

2020 EBP REGULATORY UPDATES

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Department of Labor (DOL)

Employee Benefits Security Administration (EBSA)



Changes to 2019 Form 5500

Form 5500, Line 2(d) - the principal business codes were updated to reflect changes for multiemployer (collectively bargained) plans

Schedule H, Part III - the instructions for Lines 3a(1)-(4) were revised to align with the clarified generally accepted auditing standards, AU-C 700, Forming an Opinion and Reporting on Financial Statements and AU-C 705, Modifications to the Opinion in the Independent Auditor's Report

Schedule SB Mortality Tables - Line 23 was revised to eliminate mortality table options that are not available after 2018

Schedule R instructions - a new Line 20 was added to obtain information related to PBGC reporting requirements resulting from unpaid minimum required contributions (only PBGC-insured single-employer plans are required to provide this additional information)

The maximum failure to file penalty was increased to \$2,194 per day and applies for civil penalties assessed after Jan. 23, 2019, whose associated violation(s) occurred after Nov. 2, 2015

Filing Form 5500 Without Audited Financial Statements

- General recommendation is to file the Form 5500 timely, even if the audited financial statements (if required) is not yet available for attachment
- A statement should be attached to the Form 5500 in lieu of the missing audited financial statements explaining when the amended Form 5500 filing (with the audited financial statements) is expected

For example:

ABC Co. Inc. Retirement Plan is timely filing its Form 5500. However, the audited financial statements for the plan year ending 20XX was not able to be completed in time to attach to this return.

The plan's independent auditor is currently working with the Plan Administrator and service providers to obtain information necessary to complete and issue the auditor's report.

ABC Co. Inc. Retirement Plan expects to have the audited financial statements available within the XX days. At that time, ABC Co. will file an amended Form 5500 with the audited financial statements attached.

Filing Form 5500 Without Audited Financial Statements

- What about not filing the Form 5500 and using the DOL's Delinquent Filer Voluntary Compliance Program (DFVCP) if the audit report is not ready by the Form 5500 filing deadline?
- Although DFVCP filing fees are quite low compared to the maximum per day failure to file penalty, we understand that DOL does not intend DFVCP to be used in cases where the delay is due to the audit not being available
- We understand that DOL currently has an enforcement project involving "stop filers" – plans that have been filing Form 5500 and suddenly stop – to try to prevent this tactic
- Although for plans that have never filed a Form 5500, using DFVCP may be an attractive option instead of timely filing without the audit report (which triggers a DOL notice and starts the clock on assessing penalties)
 - However, if DOL contacts the plan after the filing deadline and before the DFVCP is submitted, there is significant penalty exposure



Delinquent Filer Voluntary Compliance (DFVC) Program

- Encourages compliance with ERISA's annual Form 5500 reporting requirements by giving delinquent filers a way to avoid higher DOL, IRS and PBGC penalties by satisfying the program's requirements and voluntarily paying a reduced penalty
- Limited to plan administrators who have not been notified in writing by the DOL of a failure to file a timely Form 5500
 - So if plan is under DOL examination, it may file DFVCP submission before the investigation ends

The basic penalty under DFVCP is \$10 per day for delinquent filings (measured from the original due date of the Form 5500, regardless of extensions)

- **"Per filing" cap.** The maximum penalty for a single late Form 5500 is \$750 for a "small" plan (generally fewer than 100 participants at the beginning of the plan year) and \$2,000 for a large plan
- Use the "80 to 120" participant rule when determining whether a plan is a small or large plan
- **"Per plan" cap.** Limits the penalty to \$1,500 for small plans and \$4,000 for large plans, regardless of the number of late Form 5500's filed for the plan at the same time
- **Reduced fee for tax-exempts.** A special "per plan" cap of \$750 applies to a small plan sponsored by 501(c)(3) organizations, regardless of the number of late Form 5500's filed for the plan at the same time

There is no "per administrator" or "per sponsor" cap

Delinquent Filer Voluntary Compliance Program (DFVCP)



Requires (1) DFVCP filing; (2) filing all missed Form 5500s (including Schedules and audit report, if applicable); and (3) paying a fee (much lower than penalty amounts)

IRS and PBGC generally waive their penalties for DFVCP filers

- IRS recently increased its failure to file penalties 10x, making DFVCP even more valuable
- Must file Form 8955-SSA (if any) with IRS within 30 days after DFVCP filing [for IRS penalty waiver](#) and check the box on Part I, line C (Special extension), and enter “DFVC” in the description on line C

Internal Revenue Service

Bipartisan Budget Act of 2018 (BBA) - Hardship Withdrawal Changes for 2019

- Permits hardship withdrawals to be taken from earnings on deferrals as well as QNEC, QMAC and safe harbor sources
- Removes the requirement to take a loan prior to taking a hardship withdrawal
- Removes the 6-month deferral suspension requirement
- Effective for plan years beginning after December 31, 2018
- Amendment will be required to update plan documents for these provisions
- Other regulatory provisions for hardships still apply - for example, the safe harbor reasons for a hardship



Plan Amendments

Required Amendments List (RAL)

- Applies to individually designed plans
- Published annually (Oct. 1)
- IDP must be amended to retain qualified plan status for each item on RAL by end of 2nd calendar year following year RAL is published
- Two parts:
 - Part A: changes in qualification requirements that generally would require an amendment to most plans
 - Part B: changes in qualification requirements that Treasury and the IRS anticipate will NOT require amendments to most plans

Cumulative List

- Applies to pre-approved plans
- Published prior to 6-year restatement period
- Identifies changes in qualification requirements
- Document providers will need to issue language with interim amendments that must be adopted timely

Operational Amendments

- Applies to IDPs and pre-approved plans
- Discretionary amendments; initiated typically by plan sponsor
- Must be signed and effective before implemented in plan operations
- Certain plan provisions cannot be amended during the plan year or may result in a prohibited reduction of benefits to participants (e.g., safe harbor, etc.)

Required Amendments List (RAL)

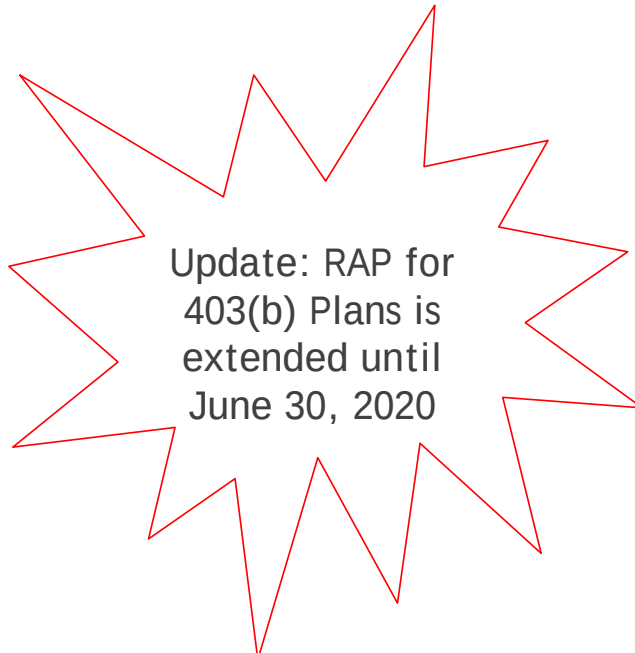
Year	RAL	Summary Part A	Summary Part B	General Amendment Deadline
2019	Notice 2019-64	- Plans that (1) suspend employee's elective deferrals as a condition of obtaining a hardship distribution or (2) do not require a representation from an employee who requests a hardship distribution that he or she has insufficient cash or other liquid assets reasonably available to satisfy the need, must be amended to eliminate the suspension and provide for the representation, for hardship distributions made on or after January 1, 2020 - Cash balance/hybrid DB plans maintained pursuant to collective bargaining agreements ratified on or before November 13, 2015 must be amended to the extent necessary to comply with those portions of the regulations regarding market rate of return and other requirements that first became applicable to the plan for the plan year beginning on or after the later of: (1) January 1, 2017, and (2) the earlier of (a) January 1, 2019, and (b) the date on which the last of those collective bargaining agreements terminates (determined without regard to any extension thereof on or after November 13, 2015)	None	Dec. 31, 2021

Required Amendments List (RAL)

Year	RAL	Summary Part A	Summary Part B	General Amendment Deadline
2018	Notice 2018-91	None	None	N/A
2017	Notice 2017-72	- Cash Balance/Hybrid Plans: comply with those portions of the final regulations regarding market rate of return and other requirements - DB plans: benefit restrictions for eligible cooperative or charity plans	DB plans: bifurcated distribution payments (both annuity and lump sum) must comply with Code Section 417(e)	Dec. 31, 2019

IRS Rev Proc 2017-18: End of 403(b) Plan Remedial Amendment Period

- March 31, 2020 is the last day of the first remedial amendment period for individually designed and preapproved 403(b) plans
- During the remedial amendment period, plan sponsors can correct plan provisions that fail to meet 403(b) rules by either:
 - Adopting a 403(b) pre-approved plan by March 31, 2020 **or**
 - Amending their individually designed plan by March 31, 2020
- Correcting plan provisions may involve adding required provisions or correcting defective provisions
 - Generally, correction must be retroactive to the later of either January 1, 2010, or the plan's effective date
 - If the plan was administered based on the defective provision, this also must be retroactively corrected



Update: RAP for
403(b) Plans is
extended until
June 30, 2020

Likewise, the IRS is extending the April 30, 2020 deadline for employers to adopt a pre-approved defined benefit (DB) plans until July 31, 2020.

IRS insists on signed and dated plan documents

Office of Chief Counsel
Internal Revenue Service
Memorandum

Release: AM 2019-002
Release Date: 12/13/2019
CC:EEE:EB:QP3
PRES-116956-19

UILC: 401.00-00

date: December 09, 2019

to: Kyle N. Brown
Division Counsel
(Tax Exempt & Government Entities)

from: Victoria A. Judson
Associate Chief Counsel
(Employee Benefits, Exempt Organizations and Employment Tax)

subject: Qualified Plan Adoption Requirements

- IRS Chief Counsel Memorandum dated Dec. 9, 2019 states that IRS will not follow a recent court decision that allowed an ESOP plan sponsor to maintain a tax-qualified plan even though during an IRS audit the sponsor could not produce a signed and dated copy of the plan document.
- The court found extraordinary circumstances excused the lack of having a signed plan document, including flooding of the employer's premises during a natural disaster

ISSUE

In light of *Val Lanes*, must a plan sponsor retain a validly executed plan document?

CONCLUSION

A plan is considered adopted only if proof of adoption of the plan is provided. A validly executed plan document should be retained and upon audit given to the exam agent to support the qualified status of the plan. Upon failure to produce an executed plan, the employer has the burden to prove that it executed a plan document as required.

IRS Rev. Rul. 2019-19: Tax treatment of uncashed retirement plan distribution checks



Limited guidance clarifies that even if the participant does not cash the check or the check becomes stale:

- The participant has taxable income in the year the plan distribution check is sent to the participant; and
- The plan has reporting and withholding obligations in the year the check is sent to the participant
- The guidance applies to active, terminated and missing participants
- IRS is continuing to look at missing participant issues (including uncashed checks) and may issue more guidance



Legislative Updates



Retirement Plans - Disaster Relief Special Rules

- Further Consolidated Appropriations Act of 2019 (enacted Dec. 20, 2019):
 - o Allows easier access to retirement funds to recover from 2018 and 2019 California wildfires and other natural disasters
 - o Participants can include qualified hurricane/wildfire distributions in their income over a three-year period
 - o Participants can repay distributions to the plan over a three-year period
- Waives the 10% additional tax on certain early distributions
- Expands:
 - o Availability of plan loans (up to \$100,000)
 - o Loan repayment period (one more year to repay)
 - o Deadline for making plan amendments



Setting Up Every Community for Retirement Enhancement (SECURE) Act of 2019

- SECURE Act was part of the Further Consolidated Appropriations Act of 2019
 - Enacted Dec. 20, 2019
- Bipartisan support for retirement plan law updates that have been pending for years
- Biggest change in retirement plan law since Pension Protection Act in 2006
- SECURE Act makes 30 changes to retirement plan law
 - Some provisions are mandatory, others are optional
 - Some provisions were immediately effective on Dec. 20, 2019
 - Other provisions took effect Jan. 1, 2020 or will take effect in 2021 or later
- Operational compliance is required as of the effective date, but plan amendments (retroactive to the first day that the new rules apply) generally will not be required any earlier than the last day of the first plan year beginning in 2022 (or later for union and governmental plans)
- IRS and DOL are scrambling to issue guidance, focusing on highest priorities
- Generally won't be an issue for 2019 plan year audits

Setting Up Every Community for Retirement Enhancement (SECURE) Act of 2019

Required or Optional	Provision	Timing
Required	Prohibits using credit/debit cards for plan loans	12/20/19
Required	Must allow long-term, part-time employees to make salary deferrals	Effective for plan years beginning after 12/31/20; hours worked before 2021 do not count
Required	DC plans must provide annual lifetime income disclosures	12 months after DOL finalizes regs
Required	Eliminates “stretch” beneficiary designations	Effective for deaths after 12/31/19

Setting Up Every Community for Retirement Enhancement (SECURE) Act of 2019

Required or Optional	Provision	Timing
Optional	DC plan fiduciaries can use a new ERISA fiduciary safe harbor to reduce uncertainties when offering an annuity to plan participants	12/20/19
Optional	Raises age 70 ½ to age 72 for required minimum distributions	Effective for individuals who turn 70 ½ after 12/31/19
Optional	Auto Enroll Safe Harbor Plans (QACA) may increase the Auto Escalation cap to 15% of pay from the current 10% cap	12/20/19
Optional	Birth or adoption in-service withdrawals of up to \$5,000	Distributions after 12/31/19

Setting Up Every Community for Retirement Enhancement (SECURE) Act of 2019

Required or Optional	Provision	Timing
Optional	Nondiscrimination testing relief for closed DBPs	12/20/19 (retroactive)
Optional	Creates “pooled employer plans”	Plan years after 12/31/20
Optional	Allows aggregated Form 5500 filing for “groups of plans”	Plan years after 12/31/21
Optional	Currently, a plan sponsor may elect to adopt a 3% QNEC safe harbor plan design as late as 30 days before plan year end. Now, you can adopt by the end of the next plan year, but 4% QNEC is required	Plan years after 12/31/19

Setting Up Every Community for Retirement Enhancement (SECURE) Act of 2019

Required or Optional	Provision	Timing
Optional	Employers can adopt a tax qualified retirement plan up to the extended due date of their tax return	After 12/31/19
Optional	In-service, direct trustee-to-trustee transfers of lifetime income investments (or annuity transfers) to an IRA or other retirement plan or distribution of that investment option if the plan discontinues offering that investment	Plan years beginning after 12/31/19
Required	IRS penalties increased 10x for failure to file Form 5500 - - from \$25 per day (capped at \$15,000 per year) to \$250 per day (capped at \$150,000)	Plan years beginning after 12/31/19
Required	Other IRS penalties also increased 10x	Plan years beginning after 12/31/19

Mortality Updates



- Society of Actuaries (SOA) issued MP-2019 improvement scale on October 24, 2019
- Incorporates mortality data from the Social Security Administration, which indicates that deaths are occurring at rates slightly higher than assumed in the 2018 mortality improvement scale (MP-2018)
- Reflects a decrease in the rate of improvements in life expectancies in the United States compared with the data in MP-2018
- SOA also updated the base mortality table with Pri-2012
- Updated information should be considered for 2019 audits and any 2018 audits issued after October 24, 2019
- Technical Question and Answer (TIS 3700.01)



The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) ([H.R. 748](#))

- The CARES Act provides short-term relief for single-employer DB plans. Specifically, employers have until January 1, 2021, to make any minimum required contributions that were originally due during 2020.
- Employers who have DC plans — like a 401(k) plan or 403(b) plan — can let participants take up to \$100,000 in “coronavirus-related distributions” by December 31, 2020.
- From March 27 to September 23, 2020 (i.e., for 180 days after the CARES Act became law), “qualified individuals” can borrow up to the lesser of \$100,000 (instead of just \$50,000) or 100% of their entire vested account balance (instead of just 50%).
- When former employees no longer have payments made via payroll deductions the loans frequently go into default, resulting in taxable income for the participant at the end of the calendar quarter following the default date and a Form 1099-R would be issued showing the loan balance as taxable income for the year. However, the CARES Act appears to provide a one-year grace period for any loans that were outstanding on or after March 27, 2020.



The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) ([H.R. 748](#))

- The CARES Act waives all 2020 RMDs from DC plans (and IRAs). That waiver includes initial payments to participants who turned age 70½ in 2019 and who did not take their initial RMD last year because they had a grace period until April 1, 2020. The RMD relief does not apply to DB plan participants.
- The CARES Act allows employees to use funds in health care flexible savings accounts (FSAs) to purchase over-the-counter (OTC) medical products, including those needed in quarantine and social distancing, without a prescription. This change also applies to Health Savings Accounts (HSAs).
- Group health plans and insurers are required to cover approved diagnostic testing for COVID-19, including in vitro diagnostic testing, without any cost-sharing to participants, at their in-network negotiated rate (or if no negotiated in-network rate, an amount that equals the cash price for such tests as publicly listed by the provider).



The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) ([H.R. 748](#))

- Group health plans and insurers are required to cover any qualifying preventative services related to COVID-19 without cost-sharing to participants.
- Effective March 27, 2020, for plan years beginning on or before December 31, 2021, employers with a HDHP and an accompanying HSA can provide coverage for telehealth services before participants reach their deductible without disqualifying them from being eligible to contribute to their HSA.
- From March 27 until December 31, 2020, employers can contribute up to \$5,250 towards an employee's student loans and such amount will be excluded from the employee's taxable income. The employer could either pay the amount to the lender or to the employee. The amount could be applied to principal or interest for "qualified education loans" defined in IRC Section 221(d)(1). The \$5,250 limit applies in the aggregate to both the new student loan repayment benefit and other employer-provided, tax-free educational assistance (e.g., tuition, fees, books).



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Concluding Remarks