching and profit-sharing contributions?

The decision to offer employer matching contributions is a business decision and not subject to ERISA fiduciary considerations. Plan sponsors wishing to reduce or suspend their plans' employer contributions may generally do so at any time on a prospective basis. For example, a 401(k) plan could be amended on April 1, 2020, to provide that employer matching contributions will be reduced or suspended effective on or after that date. Such a change would require the plan to issue all eligible participants an updated summary plan description (SPD) or a summary of material modification (SMM). Although not required, a thoughtful communication strategy to participants is strongly suggested.

Many plans do not specifically state the amount of the employer matching contribution, rather the plan document and SPD reference discretionary matching contributions. Employers with discretionary contributions should consult with their plan document providers to determine what, if any, plan document or SPD changes may be necessary. Again, a thoughtful communication strategy to participants is strongly suggested.

We still want to make the company contributions we promised our employees for 2019, can we delay their timing?

In order to deduct the company contributions for the year, you must deposit company contributions by the due date (with extensions) of the company's tax return. That could be as late as September or October for calendar year filers. In addition to the deductibility deadline, other rules specify when various contributions must be deposited to maintain the plan.

We have no assets to make our payroll or submit associated plan contributions. Did the CARES Act include any provisions that can help us through this time?

To help stem the tide of joblessness, the CARES Act's Paycheck Protection Program helps small businesses affected by coronavirus by issuing loans to cover near-term operating expenses and providing employee retention incentives. These will be fully forgiven when used for certain expenses, including payroll costs and payment of retirement benefits.

On June 5, 2020, the Paycheck Protection Program Flexibility Act of 2020 (the Flexibility Act) made some significant changes to the Paycheck Protection Program originally adopted under the March 2020 CARES Act. The original covered period during which expenses could be forgiven extended from February 15, 2020 to June 30, 2020. Employers could choose an 8-week period within the covered period at the end of which loans are forgiven. The Flexibility Act now provides for a covered period ending on the earlier of 24 weeks from the date of loan origination or December 31, 2020. A borrower with a loan originated before the Flexibility Act effective date may elect to use an 8-week covered period instead of the new 24-week period.

Small businesses (500 or fewer employees) are eligible and can apply through the Small Business Administration (SBA) office beginning April 3, 2020. Independent contractors and self-employed individuals can apply beginning April 10, 2020. Small businesses seeking more information should consult with their lenders. Banks administer this program on behalf of the SBA and Treasury.

While no guidance has been issued from the IRS or Treasury Department, CARES seems to indicate:

- the term "retirement benefits" likely includes elective deferrals that are made by employees,
- the term "payroll costs" would seem to include matching contributions, and are part of the loan's principal that would be forgiven after the covered period expires,
- calendar-year-end profit-sharing contributions for 2020 are theoretically includable if a businesses covered period ends December 31, 2020,
- year-end matching contributions or true ups also appear to be excluded.

Our plan includes an annual match. Can we include the payroll costs of the accrued portion of the match for a plan's covered period under the Paycheck Protection Program?

We do not have a definitive answer. The Paycheck Protection Program language simply says that the "payment of any retirement benefit[s]" are among the payroll costs that are included. At this time, it not entirely clear what is intended to be included in the "payment of any retirement benefit." No formal guidance has been issued by the IRS or Treasury Initial guidance issued by the U.S. Small Business Administration doesn't expand either. While the phrase appears broad, based on the intent of the program and the limited period of time during which expenses incurred may be forgiven, it is likely that a narrower interpretation of the phrase will be adopted (i.e., payments made solely as part of the employer's normal and current payroll costs). We believe it to be a safe interpretation that that participant elective deferrals and matching employer contributions are covered, but it's unclear on accrued v. due.

Until additional guidance is issued, a conservative approach is to evaluate when these amounts expenses are actually required to be paid under the terms of such plan and what the normal course of business was to make the payment. If a payment would have been made during the time frame, then it can be funded with the program proceeds. if not, proceed with caution.

That being said, the intent of the loans is to provide benefits to workers, and paying an accrued, but not due, employer contribution would be within the spirit. There's just no guidance at this point to provide definitive direction.

Contributions to our retirement plan are normally tax deductible. How does the tax deduction apply if we use Paycheck Protection Program funds to make employer contributions to our 401(k)?

In Notice 2020-32, the IRS takes the position that if a business uses the Paycheck Protection Program (PPP) loan for eligible expenses that would otherwise be deductible, the business cannot also take the tax deduction because the PPP loan, once forgiven, is not taxable income to the business. Thus, if an employer uses PPP funds to make employer contributions to a retirement plan as an eligible expense, and the PPP loan is forgiven, the business could not also deduct the employer contributions.

Can we suspend our plan's safe harbor matching contribution if we took a loan from the Paycheck Protection Program but can still show we are operating at an economic loss?

There is no guidance that limits your ability to suspend your safe harbor match midyear if you receive a Paycheck Protection Program loan. The regulations allow plan sponsors to suspend safe harbor matches midyear when operating at an economic loss as long as you meet certain other requirements for a mid-year suspension (see above **Can we amend our plan to remove the required company safe harbor contribution?**). The Paycheck Protection Program (See Lockton Alert) provides employers with a wide array of ways in which to use the loan proceeds and still qualify for loan forgiveness. In addition, the loan amounts can vary based on employers' needs and goals. An employer may take a relief loan just to cover payroll and health insurance, and pay vendors, rents, and utilities to keep operations going, and thus not to continue to pay safe harbor contributions. To date, there is no indication that the IRS would require an employer to increase the loan amount to fund the safe harbor match. Remember the suspension of the safe harbor match comes with its own penalty in the form of full year ADP/ACP testing and the likelihood of HCE refunds (see above **Can we amend our plan to remove the required company safe harbor contribution?**).

When an employee terminates, how are cash outs of vacation time, sick pay and other paid leave treated for deferral purposes?

Your plan terms will dictate the answer. Generally, an employer's payment of accrued but unused sick pay, vacation or other paid leave after severance of employment can be included in a 401(k) plan's eligible compensation definition. If your plan's compensation definition includes these sources, a terminated employee who was a plan participant will be eligible to make deferrals and earn matching and other employer contributions (if applicable) on the leave cash outs paid. This is the case even if the leave amounts are paid after the employee's severance from employment.

This is different than severance pay, which is not includable in a plan's eligible compensation definition.

Under the CARES Act's Paycheck Protection Program, what retirement plans are included under "retirement benefits"?

Treasury FAQs note it's intended for quailed defined contribution and defined benefit plans. It excludes nonqualified plans.

We've experienced delays in depositing employee deferrals and loan repayments into the plan. Is this a problem?

Generally, participant contributions and loan repayments must be forwarded to the plan on the earliest date they can reasonably to segregated from the employer's generally assets. Under Notice 2020-01, the Department of Labor (DOL) recognizes that some employers and service providers may not be able to forward participant payments and withholdings to plans during the emergency period. In such instances, the DOL will not – if the failure is attributable to the COVID-19 outbreak – take enforcement action. Employers and service providers must act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable. The guidance is effective from March 1, 2020, until 60 days after the announced end of the COVID-19 National Emergency or such other date announced by the DOL.

We suggest that you document any delays in depositing participant deferrals and loan payments related to COVID-19 circumstances and specifically note efforts made to remedy them as soon as administratively feasible.

How does the CARES Act apply to money purchase plans?

The RMD and funding relief provisions apply to money purchase plans. The loan and distribution provisions do not apply.

Workforce reductions and operational concerns

We may need to temporarily lay off employees, how would that impact their plan eligibility once they are rehired?

Employees eligible for the plan at the time of lay-off (even if not actively contributing) will usually be eligible for the plan immediately upon rehire and typically don't have to wait until the next plan entry date. For those who were not eligible for the plan as of their lay-off date, you will need to review your plan's rules. On rehire, they may be able to join the plan on the next scheduled plan entry date. However, the plan may require them to complete as much as a year of service depending on the specific plan terms and the employee's pre-layoff tenure.

What is the impact of a significant lay off?

Special rules apply if more than 20% of plan participants cease to become eligible due to a single event or series of related events. This creates a partial plan termination and immediately vests affected participants. For plans that provide immediate vesting or, if all affected employees have worked long enough to vest, there is no practical impact. But, if a plan has money subject to vesting, this is important to watch.

Partial plan terminations look at a series of related events. A single layoff may be below 20%, but when combined with a subsequent layoff due to the same economic downturn, the total may exceed 20%. This is a facts and circumstances determination. Employers may reasonably conclude that a partial termination has occurred at less than 20% turnover. If greater than 20% turnover is normal for their industry, they could conclude partial termination has not occurred.

Congress will not likely provide relief on this rule. It exists to protect participants from plan sponsors leveraging an economic downturn to terminate partially vested participants and access non-vested dollars to pay plan liabilities such as company contributions or service-provider expenses.

Do furloughed employees count against the 20% threshold in a partial plan termination?

It's unlikely since there is no severance of employment in a furlough. Admittedly, the partial plan termination rules reserve the IRS the determination to "consider other facts and circumstances". We are unaware of any guidance where a short-term furlough would trigger a partial plan termination.

If we lay off employees, are they eligible for a plan distribution?

Generally, a layoff would be considered a severance of employment, and consequently a distributable event. This is different than a furlough, which does not involve a severance of employment.

If we cannot afford the plan, can we terminate it?

Yes. The termination process is relatively straight-forward:

1. The company adopts a formal resolution or amendment to terminate.
2. Distributions are paid to participants.

The plan must still undergo regular compliance testing; fund required contributions for the part of the year prior to termination; and file a Form 5500 for each year (or portion of a year) the plan still has any undistributed assets.

However, sponsors should carefully consider the impact on their business and employees. Once the plan is terminated, special rules prevent an employer from starting a new 401(k) plan for a full year from the date the terminated plan paid its last distribution. Because the plan must still undergo all the regular administrative work and wrap up, plan termination might not save any money. A plan amendment eliminating mandatory contributions (such as safe harbor contributions) or a re-design streamlining the plan may be more cost-effective and better for company morale. If plan administrative costs are a concern, sponsors may arrange for regular plan maintenance fees to be paid from plan assets.

If you are terminating the plan because you are going through bankruptcy, plan fiduciaries should ensure that any and all monies owned to the plan are paid and that the plan is properly terminated. The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) explicitly imposes plan administration duties on plan sponsors who file bankruptcy. This also imposes those duties on individual plan fiduciaries. In bankruptcies in which employee contributions are missing, the DOL will recover those missing monies from individual plan fiduciaries potentially subjecting them to collections, liens, wage garnishments, and loss of their own plan accounts. Thus, fiduciaries must continue to properly administer the plan even in the toughest of times. Fiduciaries who put aside their duty may be held personally responsible for the results. If a plan sponsor goes into bankruptcy the fiduciaries should pay close attention to ensure that plan assets are not commingled with operating assets, no matter what financial distress the company is experiencing. Fiduciaries must know that retirement plan obligations are not equal to corporate obligations.

Have Form 5500 filing deadlines been extended?

Only for certain fiscal year plans. Under Notice 2020-23, the filing of the Form 5500 is extended for plan sponsors that that have a filing deadline falling on or after April 1, 2020 and before July 15, 2020. The extension will help only those plans with a June 30 plan year-end that had filed for an extended deadline of April 15 (the regular Jan. 31 deadline plus 2.5 months). These plans will now have until July 15 to file. As of now, for plan sponsors with calendar year plans, the July 31 deadline is fast approaching.

A plan sponsor who misses the deadline should consider using the DOL's Delinquent Filer Voluntary Compliance Program (DVFCP). It can reduce penalties but does not waive them.

We need to pay our plan service providers on time, but money is tight, can we pay expenses from the plan?

Yes. Fees associated with necessary plan services can be paid from plan assets. Necessary plan services include annual testing and government reporting, mandatory plan amendments, recordkeeping, and investment advisory services. Many recordkeepers have easy forms sponsors can complete to either pay invoices from the plan on a one-off basis or to provide a standing request to pay all eligible expenses from plan assets.

Our benefits staff is being reduced, how do we address retirement plan operations?

At times like this, it's tempting to take short cuts, but sponsors should continue diligently updating their various systems. That includes recording former employees properly on your payroll system (e.g. terminated, laid off, furloughed, etc.) and ensuring that same information is included on the files you upload to your recordkeeper. Keeping employee status, termination and rehire dates, hours worked, and compensation current ensures that all parties can process transaction requests efficiently.

We were in the process of changing recordkeepers, should we proceed?

If the plan sponsor elects, a previously planned change of service provider can occur as scheduled. All normal fiduciary considerations and notice requirements apply. Assuming the previous provider is being replaced as a result of a completed prudent process, the change, even considering current events, is based on sound fiduciary process. If the plan sponsor elected to halt the change and documented the decision was pursuant to extreme market uncertainty and events that could potentially harm participants (for example distracted participants would miss the communication or resulting necessary fund changes would be harmful), then that would be a suitable basis for not moving forward. The decision either way should be clearly documented via the normal fiduciary process.

We were in the process of implementing a fund change, should we proceed?

If the plan sponsor elects, a fund change can occur as planned. All normal fiduciary considerations and notice requirements apply. Assuming the fund is being replaced due to under-performance based on Investment Policy Statement guidelines, the change, even considering current events, is based on sound fiduciary process.

If the plan sponsor elected to halt the change and documented the decision was pursuant to extreme market uncertainty and events that could potentially harm participants (for example distracted participants would miss the communication or they are currently on furlough), then that would be a suitable basis for not moving forward.

For individual fund changes, sponsors should continue mapping to a portfolio with similar risk and return characteristics. If a similar risk/return option is not available, the safe harbor of mapping to the QDIA is the prudent approach.

With falling interest rates, how should we think about the plan's stable value option?

Money market funds entered headlines when the Federal Reserve moved to backstop prime money market funds at risk of "breaking the buck" as investors withdrew assets. This should minimally impact plan sponsors invested in government money market funds. A larger issue for money market investors is the Fed's move to zero interest rates which will cause money market yields to also fall near zero.

Plan sponsors should use evaluate whether stable value options are allowed and suitable for their plan. The construction and mechanics of a stable value portfolio offer plan sponsors a short-term opportunity to grab higher yields for participants if they transition from money market to stable value. Stable Value portfolios generally invest in short- to intermediate-term bonds with high quality. In a falling rate environment, the bonds should experience gains that would increase the market to book ratio. This could be offset by rising credit spreads, but the quality of stable value portfolios is usually high, leaving them less exposed to this. We expect stable value portfolios will have higher market-to-book ratios at the end of March. These higher ratios are essentially portfolio gains not yet paid out to participants through the crediting rate. Plan sponsors who transition to stable value portfolios when market-to-book ratios are high help their participants achieve higher yields than otherwise available in the market for a short period.

With the recent market downturn, should our investment committee consider any special review of our plan's fixed income options?

Diversification within the DC lineup is important to provide participants appropriate options with varying degrees of risk. There should be at least one if not multiple investment options in the plan that provided positive returns during the recent downturn. It should be expected that money market, stable value, aggregate bond index, and active core bond funds all likely provided positive returns. This will likely affirm most plans' good investment structures, however, if there are not one or more investments with positive return then it would become an action item to address menu design or manager selection.

When our investment committee meets next, we are evaluating our current QDIA. How should we approach this review considering the market downturn?

The QDIA investment is the most important investment in most plans as it is the one selected for auto-enrolled participants and for those participants looking to outsource investment decisions. Every target date solution has a unique glide path and construction that exposes participants to different risks at different points in time. After a market drawdown is a perfect time to assess the real time downside that participants are exposed to in any given solution. Expect that all of these solutions would have lost money in the recent environment. The key question is if the losses for any given age group in a plan's demographic are reasonable for their objectives and risk tolerance. These losses should be weighed against the portfolio's long-term performance results. Plan sponsors and participants naturally feel uncomfortable with losses, but if the discomfort is extreme or the losses are out of line with expectations, re-evaluate the QDIA option's risk exposure.

We cancelled a regularly scheduled plan committee during this time. Can we just skip this meeting and postpone our agenda items until the next time we were scheduled to meet?

Plan committees will want to reschedule meetings to monitor and manage the plan as outlined under the committee's established charter. It should be reasonable to hold committee meetings through conference calls or via a web-based application. Either avenue should allow committees to establish a quorum and for members to discuss and vote on matters.

Our investment committee couldn't meet when we normally meet. Do we need to make up this meeting?

Investment committees should reschedule meetings so they are monitoring funds as outlined under the plan's Investment Policy Statement. It should be reasonable to hold these meetings through conference calls or via a web-based application. Either avenue should allow for committees to establish a quorum and for members to discuss and vote on matters.

A committee member has left the organization. How quickly do we need to replace exiting committee members?

Follow your plan's committee charter provisions on replacing committee members. For example, some charters say that members will be appointed by action of the committee, a company or a board. Others may say that committee membership will be those who hold organizational titles, such as CEO, CFO, HR Director, etc. Address these appointments timely to ensure your committee membership is complete.

We plan on rehiring many of our employees who we laid off. Do we apply their prior plan deferral and investment elections when they return?

Generally, absent plan language to the contrary, an eligible rehired employee will need to make a new deferral election to contribute to the plan. A rehired employee who remained a plan participant after termination may have current investment elections on file. Contributions for a rehired employee without current investment elections on file will be invested under the plan's terms, more than likely into the plan's QDIA.

Our plan includes automatic enrollment and auto-escalation. How do we apply these provisions to employees we rehire?

Generally, absent plan language to the contrary, an eligible rehired employee would be automatically enrolled at the plan's default percentage if an affirmative election is not made on a timely basis. If the plan is a QACA, the plan may say that a new "initial period" could be triggered when an employee does not have a default elective contribution for an entire plan year. In these instances, a plan could elect to automatically enroll rehired employees at the plan's initial default percentage. If, however, an employee is rehired and hasn't gone an entire plan year without default contributions, the employee must be automatically enrolled at the default contribution percentage he would have been at had he not left the employer. A QACA plan also can be written to apply this provision to rehires if there has been more than an entire plan year without default contributions. Likewise, a plan may say that an employee who has gone an entire plan year without default elective contributions in an EACA who is then subject to automatic enrollment may request a permissible withdrawal pursuant to the plan's provisions.

We realized recently that some employees missed getting required disclosures. How do we correct this?

Under Notice 2020-01, the DOL says that a plan and the responsible plan fiduciary will not violate ERISA for failing to furnish a required notice, disclosure or document during the emergency period if they act in good faith and furnish the appropriate information as soon as administratively practicable. Good faith acts include using alternative electronic communications – email, text messages and continuous access websites – with plan participants and beneficiaries provided the plan fiduciary believes participants have effective access to those platforms. This presumably applies to all required ERISA notices.

The emergency period under the guidance is from March 1, 2020, until 60 days after the announced end of the COVID-19 National Emergency or such other date announced by the DOL. We suggest that you document any delays in notices related to COVID-19 circumstances and specifically note efforts made to remedy them as soon as administratively feasible.

As a result of COVID-19, we made a plan change that required a blackout notice. Is there relief available if we were unable to provide the notice 30 days in advance of the blackout?

Generally, a defined contribution plan administrator must provide 30 days' advance notice to participants and beneficiaries whose rights under the plan will be temporarily suspended, limited or restricted by a blackout period. However, the regulations provide an exception to the advance notice requirement when events beyond the plan administrator's reasonable control prevent the notice's deliver and a fiduciary so determines in writing. As allowed under Notice 2020-01, the DOL will not require a fiduciary's written determination pursuant to the blackout notices regulation as pandemics are, by definition, beyond a plan administrator's control.

Did the IRS extend the March 31, 2020, remedial amendment period for 403(b) plans?

Actions that were due on or before March 31, 2020, for 403(b) plan form defects or plan amendments are now due June 30, 2020, related to the remedial amendment period and plan amendment rules.

Has the IRS provided any relief for Form 5330 excise taxes?

Yes. The IRS will not apply interest or penalties for these excise taxes from March 30, 2020 through July 15, 2020.

Executive benefits considerations

Is there a remedy for missing the "short-term deferral" exception payment deadline?

Bonus plans are designed to take advantage of the "short-term deferral" exception from Code Section 409A and require payment by March 15th following the year in which the bonus was earned or became vested. Sponsors who missed the March 15th deadline can expect some relief from this deadline if meeting it was administratively impracticable due to an unforeseen event or if payment would jeopardize the employer's ability to continue as a going concern. Payment must be made as soon as possible after these conditions are alleviated.

Can we allow executive benefit plan participants to revoke their deferred compensation elections?

Circumstances could allow revocation in the event of an unforeseeable emergency, if the plan document allows. An unforeseeable emergency would include an illness or an extraordinary and unforeseeable circumstance beyond the employee's control (such as the COVID-19 outbreak) that creates a severe financial hardship which cannot be satisfied through other resources. A plan could also be designed to permit a participant to receive a distribution in the event of an unforeseeable emergency. The participant must show that the emergency expenses cannot be satisfied through insurance, liquidation of other assets or through cessation of deferrals under the plan. In addition, the distribution must be limited only to the amount necessary to satisfy the financial need. Review your plan documents to determine whether its terms contemplate deferral cancellations or distributions connected to an unforeseeable emergency. If not, consider whether an amendment would be appropriate.

Under Notice 2020-50, the IRS says that a nonqualified deferred compensation plan may cancel a deferral election if an employee receives a Coronavirus-Related Distribution, which will be considered a hardship distribution for 409A purposes. The IRS notes that the plan must cancel the deferral election, not postpone or delay it.

Can we allow in-service withdrawals to participants in the deferred compensation plan?

Review plan terms to see if a plan provides for payment upon an employee's separation from service. Complete termination or a reduction in hours could be considered a separation from service upon which the employee would be entitled to a distribution from the plan. Employers considering a reduction in hours for employees should review the plan terms to avoid inadvertently creating a distributable event.

Our participants are asking about their performance-based compensation elections. Was this election period extended beyond March 30?

Employers using the performance-based compensation rule that allows employees to make deferral elections up to six months prior to the related performance period's end, must establish relevant performance goals no later than the first 90 days of the performance period. This was March 30th for calendar year plans. There are no any exceptions for that as of now.

How will the timing and methodology of the existing valuation impact stock grants?

Section 409A requires that stock options be issued with an exercise price equal to the fair market value of the employer's stock on the date of issuance. Consider whether to update valuations to account for the effects of the COVID-19 pandemic prior to issuing any equity compensation.

What are the process considerations if we terminate our plan?

Exercise caution if considering a termination. Section 409A allows a voluntary plan termination and distribution of benefits under specific rules; however, those rules do not permit a termination in connection with a downturn of the employer's financial status. This would trigger negative events including:

- a requirement to terminate all NQDC plans
- delay of payments until 12 months post plan termination
- inability to open a new plan for three years after the termination

Defined benefit plan considerations

Has the IRS provided any relief for funding waiver applications for single employer plans?

Yes. Single employer plan funding waiver applications that were due on or after March 30, 2020, and before July 15, 2020, are due July 15, 2020.

Has the IRS provided any relief for deadlines related to pre-approved defined benefit plans?

Yes. The deadline is extended to July 31, 2020 for the following:

- Adopting a pre-approved plan based on the 2012 Cumulative List.
- Submitting a determination letter application under the second six-year remedial amendment cycle.
- Correcting disqualifying provisions that would have been due on April 30, 2020.

Can a Coronavirus-Related Distribution be paid from a defined benefit plan?

The CARES Act does *not* provide an exception to the distribution restrictions that apply to pension plans (e.g., money purchase plans and defined benefit plans). This does not mean that pension plans cannot include a Coronavirus-Related Distribution. But, because a stated event (such as becoming a qualified individual) is not a permissible distributable event in a pension plan, it means the ability to use the provision is much more limited.

For example, a cash balance plan does not permit any in-service distributions. Under the law, the plan could have included an in-service distribution at age 59½ (as permitted by the SECURE Act). The plan sponsor could permit a Coronavirus-Related Distribution to be made to those participants who are age 59½. This would be a limited in-service withdrawal provision.

Let's assume the plan sponsor wants to permit Coronavirus-Related Distributions a 63-year-old eligible individual could receive a Coronavirus-Related Distribution from the plan. Because the participant is over age 59 ½, she would not have been subject to the 10% additional tax for early distributions. She would be able treat the distribution as a Coronavirus-Related Distribution and include it in income over three years and be entitled to a three-year repayment period.

Can defined benefit plans delay funding their 2020 contributions?

Yes. Defined benefit plan funding relief under the CARES Act provides companies with single-employer defined benefit plans more time to meet their funding obligations. It delays the 2020 contribution due date until Jan. 1, 2021. Under Notice 2020-82, the IRS will treat a contribution with a Jan. 1, 2021 extended due date as timely if it is made no later than Jan. 4, 2021, the first business day after Jan. 1, 2021. At that time, the contributions are due with interest. It also provides that a plan's status for benefit restrictions as of Dec. 31, 2019 will apply throughout 2020. As a result, plan sponsors may use the plan's adjusted funding target attainment percentage for the last plan year ending before Jan. 1, 2020 for plan years that include calendar year 2020.

Are we required to make our delayed 2020 contribution by Dec. 31, 2020 because Jan. 1, 2021, is a holiday?

No. Under Notice 2020-82, the IRS will treat a contribution with a Jan. 1, 2021 extended due date as timely if it is made no later than Jan. 4, 2021, the first business day after Jan. 1, 2021.

If we make a minimum contribution due in 2020 by Jan. 1, 2021, does that delay result in a PBGC reportable event?

No. The CARES Act extended the due date to Jan. 1, 2021 for contributions otherwise due in 2020. If you make these required contributions by Jan. 1, 2021, there is no event to report and no need to notify PBGC.

If we can't make a required contribution due in 2020 by Jan. 1, 2021, when is PBGC reporting due and what form do we use?

Submit Form 200 by Jan. 11, 2021 (i.e., 10 days after January 1) if the accumulated value of missed contributions exceeds $1 million. Otherwise, submit Form 10 unless one of the waivers provided in section 4043.25(c) of PBGC's Reportable Events regulation applies. Generally, Form 10 is due 30 days after the missed contribution. Because January 31 is a Sunday, the due date moves to the next business day, Feb. 1, 2021.

Does the extended required contribution due date effect the treatment of contributions receivable for variable rate premium (VRP) purposes?

Under the CARES Act, plans have an additional month to make prior year contributions that will be reflected in the VRP calculation. See following calendar year plan example:

- The 2020 premium is due Oct. 15, 2020.
- Without the CARES Act, the last date for making a required 2019 contribution would have been Sept. 15, 2020.
- With the CARES Act, the last date for making a required 2019 contribution is Jan. 1, 2021.

If the premium filing is submitted Oct. 15, 2020, the discounted value of 2019 contributions received after Sept. 15, 2020 and on or before Oct. 15, 2020 also are included in the asset value for VRP purposes.

Is there any relief for missed PBGC filings, premiums, or 4010s?

The PBGC announced that the deadlines for certain filings falling between April 1, 2020 and July 14, 2020 will be extended to July 15, 2020. A majority of plan sponsors have calendar year plan years and therefore will not be impacted by this announcement. Unless additional relief is provided, companies should be prepared to file their PBGC premiums by October 15, 2020 to avoid late payment interest charges and late payment penalties.

Is there relief for target funding status contributions that were due April 1?

Some DB plans had to certify their plan by April 1, 2020 to avoid benefit restrictions (such as paying lump sums) for the 2020 plan year. Some would have had to make contributions prior to April 1 in order to achieve a target funded status. These contributions can now be delayed until later this year. Relief has not been provided for 2021 and companies who may be facing benefit restrictions will still need to certify their plan by April 1, 2021.

Has the Annual Funding Notice due date been extended?

Annual Funding Notices are still due by April 29, 2020, and as of now, there is no indication that Congress will delay the timing. Companies are required to provide AFNs to plan participants each year, and for those companies who still mail these notices, it could be difficult to meet this deadline under the current circumstances.

We have a defined benefit plan and are faced with a potential bankruptcy. How does this effect the DB plan?

DB plans for companies going through bankruptcy would be subject to a distress termination. The PBGC covers benefits up to an annual maximum amount so any distress termination will involve a lot of back and forth with the PBGC. The PBGC will collect information to ensure the company is covering as much of the benefits as possible.

The market downturn has caused our defined benefit plan's investments to be out of alignment with our IPS. Do we need to address this?

It is important to follow asset allocation guidelines specified by your Investment Policy Statement (IPS). Rebalancing your portfolio is a systematic way of buying low and selling high. This typically adds a lot of value to a portfolio over the course of a cycle and can be particularly beneficial when markets have experienced a sell-off. If you are reluctant to rebalance, break the asset re-allocation into smaller portions and commit to carrying those out over the course of the next few months.

The business impacts of the coronavirus have accelerated our thoughts on derisking our defined benefit plan. What are our considerations?

One of the first steps to derisking a pension plan is closing and freezing the plan. Most DB plans in the US are frozen as companies have shifted toward offering Defined Contribution plans instead, so a plan freeze could help a company align their benefits with their peers while helping to reduce costs. The company should review their investment strategy to determine if changes should be made to reduce the impact of future shocks. Additionally, the funding policy may need to be adjusted if the company is no longer able to commit to contributing as much money in the future.

How do we provide annual benefits under our DB plan for rehired and furloughed employees?

The plan document outlines how service and pay should be treated for partial years of service. The company should discuss this with ERISA counsel and the plan administrator.

We received a Paycheck Protection Program loan. Can we use a portion of the loan to fund our defined benefit plan?

The Treasury department confirmed in FAQs released in April that employers may include contributions to defined benefit plans in the definition of payroll costs when calculating the maximum amount of a Paycheck Protection Program (PPP) loan.

While there is no guidance yet, we believe the legislation's intent is that you can include defined benefit contributions attributable to your selected 8-week or 24-week loan payroll window under the PPP's covered period.

Will PBGC continue to review distress termination applications, and can we file a notice with financial projections that may be subject to change in the next few weeks or months?

The PBGC has confirmed that it continues to process distress termination applications during the COVID-19 pandemic. PBGC encourages plan sponsors considering a distress termination filing to schedule a pre-filing consultation with PBGC. During this consultation, PBGC can provide information on the criteria and process for a distress termination to aid in determining the appropriateness of a distress termination based on the facts and circumstances of each case. PBGC recognizes that the impact of COVID-19 on plan sponsors is not fully known and financial projections may change as a result. Plan sponsors can discuss specific facts impacting their financial projections during the pre-filing consultation. A distress termination pre-filing consultation can be scheduled by sending an email to distress@pbgc.gov or calling 202-326-4070.

Will the PBGC continue working on plan terminations during this time?

Yes. PBGC will continue working with plan sponsors on plan terminations and will consider the facts and circumstances of each case.

Employee education considerations

How do I respond to employees who are retiring in the midst of this market downturn?

Remind employees that, while they are retiring, they are generally not taking all their savings out of the market at once. This means their balances have a chance to recover when the market does. In addition, a systematic withdrawal plan can help reduce the impact of short-term market movements just as dollar cost averaging helped during the savings process.

These articles help to explain:

- Weathering a financial crisis
- Market meltdown when you're ready to retire

What can I say to plan participants who ask about managing market volatility?

Explain that defined contribution plans were designed to not only build long-term savings, but weather financial downturns. Concepts like dollar cost averaging through payroll deduction and investment into a diversified portfolio like a target date fund are examples. Reinforce the message of time in the market over timing of the market.

This article can help: Your plan was designed for market volatility

What can I share with plan participants who ask about emergency savings and rebuilding a budget?

Most retirement plan service providers offer financial wellness services that can help individuals navigate credit management, creating a budget, saving for emergencies and more. Lockton's financial wellness program offers workshops and services that address these topics, as well. Work with your account service teams to identify appropriate resources and direct employees there.