

# FYI<sup>®</sup> In-Depth

## For Your Information<sup>®</sup>

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## 2018 Planning for ERISA Multiemployer Defined Benefit Plan Operations

The calendar provided in this *FYI In-Depth* will help you set up your own schedule of activities to address as the year progresses so that you do not miss important deadlines for your qualified plans. As you evaluate the various tasks, you can confirm suitable deadlines with your vendors for their completion. Our [Reporting and Disclosure Guide](#) will also help you identify and address other event-based and participant-specific activities. As you make your plans, we discuss a number of key issues for you to consider (along with the calendar deadlines) in 2018.

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### Review of Plan Administration

In addition to verifying that routine tasks are monitored in accordance with plan terms and administrative policies – such as making required minimum distributions, sending suspension of benefits notices, and attending to the myriad annual reporting and disclosure requirements – administrators must be on the alert to some not-so-common tasks. Here are some key areas to watch:

**Brush up on the Multiemployer Pension Reform Act of 2014.** The Multiemployer Pension Reform Act of 2014, signed into law in late December 2014, contains many funding and PBGC-related changes that created concern among stakeholders in multiemployer plans. The ability of trustees and administrators to detect issues and know when to consult with trusted advisors is critical in efforts to assure compliance. Plan trustees and administrators should review the rules and communicate again with their participant and contributing employer population about the meaning and applicability of the MPRA’s provisions. For plans in the “critical and declining status” zone that expect to exercise their ability to suspend accrued benefits, suitable communications should happen early next year. Our *For Your Information* from [January 12, 2015](#), provides an overview of this law.



Issues of our *For Your Information* on regulatory guidance issued since the law was enacted include:

- June 29, 2015 issues on [IRS suspension procedures](#) and [PBGC partitions](#)
- [September 2, 2015](#) on voting procedures
- [January 4, 2016](#) on PBGC's final rule on partitions
- [February 17, 2016](#) and [May 4, 2016](#) issues on refinements to the suspension ordering rules
- [May 3, 2016](#) on final suspension rules from IRS; [July 14, 2017](#) on updated suspension procedures
- [June 7, 2016](#) on PBGC's proposal for facilitated mergers

**Comment:** To date, Treasury has approved four applications under the new benefit suspension option.

**Review and analyze insurance coverage.** Two basic types of insurance are available to protect the plan:

**Fidelity bond.** A fidelity bond is required for every fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan, with a few exceptions. On an annual basis, plans that require a fidelity bond should review existing bonds to ensure they have at least the required minimum coverage and that the elected level is appropriate for the plan. (In most circumstances, the amount of the required bond is capped at \$500,000 for a plan without an employer securities fund and \$1,000,000 for plans that hold employer securities.)

**Fiduciary liability insurance.** Insurance can be purchased to protect fiduciaries and the plan against liability or losses occurring due to a plan fiduciary's act or omission. Fiduciaries are personally liable for losses incurred by a plan due to their breach; insurance can cover some or all of these losses. So, obtaining fiduciary liability insurance in the appropriate amount has become imperative. DOL has stepped up reviews and is keeping score of ever-increasing monetary recoveries resulting from their investigations – 2,002 investigations in 2016 with 67.7% resulting in corrective action. This is in addition to dramatic settlements arising from ERISA class action litigation.

It's important to analyze the insurance policy's major defined terms to understand exactly what risks it covers. Furthermore, understanding when these policies are triggered is crucial to knowing whether the plan and its fiduciaries are adequately protected. An annual review of these policies may illuminate the requirement to report certain events to the insurer within a specific time frame to collect on a claim.

**Key Point:** Many policies cover compliance fees and penalties, such as those imposed by the IRS under their Voluntary Correction Program, but require timely notification to the insurer.

**Get set to trigger automatic payments.** Plans can call for the automatic distribution of former employee benefits with values up to the \$5,000 cashout limit without the participant's affirmative consent. For values between \$1,000 and \$5,000, absent directions from the participant about how to make the payment, a default IRA rollover is generally required. Some plan sponsors had reduced the plan cashout limit to \$1,000 to avoid the obligation of selecting a suitable vendor for the IRA. Some are reconsidering this decision in light of ever-increasing PBGC premiums and the larger number of established IRA providers that now offer such services. Amend your plan as appropriate if a change is warranted, and assure administration is in keeping with the plan document.

In addition to the automatic cashout of small payments, another situation may require payments without specific elections by plan participants. Many defined benefit plans specify that vested participants who have terminated

employment are required to commence benefit distributions upon attainment of the plan's normal retirement age. In this case, plan administrators need to provide suitable qualified joint and survivor (QJSA) notices prior to that date, and then put the benefit in pay status as the plan requires. In the absence of a waiver of the QJSA, a plan in this situation automatically begins distributions in the QJSA form.

**Remind participants of any opportunity to name beneficiaries.** Many plan administrators have had to sort out competing claims for death benefits because of unclear or missing beneficiary designations. These disputes can sometimes result in costly litigation. Most plans must make a participant's spouse the default beneficiary. If the plan offers a choice, and a participant wants survivor benefits paid to someone else, such as children, parents, or a favorite charity, a properly executed beneficiary designation is the ticket. Make a point of reminding plan participants to consider updating their beneficiary designations and let them know if they are required to use specific plan forms for making this designation.

**Identify lost participants with vested benefits.** Returned plan notices, statements, or distribution checks should trigger timely research to find lost participants. The sooner searches are started, the more likely you'll be able to locate terminated participants whose addresses have changed. Although default rollover IRAs can be set up for participants with benefit values up to the cashout limit, other missing participants must be addressed at some point, and DOL has been auditing the extent to which plan sponsors fulfill this obligation (see our [March 15, 2016 For Your Information](#)). More recently, audits have intensified with DOL alleging fiduciary breaches and assessing prohibited transaction penalties over missed payments. Under proposed rules, at plan termination, PBGC will accept funds to cover missing participants – but will require the administrator to make a diligent effort, including the use of a locator service, to find former workers due a pension. Proposed changes to the program (see our [October 5, 2016 For Your Information](#)) would also modify the search requirements to match DOL guidance for DC plans, including a requirement to search other employer plan records.

**Address foreign asset reporting obligations.** In an effort to address tax evasion, money laundering and terrorist financing concerns, compliance requirements mandate reporting of assets held by foreign financial institutions (including retirement plans) and benefit distributions to certain individuals. Plan fiduciaries will want to assess compliance with these requirements, particularly the Foreign Account Tax Compliance Act (FATCA), the Report of Foreign Bank and Financial Accounts (FBAR), and regulations issued by Treasury's Office of Foreign Assets Control (OFAC). Our [June 12, 2014 For Your Information](#) outlines these requirements; our [April 4, 2017 For Your Information](#) provides an update on filing timing.

The IRS recently released a [memo](#) to its employee plan examiners on the steps plan sponsors must take – including trustees of multiemployer plans – to avoid IRS sanctions for failing to make required minimum distributions to missing participants. Specifically, the memo requires a plan sponsor to: (1) search plan and related plan information as well as public records for alternative contact information, (2) use a commercial locator service, credit reporting agency, or internet search tool, and (3) send a letter by certified mail or make phone calls.

## Plan Amendments, Filings and Documentation

Do your plan documents correctly describe the plan provisions as intended, and are summary plan descriptions (SPDs) and administrative procedures in sync with the official documents? Now that IRS has limited its determination letter program, an annual self-check should be considered.

**Evaluate the need for plan amendments – and deadlines.** IRS procedures call for executing amendments by the end of the plan year in which the amendment is operationally put into effect in the case of discretionary

amendments, and provide extended amendment periods for modifications necessary to address changes in legal requirements. If you implemented discretionary changes during the year, make sure documentation is inked before the plan year is over.

**Partial annuity distributions.** Final IRS regulations change the rules for plans that offer mixed distribution options, such as a partial lump sum and an annuity. Effective for distributions on or after January 1, 2017, some plans may need or want to change either benefit calculations or plan provisions by that date. For details, see our [September 14, 2016 For Your Information](#); for IRS' model amendment, see our [August 25, 2017 For Your Information](#). Then stay tuned for more guidance on distribution rules – IRS issued proposed regulations that may affect how your plan calculates lump sums and Social Security level income options. When finalized, additional plan amendments may be needed. Our [December 1, 2016 For Your Information](#) explains those changes.

**Disability claims procedure.** Retirement plans that call for independent decisions on disability status rather than referencing another source such as a Social Security determination need to watch for changes in DOL requirements addressing claims procedures. Final rules from 2016 set to go into effect in 2018 are proposed to be delayed as noted in our [October 11, 2017 For Your Information](#). It remains to be seen whether the current administration will roll these back.

If you missed making required amendments, consider IRS' Voluntary Correction Program (VCP). IRS announces the VCP fees and associated rules each January in its Revenue Procedure for written determinations. Discounted VCP fees are currently available when sponsors voluntarily correct plan document failures within one year after the applicable deadline.

**Make sure your summary plan description matches your plan document.** In addition to being a disclosure required under ERISA, the SPD plays an important role in ERISA disputes, and a well-drafted and well-integrated plan and SPD will minimize successful challenges to plan determinations or fiduciary decisions. Make sure it, or a timely summary of material modifications (SMM), reflects any plan amendments made during the plan year. Don't forget that an SPD must generally be restated and redistributed every five years.

**Key Point.** A factor in many plan challenges is the statute of limitations for taking an official complaint to the federal courts for review. Sponsors should confirm that plan documents state a statute of limitations period and announce that period in SPDs as well as benefit claim denial communications.

**Create or update your investment policy statement.** For plan investments, fiduciaries must ascertain whether the plan has an investment policy statement (IPS) and guidelines and, if not, fiduciaries should consider adopting one. If an IPS is in place, it should be reviewed in light of current economic conditions. The DOL has encouraged plan fiduciaries to adopt written statements of investment policy and stated that compliance with ERISA's prudence requirement calls for maintaining proper documentation of the activities of the investment manager and of the named fiduciaries of the plan in monitoring the investment manager.

#### Service Providers Need to Know

Have you provided your actuary, consultant, TPA, etc. with copies of current signed documents? Your service providers need up-to-date information about you and your plans to be able to spot issues and assure quality service. Make sure to keep them in the loop!

**Assemble and maintain documentation.** Keeping plans up to date is crucial – but don't toss the old documents. Plan participants and beneficiaries may request prior plan materials and plan administrators need to address requests within a 30-day window. Failure to comply can lead to legal challenges; a court may hold a plan administrator who fails to comply personally liable for up to \$110 per day per affected person from the date of failure. Along with plan documents, SPDs, and SMMs, be sure to create and maintain records of participant data, such as proof of benefit distributions, benefit elections, and beneficiary designations. Arrange for continued access even after termination of the plan.

## Actuarial and Financial Disclosure

Multiemployer pension plans face a number of disclosure requirements aimed at ensuring that participants, beneficiaries, employee representatives, and contributing employers have sufficient information to properly monitor the plan's funding and financial status. Within 30 days of a request from one of these parties, the plan administrator is required to provide any or all of the following:

- Plan document and SPD
- Trust agreement
- Form 5500
- Annual funding notice
- Actuarial reports
- Investment manager reports
- Audited financial statements
- Funding waiver requests
- Latest Funding Improvement or Rehabilitation Plan

In addition, a plan sponsor or administrator must provide estimated employer withdrawal liability information within 180 days of a written request by a contributing employer.

Ensuring that reports are completed and available for delivery upon request and developing a protocol for addressing withdrawal liability requests will help avert DOL penalties of up to \$1,659 per day for failing to furnish them.

## Communicating with Your Actuary

2018 presents an opportunity for continuing discussion on rational funding expectations, managing escalating PBGC premiums, and reviewing reasonability of valuation assumptions.

**Consider mortality and other assumptions.** We continue to see the effect of plan participants' improving longevity on the cost of defined benefit plans. While recent studies indicate the rate at which mortality is improving has slowed, plan liabilities will generally continue to increase over time due to increasing longevity. Trustees may wish to change the funding assumption to fully generational tables or explore adjustments to the Society of Actuaries' RP-2014 base mortality table to better reflect plan experience. You should discuss with your actuary

whether the mortality assumption for minimum funding might be customized to reflect your particular plan's expected experience. For this purpose, assumptions based on alternatives to the SOA standard table may lead to better forecasts.

Trustees and their actuaries will also want to consider changes in other assumptions that may coincide with mortality improvements. In response to improved life expectancy and the longer period of time for making retirement savings last, many employees are planning to continue working beyond the plan's "normal" retirement date. Aligning plan retirement assumptions with this new paradigm can reduce plan liabilities, particularly for retiree medical plans and pension plans with suspension of benefits provisions and generous early retirement subsidies. On the other hand, it can also increase liabilities for a plan that provides generous actuarial increases to those electing late retirement.

**Address escalating PBGC premiums.** PBGC premium rates for multiemployer defined benefit plans have increased significantly over the past few years. Since 2014, the premium rate has increased from \$12 to \$28 (for 2018) per plan participant, and will continue to be indexed after 2018 under current law – legislative proposals have suggested further increases, including variable rate and exit premiums. These increasing PBGC premiums continue to put more pressure on funds to achieve higher returns or require higher contributions from employers to maintain their funded status. A data cleanup resulting in lower participant counts will help lower premiums. Review forecasts of future premiums and determine what tactics make sense to manage this expense.

## Meeting Your Fiduciary Duties Selecting and Monitoring Investments

Most multiemployer plans use alternative investments, and there is a possibility of increased government attention in this area. So-called "alternatives" have many appealing qualities for pension plans, but there are downsides as well. The lack of liquidity should not become an issue when the associated pension payments are far in the future – but liquidity is needed when the monies eventually come due. The lack of liquidity can also lead to a lack of transparency (the underlying investments are not necessarily disclosed frequently) and difficulties in pricing (since they are not traded frequently on the open market to establish a fair value). Some alternatives, like hedge funds, are subject to less scrutiny from regulators, and those pose additional risks in terms of governance. Accordingly, fiduciaries of a pension plan (the board of trustees) should understand all the investments in the plan's portfolio. Alternatives are significantly more complex than traditional investments and, if not fully understood, they can do more harm than good to a plan's portfolio. Trustees should be clear about their objectives in identifying alternatives that fit their needs. Simply pouring funds into alternatives without a strategy can result in bad outcomes.

DOL guidance from 2015 on "social" investments reinstated the so-called "all things being equal" test, under which fiduciaries can consider socially responsible investment goals as a tie-breaker in choosing among investment alternatives that otherwise feature equal risk and return. Fiduciaries interested in pursuing socially responsible investments can rely on this guidance – but still cannot accept lower returns or take on greater risk. Plan administrators and trustees should have a process for periodically reviewing all plan investment options. Our [November 12, 2015](#) *For Your Information* discusses the DOL guidance.

## In Closing

Planning with trusted advisors to identify tasks and set compliance goals is an important first step for assuring smooth operations in 2018. In addition to the key items noted above, trustees may want to perform an annual

“checkup” (i.e., a review of operational practices and fiduciary responsibilities) to address plan expenses, design considerations, and investments and confirm compliance with the terms of the plan document and investment policy statement, if any. Trustees may elect to conduct their own self-audit or contract with an independent party. Regardless of who performs the audit, identifying problems and initiating corrections in advance of any official agency audit is the preferred course of action.

## Calendar of Significant Multiemployer Defined Benefit Plan Compliance Tasks<sup>1</sup>

Action Item	Due Date
<b>January</b>	
2016 Form 5500 basic information and Schedule MB posting (assumes October 16, 2017 filing)	January 15, 2018
Form 1099-R to participants (or write letter for 30-day extension)	January 31, 2018
Form 945 to IRS (to report income withheld on distributions)	January 31, 2018
<b>February</b>	
Form 945 (alternative date, if withholding deposits timely made)	February 12, 2018
Form 1099-R to IRS (if paper; or file Form 8809 for 30-day extension)	February 28, 2018
<b>March</b>	
Notice of intent to request prior year amortization extension	March 1, 2018
Request for prior year minimum funding amortization extension	March 15, 2018
Report US source income of foreign persons: Form 1042-S to participants and IRS (or file Form 8809 for 30-day extension for 1042-S filing with IRS; write letter to request 30-day extension for providing 1042-S to participants; Form 1042 to IRS (or file Form 7004 for 6-month extension )	March 15, 2018
Zone certification for 2018 year from enrolled actuary to IRS and trustees	March 30, 2018 <sup>2</sup>

<sup>1</sup> Assumes calendar plan year. Does not account for short plan years, or new plans. Weekend rule generally applies to filing deadlines and certain other acts under tax rules, but not contributions and other Title I ERISA obligations.

<sup>2</sup> Assumes actuary will provide before the weekend this year.

Action Item	Due Date
<b>April</b>	
Required minimum distributions for first time qualifying participants	April 1, 2018
Form 1099-R to IRS (if electronic; or file Form 8809 for 30-day extension)	April 2, 2018
Form 990-T return of unrelated business income for prior year (or Form 8868 to request filing extension). This tax is sometimes triggered if the plan earns income from certain plan investments (for example, limited partnership interests)	April 17, 2018
Notice of Endangered or Critical Status/Notice of Election to be in Critical Status/Notice of Projection to be in Critical Status in a Future Plan Year (assuming actuarial certification signed on March 30) <sup>2</sup>	April 29, 2018
Annual Funding Notice	April 30, 2018
<b>July</b>	
Summary of material modifications if amendments adopted in 2016	July 29, 2018
Form 5330 excise tax on funding deficiency, nondeductible contribution, prohibited transaction, etc. (or file Form 5558 to request 6-month extension)	July 31, 2018
2016 Forms 5500 and 8955-SSA (or Form 5558 to request an extension)	July 31, 2018
Statement of deferred vested benefits (SSA information) to participants (unless on Form 8955-SSA extension)	July 31, 2018
<b>August</b>	
Summary plan report to employee organizations and contributing employers, if not on Form 5500 extension	August 30, 2018
<b>September</b>	
Minimum funding contribution (balance due for 2017 year)	September 15, 2018
<b>October</b>	
2017 Forms 5500, 8955-SSA, and SSA information (to participants), if on Form 5558 extension	October 15, 2018
PBGC premium due	October 15, 2018



Action Item	Due Date
<b>November</b>	
Notice of insolvency benefit level, if applicable for 2019 (if insolvency determination by September 3, 2018) <sup>3</sup>	November 2, 2018
Summary plan report to employee organizations and contributing employers, if on Form 5558 extension	November 15, 2018
Funding improvement plan or rehabilitation plan adoption	November 26, 2018
<b>December</b>	
Notice of funding waiver request for 2017	December 17, 2018
Notice of funding improvement plan or rehabilitation schedule	December 26, 2018
Minimum funding waiver request for 2017	December 31, 2018
Required minimum distributions	December 31, 2018
Triennial benefit statements/ annual alternative notice	December 31, 2018
Last day to adopt discretionary plan amendments for 2018	December 31, 2018
Request change in funding method	December 31, 2018
Request for approval of retroactive amendment reducing accrued benefits (to 2016 plan year)	December 31, 2018

<sup>3</sup> Required to be filed electronically. See our [September 28, 2015 For Your Information](#).

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