



## Employee Benefits & Executive Compensation ADVISORY ■

**NOVEMBER 8, 2018**

### **Qualified Retirement Plan Considerations and 2018 Year-End Action Items**

This advisory reminds plan sponsors of deadlines for amending qualified retirement plans and highlights other action items for plan sponsors to consider in the near future.

#### **2018 Year-End Action Items**

Most plans will not have any legally required amendments that must be adopted in 2018. However, the following are some action items for plan sponsors to consider as the end of the year approaches:

#### **Discretionary Amendments**

Plan sponsors who have added operationally optional features to a retirement plan during 2018 (e.g., a plan loan feature) must ensure that the associated "discretionary" amendments are signed no later than December 31, 2018 (for calendar-year plans). If you have made any discretionary amendments, you should take some time to make sure they have been formally adopted by the end of the year.

#### **2017 Disaster Relief**

The IRS has provided some relief for loan and hardship distributions for victims of Hurricanes Harvey, Irma, and Maria and the California wildfires ("2017 Disasters") in Announcements 2017-11, 2017-13, and 2017-15. If an amendment is required in order to provide the relief permitted by the IRS, the plan must be amended by December 31, 2018 (for calendar-year plans).

In addition to the IRS relief for the 2017 Disasters, Congress has also provided some relief for victims of Hurricanes Harvey, Irma, and Maria. The Disaster Tax Relief and Airport and Airway Extension Act of 2017 (the "Relief Act") generally provides victims of the three hurricanes with tax relief for distributions (relief from 10% early withdrawal penalty and 20% withholding, and ability to defer taxes or pay no taxes at the time of distribution), ability to repay hardship distributions intended to pay for the purchase or construction of a participant's residence in affected areas, and increased plan loan limits. If a plan wants to provide any relief available under the Relief Act, a calendar-year plan must be amended by December 31, 2019.

The IRS has not yet provided formal guidance regarding Hurricane Michael or Hurricane Florence. We anticipate that any relief given for these 2018 storms will be functionally similar to the guidance for the 2017 disasters. We also anticipate any such guidance will provide plan sponsors with ample time to amend their plans if necessary.

### **Tax reform changes to hardship distributions**

The Tax Cuts and Jobs Act and the Bipartisan Budget Act of 2018 have changed some of the rules that apply to hardship distributions. The first change narrows the deduction for a "casualty loss" under Code Section 165 for the years 2018–2025 to include only damage occurring in federally declared disaster areas. For plans that allow hardship distributions to repair damage to a principal residence, this will narrow the instances for which a hardship withdrawal is allowed since the regulations require such expenses to qualify for the casualty loss deduction under Section 165. This change is not likely to require a plan amendment, but plan administrators should be aware of the limitation and administer their hardship procedures accordingly.

The remaining hardship changes expand somewhat the availability of hardship withdrawals. To the extent plan sponsors adopt one or more of these optional changes, plans may need to be amended. One change expands the account sources that can be distributed in case of a hardship to include qualified nonelective contributions and qualified matching contributions, as well as earnings on these contributions and earnings on elective deferrals. A second change removes the requirement that participants obtain available plan loans before applying for a hardship distribution. The third change is that plans using the statutory safe harbor for hardship withdrawals will no longer be required to impose an automatic six-month suspension of deferrals after a participant receives a hardship distribution.

The IRS has not yet released formal guidance for these three discretionary plan changes or any applicable deadlines for amendment. Plan sponsors desiring to incorporate these changes may wish to make one or more of the changes operationally and amend their plans later to incorporate them once guidance is available. Alternatively, plan sponsors who are making other year-end amendments may wish to consider amending the hardship distribution language in their plans at the same time as other year-end amendments.

### **Required amendments for certain plans**

Most plans will not have legally required amendments this year. However, the following action items from prior years may still need to be addressed if applicable:

- Some single-employer defined benefit plans may need to be amended to specify how the adjusted funding target attainment percentage (AFTAP) is calculated for determining whether a prohibited payment can be paid under Code Section 436(d)(2) if the statutory language is not incorporated by reference. If an amendment is required, the deadline to adopt one is December 31, 2018.
- Some collectively bargained cash balance plans may still need to be amended by December 31, 2018, to adopt compliant interest crediting rates to be eligible for anti-cutback relief.

## Other Action Items

Although the following items do not need to be completed by the end of 2018, we recommend that plan sponsors consider the following in the near future.

### DOL fiduciary rule repeal

The fiduciary rule previously published by the Department of Labor was vacated by the Fifth Circuit in March 2018. Before the actions of the Fifth Circuit, many plan sponsors and plan fiduciaries had negotiated agreements with their record keepers and other service providers to comply with the rule. These actions may need to be unwound in light of the repeal of the fiduciary rule. While there is no firm deadline for doing so, plan sponsors and plan fiduciaries should consider reaching out to their service providers to discuss the repeal of the fiduciary rule.

### Cybersecurity and data privacy agreements

We recommend that plan sponsors evaluate their cybersecurity and data protection procedures for benefit plans. While cybersecurity and data privacy provisions are generally not incorporated into the plan document, plan sponsors should consider discussing their procedures with record keepers and other service providers to ensure that prudent protections are in place and consider whether the plan has adequate insurance coverage in the event of a cyber attack or data breach.

### Arbitration clauses in plan documents

The 2018 U.S. Supreme Court case *Epic Systems Corp. v. Lewis* upheld the enforceability of arbitration clauses in the labor context. Some practitioners have interpreted this as opening the door to including mandatory arbitration clauses in ERISA plan documents. While the law is not yet settled, mandatory arbitration clauses (if enforceable) could limit the availability of class action lawsuits under ERISA plans. While arbitration may not be appropriate for every plan or for every plan sponsor, interested plan sponsors should contact their legal advisers to discuss the potential impact adding arbitration clauses to their ERISA plans.

## Conclusion

Although there are not many significant amendments required for qualified plans in 2018, the end of the year provides an opportunity for plan sponsors to review their qualified retirement plans and consider these action items. Please do not hesitate to contact your Alston & Bird attorney to discuss any of these plan amendments or other action items.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

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