



Employee Benefits & Executive Compensation ADVISORY ■

NOVEMBER 1, 2022

Do You Need to Send an Annual Notice to Plan Participants?

*If So, You May Need to Do So by December 1, 2022**

Plan sponsors of defined contribution qualified plans may need to issue one or more annual notices to participants before the end of each plan year. Failure to issue a required annual notice can have significant consequences. For example, if a plan sponsor forgets to issue the annual 401(k) safe harbor notice, the plan could lose its safe harbor status and be forced to limit (or refund) contributions by highly compensated employees.

This advisory serves as a reminder of the multiple year-end notices that defined contribution plans must issue to participants. These notices must be distributed within a reasonable period of time, typically 30 days, before the start of the plan year.

The following table provides a list of the content and deadlines for the most common notices that plan sponsors may need to distribute. It includes:

- Traditional Safe Harbor 401(k) Notice
- Qualified Automatic Contribution Arrangements (QACA) Notice for a Safe Harbor 401(k)
- Eligible Automatic Contribution Arrangement (EACA) Notice
- Qualified Default Investment Alternative (QDIA) Notice
- Non-Safe-Harbor Automatic Contribution Arrangement Notice
- Annual participant fee disclosures

Important News...

IRS Announces 2023 Retirement Plan Limits

The IRS recently announced the dollar limits for qualified retirement plans (and generally for 403(b) and 457(b) plans) for 2023.

The following is a list of some important limits affecting retirement plans in 2023:

- The annual limit on **elective deferrals** to Section 401(k) plans, Section 403(b) annuity contracts, and eligible Section 457 plans has increased to \$22,500.
- The annual limit for **catch-up contributions** for individuals age 50 and older to Section 401(k) plans, Section 403(b) annuity contracts, and eligible Section 457 plans sponsored by governmental entities has increased to \$7,500.
- The limit on **total compensation** used in computing contributions and benefits under Section 401(a)(17) has increased to \$330,000.
- The dollar limit on **aggregate annual additions to defined contribution plans** has increased to \$66,000 plus any catch-up contributions.
- The dollar limit on annual benefits in a **defined benefit plan** under Section 415(b) (before adjustment for age and form) has increased to \$265,000.
- The earnings threshold for determining who qualifies a **highly compensated employee** has increased to \$150,000.
- The **Social Security taxable wage base** has increased to \$160,200 for 2023.

* This deadline applies to calendar-year plans. Non-calendar-year plans have similar requirements, though their deadlines may be different.

Notice	Summary of Content	When/to Whom	Potential Consequence for Failing to Timely Deliver Notice
Traditional Safe Harbor 401(k) Notice (Code Section 401(k)(12))	<ul style="list-style-type: none"> Description of safe harbor matching contribution formula. Other available employer contributions. Type and amount of compensation that can be deferred. How and when to make a cash or deferred election (including administrative requirements). Withdrawal and vesting provisions. How to obtain additional information such as an SPD. Right to amend employer contributions mid-year. For plans that satisfy the safe harbor through nonelective contributions, a formal notice is no longer required. 	Disclosure is required to all eligible employees. The notice is deemed to have been given timely if it is provided 30 to 90 days before the beginning of the plan year (exceptions for new plan and newly eligible employees).	<ul style="list-style-type: none"> Possible qualification defect. Possible loss of safe harbor status.
Qualified Automatic Contribution Arrangements (QACA) Notice for a Safe Harbor 401(k) (Code Section 401(k)(13))	<ul style="list-style-type: none"> The same items described in the traditional safe harbor 401(k) notice above. The level of elective contributions that will be made if the employee does not make an affirmative election. The employee's right to not have elective contributions made or to change the amounts. How contributions will be invested, including how contributions will be invested in the absence of an investment election by the employee. 	Disclosure is required to all eligible employees. The notice is deemed to have been given timely if it is provided 30 to 90 days before the beginning of the plan year (exceptions for new plan and newly eligible employees).	<ul style="list-style-type: none"> Possible qualification defect. Possible loss of safe harbor status. If the QACA arrangement uses a QDIA, under DOL Regulation 2560.502c-4, a civil penalty of \$1,899 per required recipient may be assessed if the notice is not provided.
Eligible Automatic Contribution Arrangement (EACA) Notice (Code Section 414(w))	<ul style="list-style-type: none"> The same items described in the traditional safe harbor 401(k) notice above (to the extent applicable). The same items described in the QACA Notice for a Safe Harbor 401(k) above. The employee's right to make a permissive withdrawal and the procedures for electing such a withdrawal. 	Disclosure is required to all eligible employees. The notice is deemed to have been given timely if it is provided 30 to 90 days before the beginning of the plan year (exceptions for new plan and newly eligible employees).	<ul style="list-style-type: none"> Possible loss of ability to return contributions to participants. Possible qualification defect.
Qualified Default Investment Alternative (QDIA) Notice (ERISA Section 404(c)(5))	<ul style="list-style-type: none"> A description of the conditions under which assets will be invested in a QDIA. An explanation of the right of participants to direct the investment of assets in their individual accounts. A description of the QDIA, including a description of the fees, investment objectives, and risk and return characteristics. 	Annual notice must be provided to each individual who has not made an affirmative deferral election under the plan at least 30 days before each plan year.	<ul style="list-style-type: none"> Potential loss of 404(c) fiduciary protection for default investments until corrected.
Non-Safe-Harbor Automatic Contribution Arrangement Notice (ERISA Sections 404(c)(5), 514(e))	<ul style="list-style-type: none"> The same items described in the QDIA notice above. The level of elective contributions that will be made if the employee does not make an affirmative election. The employee's right to not have elective contributions made or to change the amounts. 	Disclosure is required to all eligible employees. Notice must be provided within a "reasonable time" before each plan year (e.g., at least 30 days).	<ul style="list-style-type: none"> Under DOL Regulation 2560.502c-4, a civil penalty of \$1,899 per required recipient may be assessed if the notice is not provided.
Annual Fee Disclosures (ERISA Section 404)	<ul style="list-style-type: none"> Tabular disclosure showing performance over 1-, 3-, and 10-year periods. Summary of investment fees. Information on how to change investments. 	At least once every 14 months to each participant or beneficiary who can direct investment of an account.	<ul style="list-style-type: none"> Possible breach of fiduciary duty.

Practice Pointers

- In addition to the year-end notices described above, there are several additional notices that must be provided from time to time. These include Summaries of Material Modifications (SMMs), Summary Annual Reports (SARs), and notices regarding changes to investment funds and certain other information in the Annual Fee Disclosure.
- Plan sponsors can generally combine multiple notices in a single notice. However, since different notices have different distribution requirements, generally a combined notice should be distributed to the broadest applicable recipient group.
- These and other notices may also require distribution during the plan year to newly eligible participants or rehired participants.
- Sponsors of defined contribution plans may also have other notices they must provide participants, such as diversification notices (ERISA Section 101(m), IRC Section 401(a)(35)) and quarterly or annual participant statements (ERISA Section 105(a)).
- Plans that issue a safe harbor notice should include language in the notice clearly reserving the employer's right to reduce or eliminate employer safe harbor contributions.
- Recent DOL guidance may allow distribution of many annual notices through electronic means, subject to certain rules and restrictions. Some recordkeepers may have adopted some of these guidelines by default, so plan administrators are encouraged to contact their recordkeepers to see whether any of these electronic communications programs have been implemented.
- Defined contribution plans are now required to provide a lifetime income disclosure annually. These were generally provided in spring or summer 2022 for calendar-year plans and are required annually thereafter. We recommend discussing this notice with your recordkeeper to confirm compliance.

Please do not hesitate to contact your Alston & Bird attorney if you have any questions about notice obligations or if we can assist you in providing proper notices for your qualified retirement plan.

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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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