



CLIENT ACTION Bulletin

Employee Benefits

Year-End Compliance Issues for Single-Employer Retirement Plans

SUMMARY By year-end 2012, sponsors of calendar-year single-employer retirement plans must act on necessary and discretionary amendments and perform a range of administrative procedures to ensure compliance with statutory and regulatory requirements. There also are year-end issues that employers sponsoring nonqualified deferred compensation plans (NDCPs) should consider. This *Client Action Bulletin* looks at key areas that such employers and sponsors of defined benefit (DB) or defined contribution (DC) plans should address by Dec. 31, 2012.

DISCUSSION **Plan Amendments and Related Issues**

As always, reviewing plan documents and amendments before the end of the year is important. Plan sponsors should consider:

- **DB Plan Amendments** -- In December 2011, the IRS published a sample amendment that plan sponsors may adopt to comply with the benefit restriction provisions that were added by the 2006 Pension Protection Act (PPA). Plan sponsors generally adopted PPA amendments in 2009, but may or may not have adopted the benefit restriction provisions because the IRS provided for a delay. Even sponsors that included the benefit restriction provisions in their earlier PPA amendments may want to adopt the IRS model language as a safe harbor. In the long run, adoption of the IRS model language may save sponsors time, effort and expense in the event of an audit or during the determination letter process. The deadline for adopting a plan amendment for the benefit restriction provisions is generally the last day of the 2012 plan year (i.e., Dec. 31, 2012, for calendar-year plans).
- **Cash Balance Plans Amendments** – In guidance issued in September 2012, the IRS announced that the effective date of the proposed hybrid regulations relating to market rate of return and related hybrid plan provisions will be postponed until plan years beginning in 2014. This means that the deadline for hybrid plan amendments will also be delayed.
- **Amendments for the Moving Ahead for Progress in the 21st Century Act (“MAP-21”)** – Unless the IRS issues guidance to the contrary, the funding relief under MAP-21 requires only operational changes. However, if a plan’s PPA amendment specifically indicated the segment rates to be used in determining funded percentages, an amendment permitting the use of MAP-21 rates would be required if MAP-21 rates are used for 2012.

Individually designed plans with an Employer Identification Number (EIN) ending in a “2” or a “7” are Cycle B filers (regardless of whether or not the plan is a calendar-year plan) and have until Jan. 31, 2013, to adopt and, if desired, submit for IRS approval the PPA restatements. Individually designed multiple-employer plans are also in Cycle B and subject to the Jan. 31, 2013 deadline as well.

Required amendments relating to prior plan years should be considered as part of any year-end plan reviews, taking into account whether they have been properly adopted and executed. Similarly, if discretionary, operational changes were made **during the current plan year**, the amendments should be formally adopted by Dec. 31, 2012.

If a plan sponsor discovers it has failed to adopt a plan amendment, it should consider correcting the mistake through the IRS’s Employee Plans Compliance Resolution System (EPCRS). In many cases, EPCRS’s standard filing fees are reduced for a failure to adopt either required or discretionary amendments. The monetary sanction can be substantial if the IRS discovers a late amendment or a failure to adopt an amendment during the agency’s audit or a review of a determination letter request.

Annual Notices and Benefit Statements

As in past years, there are a variety of notices that plan sponsors may need to distribute to participants:

- For DC plans, provide by Dec. 1, if applicable: a 401(k) safe harbor notice; an automatic enrollment notice; and/or a qualified default investment alternative notice.
- For DC plans that allow participant-directed investments, by Dec. 31 provide, if not included in a summary plan description (SPD), a statement: relieving the plan sponsor of liability for certain losses resulting from participants' exercise of their rights; and notifying participants about the availability of any investment advice services.
- For DC plans and non-PBGC-covered DB plans, distribute the Summary Annual Report (SAR) two months after the Form 5500 filing was due (e.g., Dec. 14, if an Oct. 15 extension applies).
- For DB plans subject to ERISA and the tax code, post on the sponsor's intranet site Parts I and II of the 2011 Form 5500 and the Schedule SB or MB by Jan. 11, 2013, if an Oct. 15 extension applies.

The requirements for participant benefit statements vary depending on the type of plan:

- For participant-directed DC plans, provide quarterly statements with the required fee disclosures. Plan sponsors also should determine when the annual fee disclosure will be distributed in 2013.
- For nonparticipant-directed DC plans, provide statements annually by the Form 5500 due date.
- For DB plans, provide statements every three years or provide an annual notice explaining how participants may obtain statements.

Other Operational Action Items

Plan sponsors also should:

- make recurring age 70-1/2 required minimum distributions (RMDs) to participants, for both DC and DB plans;
- process corrective distributions to correct a failed 2011 actual deferral percentage/actual contribution percentage (ADP/ACP) test to maintain a 401(k) plan's qualified status;
- modify elections made to reduce the funding carryover balance or prefunding balance as a result of using MAP-21 for the 2012 plan year, for DB plans; and/or
- certify the 2012 plan year funding percentage ("AFTAP"), if the DB plan used a "range" certification, and/or recertify the AFTAP to reflect the use of MAP-21 rates for a prospective change in benefit restrictions.

Nonqualified Deferred Compensation Requirements

The IRS's transitional relief for NDCPs that condition the receipt of severance payments or other compensation upon the execution of a release or similar agreement expires on Dec. 31, 2012. Such conditioning is considered a timing failure that is subject to early income inclusion and tax penalties if not corrected. NDCP sponsors should amend their plans on or before Dec 31, 2012, to correct this timing failure and avoid penalties. In addition, NDCP sponsors should consider the effect of the additional 0.9% Medicare payroll tax (beyond the 1.45% otherwise assessed) that goes into effect on individual employee wages exceeding \$200,000 beginning Jan. 1, 2013. In certain cases, NDCP sponsors may want to include the estimated value of vested defined benefit supplemental employee retirement plan (SERP) benefits in 2012 before the additional Medicare tax applies.

ACTION

Although the year-end clock is rapidly ticking, there is still time to review and amend NDCPs and retirement plans. All single-employer plan sponsors should check their plan document files and ensure that the PPA and other amendments for prior plan years are adopted and executed. Operational procedures and plan changes also should be assessed for compliance, as well as for properly drafted, adopted, and executed amendments. In addition, the need for participant notices should be determined and, if necessary, distributed as soon as possible.

For additional information about year-end compliance reviews or plan amendments for calendar-year retirement plans and NDCPs, please contact your Milliman consultant.