THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

Statement by The ERISA Industry Committee
to the
House Committee on Ways and Means Select Revenue Measures Subcommittee
Hearing on
"Tax Relief to Support Workers and Families during the COVID-19 Recession."

June 18, 2020

Chairman Thompson, Ranking Member Smith, and members of the Subcommittee, thank you for this opportunity to submit a statement for the record on behalf of The ERISA Industry Committee (ERIC) regarding tax relief to support workers and families during the COVID-19 pandemic. This pandemic has been a strain on every part of the economy. As an organization that represents exclusively large employers that sponsor retirement and other benefit plans for their own workforce, we believe that supporting workers and families necessarily includes supporting the employers that are providing jobs and benefits sustaining workers, retirees, and their families. As such, we encourage a comprehensive approach that supports workers, employers, retirees, and families.

ERIC is the only national association that advocates exclusively for large employers on health, retirement, paid leave, and compensation public policies at the federal, state, and local levels. ERIC's member companies are leaders in every industry sector and provide comprehensive retirement benefits to tens of millions of active and retired workers and their families across the country. You are likely to engage with an ERIC member company when you drive a car or fill it with gas, use a cell phone or a computer, watch T.V., dine out or at home, fly on an airplane, visit a bank or hotel, benefit from our national defense, receive or send a package, go shopping, or use cosmetics.

Introduction

ERIC member companies are working hard to keep their businesses viable, to keep workers employed, and to continue providing benefits. Each member company has a different situation, but all of them can benefit from changes in the tax code to help them support their workers and their workers' retirement security. ERIC very much appreciates the retirement provisions in the "*The Coronavirus Aid, Relief, and Economic Security (CARES) Act*" (H.R. 748) and supports the retirement provisions in the "*Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act*" (H.R 6800). ERIC thanks the Subcommittee, and all House members, for their work on both of these bills.

To further support the financial and retirement security of workers and retirees, ERIC encourages Congress to implement the following provisions.

- HEROES Act retirement provisions including:
  - Funding relief for single employer defined benefit pension plans
  - Clarification of plan loan provisions included in the CARES Act
  - Further expansion of the required minimum distribution (RMD) rules

   - Flexibility for dependent care and health flexible spending account elections
- Suspension of matching contributions in safe harbor plans
- Increase in the RMD age to 75
- Elimination of barriers to allow greater use of lifetime income products
- Catch-up retirement contributions for those affected by COVID-19

Furthermore, ERIC requests the Committee's support in seeking additional guidance on the following regulatory requests:

- Clarification of the loan suspension period
- Refund of dependent care/FSA deferrals
- Relief on deferrals for commuter benefits
- Relief from partial plan termination definitions
- Clarification of participants affected by COVID-19 as defined under the CARES Act
- Cessation of 409A deferrals

Finally, ERIC would like to encourage the Committee and Congress to provide comprehensive reform for multiemployer pension plans.

Details on all of these provisions are provided below.

Support for the Retirement Provisions in the HEROES Act

The HEROES Act includes provisions that are vital to helping workers use retirement benefits to sustain their financial health, to help employers maintain jobs and benefits, and to help workers maintain retirement security. Therefore, ERIC believes it is critical that Congress pass these provisions.

Funding Relief for Single Employer Defined Benefit Pension Plans. By providing funding relief to single employer pension plans, the HEROES Act recognizes that employers that sponsor these plans are experiencing a particularly unexpected financial strain caused by the COVID-19 pandemic. The HEROES Act provides much-needed funding relief by extending the funding stabilization percentages for single employer plans. This relief includes reducing the ten percent interest rate corridor to five percent effective this year and delaying the phaseout of the five percent corridor until 2026, at which point the corridor would increase by five percentage points each year until it attains 30 percent in 2030. Also, a five percent floor would be put on the 25-year interest rate averages. ERIC also praises the extension of the amortization period from seven years to 15 years and the reduction of the shortfall amortization base to zero for plan years beginning before January 1, 2020. ERIC believes that this funding relief provides critical support for businesses that maintain single-employer plans and are focused on reopening their doors and creating safe environments for their employees.[1]

[1] ERIC recognizes that there are many ways to implement funding relief. In addition to the provisions in the HEROES Act, there are additional alternatives such as freezing the interest rate assumption for minimum funding at

Clarification of the loan provisions under the CARES Act**.** ERIC supports the clarification that the early distribution and plan loan relief rules under the CARES Act also apply to money purchase pension plans. The HEROES Act also clarifies that employers can rely upon employee certification as to the employee's eligibility for increased CARES Act loan limits. Employee self-certification will allow quicker access to additional funds and provide stability for workers and families in defined contribution plans. As such, we recommend that employee self-certifications also extend to loan repayments, hardship withdrawals, and rollover amounts to futher simplify these transactions. These clarifications will assist plan sponsors in allowing workers to use retirement savings to help ease any current financial strain due to the COVID pandemic.

Further Expansion of the Required Minimum Distribution (RMD) Rules. ERIC commends the waivers for RMDs for 2019 in defined contribution plans and IRAs in the *HEROES Act*. ERIC also supports the waiver of the 60-day rule for 2019 and 2020 RMD rollovers. These waivers will allow the funds to continue growing in retirees' portfolios and experience the "upside" after extreme market volatility.

In addition to the provisions in the HEROES Act, ERIC encourages the Committee to provide further clarification for the RMD relief provided in the CARES Act. The CARES Act allows beneficiaries to waive RMD distributions for 2020. However, it did not contain a provision for individuals to recontribute distributions already received in 2020. If the plan has already issued what was believed to be an RMD for 2020, or the plan sponsor wishes to have the plan continue to issue planned distributions in 2020, there is a risk that such distributions may create a qualification issue. To prevent such disruption, we recommend that Congress clarify that the waiver of the RMD distribution is optional and that distributed amounts can be returned to the plan without penalty.

Flexibility for Dependent Care and Health Flexible Spending Arrangement (FSA) Elections**.** The HEROES Act provides several changes to dependent care and health flexible spending arrangements that are beneficial to workers. The Act increases the amount of excludable employer-provided dependent care assistance from $5,000 to $10,500 for taxable years beginning during 2020. It also increases the carryover amounts for health FSAs and dependent care FSAs to $2,750 and $10,500, respectively. Also, the Act permits health FSAs, dependent care FSAs, and cafeteria plans to extend the grace period for unused benefits for the 2020 plan year, up to 12 months. The Treasury Department and the Internal Revenue Service (IRS) recently issued guidance providing greater flexibility in the carryover amounts of FSAs, but does not go as far as the HEROES Act legislation.[2] While we appreciate the regulatory guidance, we believe that the provisions in the HEROES Act that expand contribution options, increase the carryover amounts, and extends the grace period provide greater assitance to workers.

---

pre-Coronavirus levels or implementing a simplified process for funding waivers for 2019 and 2020, with relaxed qualification criteria.

[2] IRS Notice 2020-29 and Notice 2020-33

Additional Legislative Recommendations

In addition to the provisions included in the HEROES Act, ERIC encourages the Committee to consider the following changes to help American families, employees, retirees, and employers.

Suspension of Matching Contributions in Safe Harbor Plans**.** We encourage Congress to allow plan sponsors who do not qualify for "economic loss" and who did not provide a safe harbor notice in late 2019 to prospectively suspend safe harbor matching contributions without the need to prorate the Section 401(a)(17) limit for the pre-suspension period. In addition, we recommend extending by two years the period during which corrective qualified non-elective contributions (QNECs) can be made for a failed ADP test triggered by a suspension of non-safe harbor matching contributions.

Increase the Required Minimum Distribution Age to 75.[3] The required minimum distribution (RMD) rules are aimed at preventing individuals from using their qualified plans and IRAs to accumulate significant assets for future generations. However, the current RMD rules do not adequately reflect the increases in life expectancy. Furthermore, mandating distributions during the current market uncertainty will force beneficiaries to suffer losses unnecessarily. Therefore, increasing the RMD age from 72 to 75 supports additional flexibility and distribution options that are better tailored to meet beneficiaries' retirement income needs generally and especially at this uncertain time.

Elimination of Barriers to Allow Greater Use of Lifetime Income Products. During this time, workers may not be able to contribute to retirement plans or might be using retirement savings to make up for lost earnings. To aid these workers in maximizing retirement security, we encourage the Committee to eliminate barriers to the use of lifetime income products. Specifically, we encourage Congress to amend current law to allow for more than 25% of any retirement plan balance to be rolled over to a qualifying longevity annuity contract (QLAC) and to increase the dollar limitation on premiums for QLACs to $200,000 adjusted each year for inflation.

Catch-up Retirement Contributions for those Impacted by COVID-19**.** In balancing short-term and long-term financial needs, it is essential to give workers greater flexibility during this critical time. For employees that have not been able to make on-going contributions to their retirement plans, allowing a "catch-up" elective deferral could substantially aid their retirement security.

Regulatory Requests

ERIC is also working with the Treasury Department and the Internal Revenue Service (IRS) (the Agencies) to provide much-needed relief and guidance critical to plan sponsors dealing with employee benefits issues during the pandemic. ERIC appreciates any assistance the Committee can provide in securing guidance on the issues detailed below.

---

[3] This recommendation along with increasing the use of lifetime income products and allowing catch-up contributions for those impacted by COVID are part of a 5-Point Plan established by the Insured Retirement Institute and supported by ERIC.

Clarification of the Loan Suspension Period. Plan sponsors need clarification of the loan suspension period under the CARES Act. There is an interpretation that the CARES Act provides that only payments "due in 2020" can be delayed up to a year, but that payments due in 2021 cannot be suspended. Therefore, payments due between June and December 2020 could be delayed until June-December of 2021, but January 2021 payments (and onward) would start in January 2021. As such, there would not be a full one-year period of loan non-payment. Consequently, we request clarification that the entire years' worth of payments can be suspended – even payments that start in January 2021.

Refund of Dependent Care and FSA Deferrals. Although current guidance has provided some flexibility for dependent care and health FSA contributions, additional flexibility is still needed. Due to the quarantines resulting from the pandemic, many workers are unable to use these funds for child-care services, which may still be closed, or to visit physicians to receive elective services that they had anticipated paying for with their health FSA. We propose that the Agencies permit plans to offer affected workers the opportunity to receive a refund of contributions that are unlikely to be used due to the COVID pandemic, without negative tax consequences or penalties.

Relief on Deferrals for Commuter Benefits. Many employees who signed up to use commuter benefits will have substantial balances that are unlikely to be used this year due to the COVID pandemic. Moreover, some of these employees are being terminated or furloughed because of the COVID pandemic. It seems unreasonable to force the employer to keep this money due to a tax code technicality. Therefore, we encourage the Agencies to allow taxable refunds of commuter benefits set aside during 2020.

Relief from Partial Plan Termination Definitions. ERIC encourages the Agencies to change the definition of affected participants for partial plan termination to exclude from accelerated vesting employees who terminate employment voluntarily. Pandemic-related facility closings may reduce the number of active plan participants sufficiently to cause partial plan terminations, requiring full vesting of all affected participants. While participants who terminate employment voluntarily during the period in question are not taken into account in determining whether there has been a sufficient reduction in plan participation to cause a partial termination, they nevertheless benefit from full vesting under existing IRS guidance. We urge the Agencies to issue guidance providing that participants who terminate employment voluntarily during 2020 or 2021 will not be treated as affected participants in the event of a partial plan termination attributable to the pandemic.

Clarification of Participants Affected by COVID-19 as Defined Under the CARES Act. Clarification is needed regarding how to determine which participants meet the definition of "affected participant" under the CARES Act. The Act defines "affected participant" as including a participant who tests positive for COVID-19, or whose spouse or dependent tests positive, using a CDC-approved test. As a practical matter, participants who are advised by a medical professional that they have tested positive would have no way to know whether the test is CDC-approved unless he or she is able to ask the provider. Moreover, individuals may present with symptoms or other indicators (e.g., a chest X-ray) that would lead a medical professional to diagnose them as likely to have a COVID-19 infection, and to direct them to self-quarantine without a test being administered (e.g., because tests are still not readily available and are being limited to specified individuals). Guidance should be provided that would allow those individuals to be deemed to be affected by COVID-19 so that the participant may access the relief provided by the CARES Act.

Cessation of 409A Deferrals. Participants in a nonqualified deferred compensation plan under Code section 409A cannot cease deferrals unless there is an extraordinary and unforeseen circumstance that creates a severe financial hardship. Employers are not clear whether the current COVID-19 situation alone qualifies as an extraordinary and unforeseen circumstance that creates a severe financial hardship or if there must be other factors.

Reforming the Multiemployer Pension System

The multiemployer pension system is a looming crisis that Congress needs to address immediately and comprehensively. While multiemployer reform is not a result of the COVID pandemic, this health crisis has exacerbated the issues surrounding these plans. More than six million retirees and four million hard-working Americans rely on multiemployer pension plans, many of which are running out of money. The federal backstop that financially supports failing plans, the Pension Benefit Guaranty Corporation (PBGC), is projected to go bankrupt by 2025. During the COVID pandemic, thousands of people have already been forced to endure severe cuts to their retirement benefits. If Congress fails to reach a bipartisan compromise this year, the risk of losses to workers, retirees, employers, and the economy grows exponentially, which will lead to job losses in all 50 states, rising unemployment, and the loss of billions of dollars in tax revenue. Congress must seize the opportunity as a launchpad for negotiations toward a resolution that will protect the millions of Americans who are depending on it – without hanging American businesses out to dry.

Conclusion

ERIC again thanks you for the hard work you have already done to support workers, families, employers, and retirees during the pandemic. We stand ready to continue this work with you. Thank you for the opportunity to share our concerns during this Subcommittee hearing. If you have any questions, please contact me at arobinson@eric.org or by calling 202-789-1400.

Sincerely,

Aliya Robinson

Aliya Robinson
Senior Vice Present
Retirement and Compensation Policy