



CLIENT ACTION Bulletin

Employee Benefits

Year-End Compliance Issues for Single-Employer Retirement Plans

SUMMARY By year-end 2016, 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. This *Client Action Bulletin* looks at key areas – including administrative compliance issues – that sponsors of such defined benefit (DB) or defined contribution (DC) plans should address by Dec. 31, 2016.

DISCUSSION **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 changes during 2016 must formally adopt plan amendments by Dec. 31. For example, if the plan added an in-plan Roth rollover provision for the 2016 plan year, the amendment must be adopted by Dec. 31, 2016.

Similarly, some required plan amendments must be adopted by year end. For example, sponsors of cash balance or other hybrid plans must adopt amendments reflecting the IRS's 2015 final rule prior to the start of the 2017 plan year (and the plans also must operate in compliance with that rule at that time). In addition, required 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.

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 IRS's Employee Plans Compliance Resolution System (EPCRS), which, in many cases, lowers the standard filing fees for such failures. For example, for a failure to timely adopt an interim amendment, the EPCRS fee to resolve the failure is \$375 if no other failures are involved. Monetary sanctions can be substantial if a late amendment or a failure to adopt an amendment is discovered during an IRS audit.

Operational errors should also be corrected through EPCRS, which has a new reduced compliance fee schedule. Many errors may be self-corrected without contacting the IRS or paying a fee.

Determination Letter Program Closing

Many sponsors seek assurance that a retirement plan is tax-qualified by requesting a determination letter from the IRS. Unfortunately, the IRS announced in *Revenue Procedure 2016-37* that the 5-year cycle determination letter program for individually designed plans will end for most ongoing plans as of Jan. 31, 2017. This means that individually designed plans in "Cycle A" (i.e., with an Employer Identification Number (EIN) ending in a "1" or a "6," regardless of whether or not the plan is a calendar-year plan) will be the last group that may adopt and, if desired, submit Pension Protection Act (PPA) restatements for IRS approval. Cycle A filers must do so by Jan. 31, 2017.

Certain exceptions to the closing of the determination letter program are available for plan terminations, new plans, or "other circumstances" to be announced by the IRS. The agency said it will annually release a list of required amendments and an operational compliance list to help plan sponsors ensure that the plans satisfy all qualification requirements.

To continue to receive determination letters, sponsors of individually designed plans, including certain employee stock ownership plans (ESOPs) and cash balance plans, may wish to adopt a preapproved plan. Sponsors of individually designed DC plans have until Apr. 30, 2017, to adopt the preapproved plan; DB plan sponsors have several years before adoption is required. However, Cycle A filers of individually designed DB plans who wish to switch to a preapproved plan must sign Form 8905 (*Certification of Intent To Adopt a Preapproved Plan*) prior to Jan. 31, 2017.

Annual Notices and Benefit Statements

As in past years, plan sponsors may need to distribute certain notices 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, provide by Dec. 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, and about the availability of any investment advice services the plan sponsor offers.
- For DC plans that allow participant-directed investments, provide quarterly benefit statements by Nov. 14, 2016. While plan sponsors may include the required annual fee disclosure with this statement, the absolute deadline for such disclosure will depend on the date they supplied the prior year's disclosure (i.e., 14 months from such date).
- 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. 15, 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 2015 Form 5500 and the Schedule SB or MB within 90 days after the date the Form 5500 is filed (by Jan. 13, 2017, if Form 5500 was filed on Oct. 15, 2016).
- For DB plans, provide benefit 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), for both DC and DB plans;
- process corrective distributions to correct a failed 2015 actual deferral percentage/actual contribution percentage (ADP/ACP) test to maintain a 401(k) plan's qualified status;
- review the DB or DC plan's definition of compensation for possible effects on plan administration, employer contribution costs, and nondiscrimination in light of the DoL's final rule on overtime pay (see [Client Action Bulletin 16-2](#)) effective Dec. 1, 2016;
- for DB plans, consider the effects of the 2016 mortality table update (e.g., for calculating the funding target) and discuss options with the plan's actuary and/or other professional advisers;
- if desired, make a voluntary funding election to avoid ERISA 4010 filing or 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 2016; and
- certify the DB plan's 2016 plan-year funding percentage (AFTAP), if the plan used a "range" certification.

ACTION Although the year-end countdown rapidly approaches, there is still time 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. For example, the revised definition of fiduciary and related rules recently issued by the DoL are generally effective Apr. 10, 2017, subject to a phased implementation approach for certain exemptions that will become fully effective on Jan. 1, 2018. Plan sponsors and their affected service providers should begin the process of identifying the changes required to adjust to the change from non-fiduciary to fiduciary status.

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