

Client Action Bulletin

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Year-end compliance issues for single-employer retirement plans and nonqualified deferred compensation plans

SUMMARY

By year-end 2020, sponsors of calendar-year single-employer retirement plans must adopt necessary and discretionary plan amendments to ensure compliance with the statutory and regulatory requirements of ERISA and the tax code. In particular, changes to retirement plan rules under the Setting Every Community Up for Retirement Enhancement (SECURE) and Coronavirus Aid, Relief, and Economic Security (CARES) Acts not only require a few actions by year-end 2020, but also spill into the first week of January 2021. This Client Action Bulletin looks at key areas—including administrative compliance issues—that defined benefit (DB) and defined contribution (DC) plan sponsors should address by December 31, 2020. In addition, a year-end deadline in 2020 may apply to some nonqualified deferred compensation plan (NDCP) sponsors.

DISCUSSION

[Qualified plan amendments](#)

Employers should review their retirement plan documents before the end of the year to ensure that discretionary or operational features comply with the tax code. Sponsors that made *discretionary* changes during 2020 must formally adopt plan amendments by December 31, 2020. In addition, required or discretionary amendments relating to prior plan years should be considered as part of any year-end plan review, taking into account whether they have been properly adopted and executed.

Although there are several changes related to new legislative and regulatory requirements from the SECURE Act and subsequently the CARES Act that arose due to the COVID-19 pandemic, and that are required to be in place operationally, as discussed below, plan amendments reflecting these changes are generally not required until the last date of the 2022 plan year. However, this delay does not apply if a plan is terminating.

[Correcting failures to amend a plan](#)

If a plan sponsor discovers it has failed to adopt either a required or discretionary plan amendment, it should consider correcting the mistake through the Employee Plans Compliance Resolution System (EPCRS) of the Internal Revenue Service (IRS). Doing so, in many cases, lowers the standard filing fees for correcting such failures. For example, for a failure to adopt an interim amendment on time, the EPCRS fees to resolve the failure fall between a ranges of \$1,500 to \$3,500, based on the amount of plan assets. Monetary sanctions can be substantially more than this if the IRS audits the plan and discovers a late amendment or a failure to adopt an amendment. Plan sponsors may also correct operational errors through EPCRS, many of which can be self-corrected without contacting the IRS or paying a fee.

[Special note for single-employer DB plans:](#)

The CARES Act provided companies sponsoring single-employer defined benefit pension plans an option to defer cash contributions until January 1, 2021 that otherwise would have been required in calendar-year 2020, regardless of the first day of the plan year. Plan sponsors are cautioned to have substantive discussions with their plan advisors on the impact of the plan's funded ratio, mandatory disclosures, and communications with participants.

Potential NDCP amendment

Under current rules governing NDCPs, publicly traded sponsors of these plans may delay a payment past the designated payment date to the extent that the sponsors reasonably anticipate that, if the payment were made as scheduled, it would not be deductible as a result of the \$1 million deduction limit under Internal Revenue Code Section 162(m). However, due to a change in these deductibility rules, the payment may never become deductible or only become deductible after a significant period of time, thereby resulting in the payment never being made or being significantly delayed. In order to prevent a conflict between the NDCP rules and the amended deductibility rules, sponsors of NDCPs that include a provision requiring a delay of any amounts due to the \$1 million deduction limit must amend their NDCPs to remove such provision by no later than December 31, 2020. However, if any amounts under the NDCP are grandfathered from the deductibility rule change, sponsors may choose to have the amendment only apply to amounts that are not grandfathered under these rules.

Annual notices and benefit statements

As in past years, plan sponsors will need to distribute certain notices to participants.

- If the plan sponsor made an early election to make use of the final safe harbor electronic disclosure regulations of the U.S. Department of Labor (DOL), then participants should be properly sent the appropriate disclosures, which used to be mailed in paper format.
- For DB plans subject to ERISA and the tax code, a post must be made on the sponsor's existing intranet site of Parts I and II of the 2019 Form 5500 and the Schedule SB or MB, within 90 days after the date the Form 5500 is filed (by January 13, 2021, if Form 5500 was filed on October 15, 2020). The Schedule SB may be affected by the timing of CARES Act delayed contributions mentioned above.
- For DB plans, provide benefit statements every three years or an annual notice explaining how participants may obtain statements.
- For DC plans, and DB plans not covered by the Pension Benefit Guaranty Corporation (PBGC), e.g., "professional service employers" with fewer than 26 employees, electing church groups, etc.:
 - By December 15, distribute the 2019 Summary Annual Report (SAR) if the Form 5500 deadline was extended because of a corporate tax filing extension.
 - By December 15, distribute to participants the 2019 SAR, if the 2019 Form 5500 due date was extended by an IRS Form 5558 filed on time. For corporate employers, distribute the 2019 SAR if no IRS Form 5558 was filed but an extension request (IRS Form 7004) was filed on time for the employer's income tax return (IRS Form 1120). For tax-exempt employers, distribute 2019 SAR if no IRS Form 5558 was filed but an extension request (IRS Form 8868) was filed on time for the employer's information return (IRS Form 990).
- For DC plans that allow participants to direct their investments:
 - Provide by November 14 the quarterly benefit/disclosure statement and the statement of plan fees and expenses actually charged to individual plan accounts during the third quarter of 2020.
 - Provide by December 31 a statement—if not included in a summary plan description (SPD)—that the plan fiduciaries are relieved of liability for certain losses resulting from participants' exercise of their rights to direct their investments, and about the availability of any investment advice services the plan sponsor offers.
- For DC plans, provide by December 2, if applicable: a 401(k) safe harbor notice; an automatic enrollment notice; and/or a qualified default investment alternative notice.
- For employee stock ownership plans (ESOPs), provide by December 2 a diversification notice to participants who are first eligible to divest employer securities on January 1, 2021.

Other operational action items

By December 31, 2020, retirement plan sponsors should also:

- Set specific dates for savings plan administration in order for any coronavirus-related distributions (CRDs) under the CARES Act elections to qualify for inclusion on 2020 Form 1099-R.
- Resume collecting loan repayments for DC plans that permitted repayments to be delayed by the CARES Act.
- Review relevant documents associated with the retirement plan governance and fiduciary obligations. Written plan minutes discussing actions taken and to be taken by the committee should be finalized.
- Make recurring required minimum distributions (RMDs) for both DC and DB plans, unless RMDs under a DC plan were waived for the 2020 plan year, with particular attention to the change in RMD age to 72 from 70½ .
- Ensure a 401(k) plan's qualified status in the event of a failed 2019 actual deferral percentage (ADP) test or actual contribution percentage (ACP) test by:
 - Paying all affected participants any ADP/ACP corrective distributions needed to correct the failure
 - Making a qualified non-elective contribution (QNEC) to all non-highly compensated employees
- Use forfeitures based on how DC plan documents require them to be used.
- Make the required top-heavy contributions for top-heavy DB and DC plans.
- If desired, make a voluntary funding election to avoid an ERISA 4010 filing or at-risk status for single-employer DB plans (i.e., elections to reduce a credit balance or revoke a credit balance election) and/or request a change in the funding method for 2020.
- Certify the DB plan's 2020 plan-year funding percentage (AFTAP), if the plan used a "range" certification. (Note: A failure to meet this deadline will result in the AFTAP for the plan year being deemed under 60% retroactively to October 1, 2020.)
- Make an election to reduce the DB plan's carryover and/or prefunding balance as of January 1, 2020 (e.g., to avoid or terminate a benefit restriction) by providing an irrevocable written notification to the plan's enrolled actuary and plan administrator.
- If necessary, revoke a prior election to use a carryover or prefunding balance to meet minimum funding requirements for 2020 by providing an irrevocable written notification to the DB plan's enrolled actuary and plan administrator. (Note: This election is only allowed to the extent that the amount of the prior election exceeded the minimum required contribution.)

ACTION

Although the year-end 2020 countdown rapidly approaches, there is still time to review and amend retirement plans. For example, defined contribution plan sponsors may wish to consider amending their plans to allow for hardship distributions under the IRS's final rule. Operational procedures and plan changes also should be assessed for compliance and properly drafted, adopted, and executed amendments. In addition, the need for participant notices must be determined and, if necessary, any required notices should be distributed as soon as possible. Plan sponsors also should be mindful of pending legislation or recently enacted laws that have compliance-related implications. Plan sponsors should review their plans and SPDs to be sure they are in compliance.

For additional information about year-end compliance review plan amendments for calendar-year retirement plans or preapproved plan availability, please contact your Milliman consultant.



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