

# Client Action Bulletin

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NOVEMBER 11, 2021

## Yearend Compliance Issues for Single-Employer Defined Benefit and Defined Contribution Retirement Plans

### SUMMARY

By yearend 2021, sponsors of calendar-year single-employer retirement plans must adopt necessary and discretionary plan amendments to ensure compliance with statutory and regulatory requirements of ERISA and the Internal Revenue Code (IRC). 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, 2021. In addition, in 2021 there is a year's-end deadline that may apply to some nonqualified deferred compensation plan (NDCP) sponsors.

### DISCUSSION

#### Qualified Plan Amendments

Employers that sponsor retirement plans should review their plan documents before the end of 2021 to ensure that discretionary or operational features comply with ERISA and the Internal Revenue Code (IRC). Sponsors that made discretionary plan changes during 2021 must formally adopt plan amendments by December 31, 2021. In addition, required or discretionary amendments relating to plan years prior to 2021 should be considered as part of any yearend plan review, taking into account whether they have been properly adopted and executed.

Although there are several qualified plan changes related to the Setting up Every Community for Retirement Enhancement (SECURE) Act and to the Coronavirus Aid, Relief, and Economic Security (CARES) Act 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 plan year that starts on or after January 1, 2022. However, this permissible delay does not apply if a plan is terminating.

Plan sponsors of certain individually designed plans must check their plans to see whether any amendments are required in order to comply with the IRS 2019 Required Amendments List in IRS Notice 2019-64 for individually designed tax-qualified retirement plans. The 2019 list identifies the following changes that may require amendments to an individually designed retirement plan by December 31, 2021:

- IRC §401(k) and §403(b) plans must be amended to comply with the mandatory changes updating the hardship distribution rules included in the Bipartisan Budget Act of 2018 (BBA) for such plans. If applicable, effective as of January 1, 2020, plans must be amended to (1) eliminate any requirement that an employee suspend elective deferrals or employee contributions as a condition for receiving a hardship distribution, and (2) require employees who request hardship distributions to represent that they have insufficient cash or other liquid assets reasonably available to satisfy the financial need.
- Collectively bargained cash balance/hybrid defined benefit pension plans that use a market rate of return and are maintained pursuant to one or more collective bargaining agreements ratified on or before November 13, 2015, must be amended to comply with rules regarding market rate of return and other requirements that first became applicable to such plans on or after January 1, 2017.

### Temporary Reversals of IRC §420 Transfers

The Consolidated Appropriations Act, 2021 (Act) permits a plan sponsor that elected to transfer excess defined benefit pension plan assets, in order to prefund a retiree health benefits account or a retiree life insurance account, to terminate such election by December 31, 2021, with respect to any taxable year specified by the taxpayer that begins after the election. As background, IRC §420 permits “qualified future transfers,” under which up to 10 years of retiree health and life costs may be transferred from an overfunded pension plan to a retiree health benefits account and/or a retiree life insurance account within the plan, an IRC §401(h) account. Such transfer must meet several requirements, including that the plan must be at least 120% funded (using reasonable actuarial assumptions) at the outset and throughout the transfer period. Under the Act, the employer can elect to terminate the existing transfer period as of any taxable year that begins after the date of election. Any assets that are not used as of the effective date of the terminated transfer period must be transferred back to the pension plan within a reasonable period of time. Those amounts will be treated as an employer reversion unless an equivalent amount is transferred back to the retiree medical or life account within five years after the original transfer.

### Correcting Failures to Implement Timely Amendments to a Retirement Plan

If a plan sponsor discovers a failure to adopt either a required or discretionary plan amendment, it should consider correcting the mistake through the IRS’s Employee Plans Compliance Resolution System (EPCRS). (Note that IRS Revenue Procedure 2021-30 updated EPCRS in July 2021.) 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 range of \$1,500 to \$3,500, based on the amount of plan assets. Monetary sanctions can be substantially more than this range if the IRS audits the plan and discovers a late amendment or a failure to adopt an amendment. Plan sponsors also may correct operational errors through EPCRS, but many such errors can be self-corrected without contacting the IRS or paying a fee, provided the corrective action is taken in a timely manner as specified in EPCRS

### Prepping for the 2022 Updated Life Expectancy Tables

Updated life expectancy and distribution tables will be used to determine required minimum distribution amounts under defined benefit and defined contribution qualified plans—also including IRC §457, §403(a) and §403(b) plans—for distribution calendar years beginning on or after January 1, 2022. As a result, required minimum distributions will generally be reduced, allowing participants to retain larger account balances to cover longer life spans, as well as to decrease yearly individual income tax liability. These updated life expectancy tables may also impact the application of the additional 10% tax on early distributions because plans may use these tables to determine whether the exception under IRC §72(t) applies. That is, that the 10% penalty tax will not apply if the distribution is taken as a series of substantially equal period payments made for the life (or life expectancy) of the employee or joint lives (or joint life expectancies) of the employee and their beneficiary. While most plan sponsors will not need to amend their plans for these changes (life expectancy and distribution period tables are rarely included in plan documents), they may want to check with their recordkeepers before the end of 2021 to make sure their systems are now equipped to calculate required minimum distributions according to the new requirements for 2022 and beyond.

### Annual Notices and Benefit Statements

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

**For DB plans subject to ERISA and the IRC**, the sponsors must post on the existing intranet site Parts I and II of the 2020 Form 5500 and the Schedule SB or MB within 90 days after the date the Form 5500 is filed (by January 13, 2022, if Form 5500 was filed on October 15, 2021). However, the IRS has issued guidance (IRS News Release IR-2021-175) extending the Form 5500 filing deadline (including Form 8955-SSA) for businesses located in areas designated by the Federal Emergency Management Agency (FEMA) as qualifying for assistance due to Hurricane Ida and other recent natural disasters.

**For DB plans**, plan sponsors need to 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., plan sponsors must distribute the 2020 Summary Annual Report (SAR) to participants by December 15, if the 2020 Form 5500 due date was extended by a timely filed IRS Form 5558. Corporate employers must distribute the 2020 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). Tax-exempt employers must distribute the 2020 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 own investments**, plan sponsors must 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’ exercising their rights to direct their investments, and about the availability of any investment advice services the plan sponsor offers.

For **DC plans**, plan sponsors must provide, by December 1, 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**, plan sponsors must provide, by December 2, diversification notice to participants first eligible to divest employer securities on January 1, 2021.

#### Other Operational Action Items by December 31, 2021, by Plan Sponsors

- Make recurring required minimum distributions (RMDs), for both DC and DB plans.
- Maintain a §401(k) plan’s qualified status due to a failed 2020 actual deferral percentage (ADP) test or actual contribution percentage (ACP) test by (1) paying to all affected participants any ADP/ACP distributions needed to correct the failure; or (2) making a qualified nonelective contribution (QNEC) to all non-highly compensated employees.
- Use the forfeitures for DC plans under which the plan document provides for use of a forfeiture account.
- Make the required top-heavy contributions for top-heavy DB and DC plans.
- If desired, make a voluntary funding election to a DB plan to avoid an ERISA §4010 filing or IRC §436 at-risk status (i.e., DB plan elections to reduce a credit balance or revoke a credit balance election) and/or request a change in the funding method for 2021.
- Certify the DB plan’s 2021 plan-year adjusted funding target attainment 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, 2021.)
- Make an election to reduce the DB plan’s carryover and/or prefunding balance as of January 1, 2021 (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 for a DB plan to meet IRC §430 minimum funding requirements for 2021 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.)

DB plan sponsors wishing to utilize certain funding relief elections offered under the American Rescue Plan Act of 2021 (ARPA) generally must make such elections by the later of the last day of the plan year beginning in 2021, or December 31, 2021 (per IRS Notice 2021-48). Because the sponsors’ Form 5500 filings can affect how the ARPA relief applies to their plans, sponsors should consult their actuaries to assist with the determination regarding how to apply the ARPA relief and confirm that their 2020 Form 5500 filings are prepared in a manner that reflects their relief elections.

## ACTION

Although yearend 2021 rapidly approaches, there is still time for plan sponsors to review and amend retirement plans. 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 yearend compliance reviews, plan amendments for calendar-year retirement plans, or preapproved plan availability, please contact your Milliman consultant.



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