

# Coronavirus H.R. Concerns For 401(k) Plan Sponsors

By Ary Rosenbaum, Esq.

As an ERISA attorney for almost 22 years, I've kind of seen it all, especially the dot-bomb economic bailout exacerbated by the September 11th attacks and the 2008 financial meltdown where our entire economic system seemed to be in a freefall. However, the Coronavirus Covid-19 pandemic will have a greater negative impact on our business as much of our country is under order to stay at home. If you're a business that isn't considered essential by your state government, you are clearly in a world of hurt. Money for payroll and benefits going out hurts a lot more when no money is coming in. As a business owner, you might have to make some unfortunate decisions as it pertains to staff, so you're going to have to make decisions that will impact your 401(k) plan. This article is all about how 401(k) issues may arise with the business decisions you have to make including layoffs.

## You still have to fulfill your role as a 401(k) plan fiduciary

We have been getting plenty of guidance from the local, state, and Federal governments on how to proceed during this pandemic. That means our business could be restricted in whether it could operate at all or whether everyone must work remotely. Regardless of this guidance, there is nothing from the Internal Revenue Service (IRS) or the Department of Labor (DOL) that lets you off the hook in your role as a plan sponsor and plan fiduciary. While your offices might be closed or you're completely shut down for the foreseeable future, you still have

to operate your 401(k) plan as prudently as you did before the world went awry.

## The value of your employees

Where I lived, the entire community was decimated by Hurricane Sandy. My favorite local business is my mechanic Ralph, who has operated a car care center for 40 years. Unlike me, he wasn't flooded, but 1/3rd of his clients got new cars as a result of the



flood including yours truly. Since he also didn't have power for 2 weeks, his business was in shambles. Since he valued his long-term employees and found finding replacements for such skilled employees impossible, Ralph dug into his life's savings to keep his staff employed. He's still flourishing today despite the setbacks because he made that decision in October 2012. You might not be in the position of Ralph where you can afford to do that or you don't have an irreplaceable staff. While you have to consider your financial situation, you also

need some empathy for your employees regardless of the painful decisions you might have to make, which could be eliminating hours, furlough, or outright termination. A law firm that I interviewed with over 10 years ago, recently eliminated some staff (just within two weeks of the pandemic affecting business) and their email to the staff that remained was just cold and impersonal. You might have to make some very difficult decisions in letting employees go, but remember they have feelings too.

## Termination vs. furlough

If you have to let go of some or all of your employees, how you do it may affect your 401(k) plan and may affect whether these targeted employees can receive a distribution of their account balance or not. Based on something contractual (such as collective bargaining) or the idea that the change to your business might be temporary, employees on furlough are treated differently than employees that are terminated for purposes of your 401(k) plan. Employees that are furloughed are still considered your employees, they haven't been terminated. Without a severance of employment, these furloughed employees wouldn't be entitled to an immediate distribution of their 401(k) plan. While they may be entitled to a hardship distribution or a loan (depending on what your plan says), these furloughed employees just can't take their 401(k) account balance to an IRA rollover or another employer's retirement plan or in cash. On the flip side, terminating these employees could negatively impact your 401(k) plan. If a large number of your

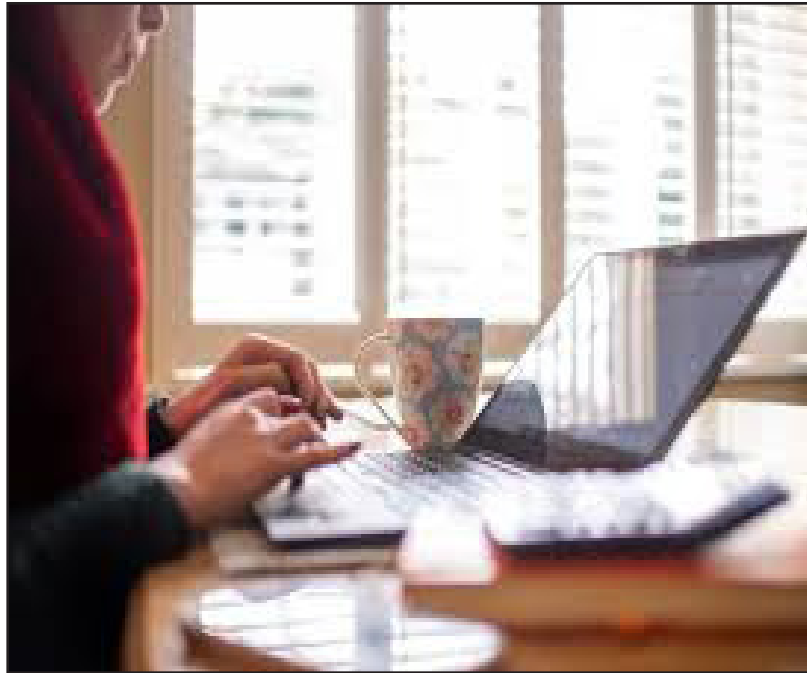
employees are terminated, your plan might be going through a partial termination. A partial termination usually happens (based on facts and circumstances) if more than 20% of your total plan participants were laid off in a particular year. The partial termination rule requires all terminated employees to be fully vested in their account balance as of the date of the partial plan termination. They must become 100% vested in all employer contributions (including matching contributions) regardless of your plan's vesting schedule. So when deciding what to do with your employees, understand there is a difference between furlough and termination.

### Severance pay and the impact on 401(k) plans

If you do make the painful decision of terminating employees, keep in mind that severance pay is an issue for 401(k) plan compensation purposes. If severance pay is included for purposes of compensation for 401(k) purposes, you will have to allow plan participants the opportunity to defer from that severance pay. According to the regulations, severance pay is to be included in compensation for your 401(k) plan if it meets all of the following criteria: 1) The payment is regular compensation for services performed during an employee's regular working hours or compensation for services performed outside their regular working hours (such as overtime), a commission, bonus, or other similar payment, 2) the payment would have been paid to the employee before the severance from employment if the employee had continued working for you, and 3) the payment is made by the later of 2½ months after severance from employment or the end of the limitation year that includes the date of severance from employment.

### Plan participants need to get those notices

Thanks to social distancing and working from home, disseminating required notices to your 401(k) plan are more difficult. Also, your employees may want a summary plan description or other information in light of



the pandemic. Under ERISA, SPDs and other plan documents must be provided to employees within 30 days following the employee's request. If your employees are working remotely or have been terminated/furloughed, SPDs can also be distributed through the mail or electronically. If distributed electronically, SPDs and other plan documents should be provided in compliance with the electronic disclosure rules. Just remember that even though your employees may not be working at your office, they're still entitled to their ERISA protected notices. Whether you email it or physically mail it, you still have a responsibility to provide this information.

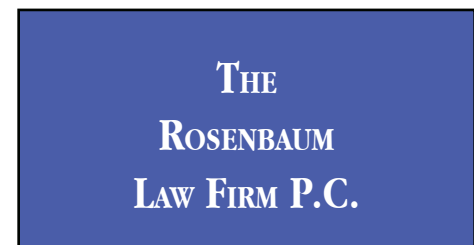
### Should you eliminate employer contributions?

If your 401(k) plan has required contributions such as a safe harbor 401(k) or a stated matching contribution or you have another retirement plan with minimum funding requirements (defined benefit/cash balance/target benefit/money purchase) or even if you a discretionary employer contribution (such as matching and profit-sharing contributions), now is the time to consider whether you can afford these contributions or not. Thanks to accrual requirements with many of these mandatory contributions, realizing that you can't afford a contribution in December isn't going to help you avoid that mandated contribution. As a plan sponsor, you have a lot more leeway in perhaps freezing or eliminating these types of contributions if you figure it out before June 1. If you offer a discre-

tionary contribution such as matching or profit sharing, it's probably a better idea to decide now whether the contributions should be suspended so participants can plan accordingly especially for matching contributions if your practice and/or plan document calls for matching contributions to be made every payroll period. If you need to save revenue because of a lack of revenue coming in as a result of this pandemic, consider whether you need to suspend and/or eliminate any type of employer contributions ASAP.

### Terminating the plan is a bad idea

I'm sure being a 401(k) plan fiduciary isn't easy, but the last thing you should do is panic and doing something rash. You might consider terminating your 401(k) plan and that is a decision that you should avoid if your business is going to continue. The reason why terminating your 401(k) plan is a bad idea because of what is known as the successor plan rule. The successor plan rule prohibits an employer from terminating a 401(k) plan, distributing the plan assets to participants, and, then, starting a new plan within 12 months after the original plan is terminated (with very limited exceptions). So terminating the plan is a terrible idea because it will likely preclude you from having another plan for a year.



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**The Rosenbaum Law Firm P.C.**  
734 Franklin Avenue, Suite 302  
Garden City, New York 11530  
(516) 594-1557

<http://www.therosenbaumlawfirm.com>  
Follow us on Twitter @rosenbaumlaw