



Employee Benefits & Executive Compensation ADVISORY ■

OCTOBER 28, 2021

Retirement Plan Amendments and 2021 Year-End Action Items

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

Qualified Plan Amendments

Amendments for changes in law

December 31, 2021 Is the Deadline for Hardship Amendments

The final regulations issued under the Bipartisan Budget Act of 2019 require calendar-year plans to be amended no later than December 31, 2021. These rules affected the rules regarding hardship withdrawals from defined contribution plans, including the following:

- Eliminating the suspension of employee elective deferrals as a result of an employee's hardship withdrawal.
- Requiring participants to certify that they have insufficient cash or liquid assets reasonably available to satisfy their financial need.
- Optional removal of the requirement that participants obtain a loan before receiving a hardship withdrawal.
- Optional increase in the sources available for a hardship withdrawal.
- Addition of [a new safe harbor hardship category](#) related to federally declared disaster areas.

Plans were required to implement the mandatory provisions operationally no later than January 1, 2020, and many plans have also implemented optional provisions operationally. For calendar-year plans, it is critical to ensure that any provisions implemented during the 2019, 2020, and 2021 plan years are documented in a formal amendment no later than December 31, 2021. Any features operationally added in future years should be incorporated through a formal amendment during the plan year they are added. Plan sponsors should consult their recordkeepers and legal counsel to ensure any required amendments have been made. Note that pre-approved plans may have already been amended by the plan provider, so if you sponsor a pre-approved plan, be sure to confirm with your vendor whether any action is required.

December 31, 2022 Is the Deadline to Adopt Changes Under Other Recent Legislation

The SECURE Act, the CARES Act, and the Consolidated Appropriations Act of 2021 included several additional optional and mandatory provisions. The deadline to adopt amendments reflecting these provisions is generally

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December 31, 2022. The following is a list of several of these changes; consult your legal advisor to determine whether your plan needs to be amended because of these or any other changes in recent legislation.

- **Required:** Delay the required beginning date for required minimum distributions from April 1 following the calendar year in which the participant reaches age 70½ to April 1 following the calendar year in which the participant reaches age 72. This change only applies to participants born after June 30, 1949.
- **Required:** Change in distribution rules for benefits payable upon the death of a participant. The new rule under the SECURE Act generally applies to participants who die on or after January 1, 2020 and requires distributions within 10 years after the participant's death unless the beneficiary is the participant's spouse or a member of a specific list of other "eligible designated beneficiaries."
- **Required:** Allow part-time employees to be eligible to make elective deferrals if they work at least 500 hours for three consecutive years beginning for plan years that start on or after January 1, 2021.
- **Optional:** Addition of special distributions for childbirth or adoptions.
- **Optional:** In-service distributions from a pension plan as early as age 59½.
- **Optional:** Increase the maximum automatic deferral percentage under a qualified automatic deferral arrangement from 10% to 15% of compensation. Note the 10% maximum still applies for the first year of participation.
- **Optional:** Relief to participants affected by the coronavirus pandemic, including coronavirus-related distributions, suspension of loan repayments, and increased loan amounts during certain portions of 2020.
- **Optional:** Disaster-related relief under the Consolidated Appropriations Act of 2021, including \$100,000 qualified disaster distributions, increased loan amounts, and the ability to suspend repayments for those whose principal residence is in a qualified disaster area or who suffer economic loss due to a qualified disaster.

Additionally, the CARES Act suspended required minimum distributions for 2020. We recommend plan sponsors discuss how this was implemented with their recordkeepers and legal advisors and consider whether any actions taken need to be reflected in an amendment.

Discretionary amendments

Plan sponsors that have made discretionary changes to their qualified retirement plans or may have added operationally optional features other than those discussed above during 2021 (e.g., a plan loan feature) must ensure that the associated "discretionary" amendments are signed no later than December 31, 2021 (for calendar-year plans). If you have made any discretionary amendments to your qualified retirement plan, you should take some time to make sure they have been formally adopted by the end of the year.

Other Action Items

Considerations for safe harbor plans

In response to the coronavirus pandemic, many companies sponsoring safe harbor plans elected to reduce or suspend employer contributions to their qualified retirement plans, including in some cases a reduction or suspension of safe harbor contributions. Retirement plans that may have previously satisfied safe harbor requirements may need to conduct nondiscrimination testing for the 2021 plan year due to the reduction or suspension of employer contributions. If your qualified retirement plan did reduce or suspend employer contributions, and if you are planning to resume making employer contributions, including safe harbor contributions, for the 2022 plan year, you may need to take action before the end of 2021. For qualified retirement plans intending to satisfy safe harbor requirements, the required

steps may vary based on whether the plan uses matching contributions or nonelective contributions to satisfy the safe harbor requirements.

For qualified retirement plans that will use matching contributions to satisfy the safe harbor requirements for the 2022 plan year, the plan will need to be amended by December 31, 2021. Additionally, participants should be sent their annual safe harbor notice no later than December 1, 2021. We recommend that the safe harbor notice highlight the plan sponsor's ability to reduce or suspend safe harbor contributions in the future in case adjustments need to be made in 2022.

For qualified retirement plans that will use nonelective contributions to satisfy the safe harbor requirements for 2021, the safe harbor notice is generally no longer required. Additionally, the plan may not need to be amended until as late as 30 days before the end of 2022 to reflect the retirement plan's safe harbor status, or even later if the nonelective contribution is 4% of compensation or more. However, we recommend discussing the specific requirements with your legal advisor to determine whether communication to participants may be desired and to ensure compliance with the requirements necessary to qualify for safe harbor status.

Considerations from recent DOL guidance

The Department of Labor has recently issued several pieces of guidance covering a number of topics, including guidance on what constitutes fiduciary advice and recommendations for cybersecurity best practices. Year end presents an opportunity for plan fiduciaries to discuss these topics with recordkeepers and consider whether it is appropriate to make any additional enhancements.

Other items to consider

As you review your plan document, you may consider whether adding any of the following provisions to your retirement plan is appropriate:

- Internal limitations period for filing claims
- Forum selection clause
- Mandatory arbitration provision

We recommend all plan sponsors consider these features and discuss them with your legal advisor, but please be aware that these features are not legally required and might not be appropriate for every qualified retirement plan or for every plan sponsor.

Also, recall that IRS and DOL guidance from 2020 suspended certain deadlines for participants to appeal claims until the earlier of (1) the end of the national emergency based on the coronavirus outbreak; or (2) one year. Because this is an individual limit, until the national emergency period is formally ended, this will require individual tracking of appeal deadlines. We recommend ensuring your plan administrator is continuing to resolve claims and respond to appeals as required under your plan.

Conclusion

The end of the year presents an opportunity for plan sponsors to review their qualified retirement plans and consider whether their retirement plans have any legally required amendments and whether they want to add any of the features discussed above even before a legally required deadline. 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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