

2019 Planning for ERISA Single-Employer Defined Contribution 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 help you identify and address other activities that are event-based and participant-specific. As you make your plans, we have several key issues for you to consider (along with the calendar deadlines) as we head into 2019.

In this issue: [Review of Plan Administration](#) | [Plan Amendments, Filings and Documentation](#) | [Fee Disclosures](#) | [Plan Features to Boost Retirement Savings](#) | [In Closing](#) | [Calendar of Significant DC Plan Compliance Tasks](#)

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 safe harbor notices, and attending to the myriad annual reporting and disclosure requirements — administrators must be on the alert for some important tasks. Here are some key areas to watch:

Update the “Special Tax Notice” for eligible rollover distributions. In September, the IRS issued Notice 2018-74 to update its Safe Harbor Explanations for eligible rollover distributions to take into account certain legislative changes and other recent guidance. (See our [September 19, 2018 For Your Information](#).) The explanations, also known as the “Special Tax Notice Regarding Plan Payments” or the “Section 402(f) Notice,” generally must be provided to a recipient of an eligible rollover distribution between 30 and 180 days before an eligible rollover distribution is issued. Different versions of the notice are used for eligible rollover distributions made from a Designated Roth account and those that are issued from non-Roth accounts. If you haven’t done so already, make sure these notice updates are addressed in a timely manner and incorporated into distribution materials issued to recipients by the plan and its service providers.

Make timely 401(k) deposits. Failure to deposit employee contributions and loan repayments timely is a prohibited transaction that will subject the plan sponsor to excise taxes, interest charges and additional reporting. Deposits are timely if they are submitted as soon as contributions can reasonably be segregated from the

employer's assets. Once a plan sponsor demonstrates that contributions can be deposited within a certain number of days after payroll — say four business days — the DOL may view that as the standard for that plan. If deposited in a future cycle after eight days, for example, the deposit may be deemed late. As this continues to be an area of focus for DOL audits, consistency and attention to timeliness is critical. The DOL's Prohibited Transaction Exemption limits the exemption for Voluntary Fiduciary Correction Program filers to deposits that are no more than 180 days late, so that the timeliness of deposits should be reviewed more frequently than annually. Plan sponsors with late deposits that don't qualify for this exemption must file Form 5330 and pay a 15 percent excise tax on the prohibited transaction, which is due by the last day of the 7th month after the end of the tax year of the employer — July 31 for calendar-year filers.

Process automatic cashouts of small balances. Many plans provide for the automatic cashout of small balances to terminated participants. For such plans, distributions should be processed and terminated participants must be notified. At the very least, an annual “sweep” of small balances should be conducted in keeping with the plan terms. This process can be effective in keeping small balances out of the plan to avoid continued costly administration and having to track down missing participants in the future. Participants with larger balances are more likely to keep the recordkeeper informed of their addresses.

Identify lost participants with account balances. Returned plan notices, statements or distribution checks should be researched timely to find lost participants. The sooner the search is started, the more likely you'll be able to locate terminated participants whose addresses have changed. Funds covering any check that remains outstanding for longer than the plan's stale check period should be redeployed to the participant's investment accounts or, depending on the amount and the payment's eligibility for rollover, rolled into an IRA. Adjustments may be needed to address any income tax that had been withheld. Guidance from the DOL is available on how fiduciaries of terminated defined contribution plans can try to locate missing participants or beneficiaries and distribute balances. With the removal of the IRS and SSA letter-forwarding services, the use of Internet search tools is required. (See our [September 3, 2014](#) *For Your Information*.) The DOL has recently focused more of its audit attention on whether plan sponsors are staying on top of finding missing participants so that plans can issue required distributions to them. (See our *For Your Information* from [March 15, 2016](#).) More recently, audits have intensified with DOL alleging fiduciary breaches and assessing prohibited transaction penalties over missed payments in some cases. At plan termination, under final PBGC regulations, defined contribution plans can turn over lost participant balances to the PBGC missing participant program after making a diligent search for the participants. PBGC will also take funds for uncashed checks that have not been cashed by the “cash-by” date prescribed on the check or by a notice (see our [January 2, 2018](#) *For Your Information*).

The IRS provided a [Field Directive to its Agents](#) on the steps plan sponsors must take 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.

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 update their beneficiary designations and let them know if they are required to use specific plan forms for making their designation.

Address foreign asset reporting obligations. 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.

Review forfeitures and investment credits. On an annual basis, plans with a vesting schedule may accumulate funds in a forfeiture account. Many plans provide that nonvested balances may be forfeited when the participant takes an actual distribution or after five one-year breaks in service. In addition, plans may accumulate credits from revenue sharing that are deposited into “ERISA accounts.” The plan must provide for how the forfeitures and revenue sharing will be used — to pay expenses, reduce contributions or be reallocated. At the end of the plan year, these accounts should be reviewed to confirm that no unused balances are held unallocated.

Watch out for IRS audit issues. IRS often shares information about the types of mistakes they are picking up in plan audits. For defined contribution plans, they report finding that compensation used for plan allocations or nondiscrimination tests doesn’t always match plan document definitions, automatic enrollment is not properly implemented, and employee deferrals do not correctly reflect participant elections. A self-audit is a good tool for finding and correcting these issues. The IRS website contains excellent resources for areas to focus on and acceptable correction methods.

Confirm all payroll processes are clean and audited for year-end testing. Ensure that all relevant data is clean to enable year-end testing to start promptly with the new year. If highly compensated employees’ deferrals must be capped for testing purposes, early identification will prevent participants from exceeding plan limits. If any employer contributions are computed on an annual basis, or if the plan provides for the “true-up” of matching contributions, confirm that these calculations are addressed.

Don’t Forget to Update Plan Limits

IRS will soon announce changes to qualified plan limits. Check with your payroll department and your administrative service provider to make sure the new limits will be properly taken into account when determining contributions.

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 these losses. So, obtaining fiduciary liability insurance in the appropriate amount has become more imperative. DOL has stepped up reviews and is keeping score of ever-increasing monetary recoveries resulting from their investigations — [1,707 investigations](#) were undertaken in 2017 with 65.3 percent 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 the policy 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.

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 discretionary amendments by the end of the year in which the amendment is operationally put into effect and provide extended amendment periods (generally) 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.

If you missed making required amendments, consider filing a correction under the IRS' Voluntary Correction Program (VCP). IRS announces the VCP fees and associated rules each January in its Revenue Procedure for written determinations. Beginning in 2018, discounted VCP fees are no longer available to sponsors who voluntarily correct plan document failures within one year after the applicable deadline, which was the case for earlier years. Although VCP filings can be costly, self-correction without filing is not permitted in this circumstance.

Some amendments to attend to include changes in disability claim procedures (typically in documents or SPDs, but not required to maintain qualification), how the plan uses forfeitures, provisions for disaster-related distributions and loans, and possible distribution and compensation changes stemming from modifications in the 2017 Tax Cuts & Jobs Act (TCJA) and the 2018 Bipartisan Budget Act (BBA). These include:

Changes to compensation definitions. The TCJA changed the tax treatment of certain fringe benefits, such as moving expenses for non-military personnel and bike commuting expenses for 2018. These changes may affect whether these items count as plan compensation for purposes of determining contributions and benefits. Even if there is no impact on plan compensation, it may be necessary or desirable to amend the definitions of pay used to

Service Providers Need to Know

Have you provided your recordkeeper, consultant, TPA, etc., with copies of current signed documents? Have you informed them of any changes in your controlled or affiliated service group? 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!

identify HCEs and apply the 415 limits. Also, changes may need to be made in data collection and payroll practices to avoid potential errors in calculating contributions and determining HCEs for nondiscrimination testing.

Tax law changes for hardship withdrawals. TCJA and BBA introduced several changes for hardship withdrawals that may require mandatory or discretionary plan amendments:

- Effective January 1, 2018, casualty loss deductions were limited based on federal disaster area declarations. Plans that limit casualty withdrawals based on deductibility need to either change operations, or amend to expand the plan's definition of hardships, keeping in mind that they may lose safe harbor status on their hardship rule. (See our [February 15, 2018 For Your Information.](#))
- Effective January 1, 2019, Congress instructed IRS to revise the safe harbor hardship withdrawal rule for demonstrating that a distribution is necessary to satisfy an immediate and heavy financial need by eliminating the need to take loans before taking hardship distributions and the requirement to suspend employee contributions for six months after the withdrawal. In addition, plans can now allow hardship withdrawal of QNECs, QMACs and earnings on elective deferral (pre-tax and Designated Roth) contributions. See our [February 9, 2018 Legislate](#) for information on the changes. Note that, as of this writing, it is not clear whether a 401(k) plan that uses a nondiscrimination safe harbor must remove the six-month suspension requirement for the 2019 plan year due to the elimination of that permitted restriction on elective deferrals, or whether the plan can wait for IRS guidance to be issued.

In addition to meeting amendment deadlines, plan sponsors will want to refine plan communications as early as possible so that participants can appreciate the degree to which a deferral election will affect other financial considerations.

Use of forfeitures. Revised IRS regulations adopted in 2018 gave way to the widespread practice of using forfeitures to cover QNECs, QMACs, and safe harbor contributions as described in our [July 20, 2018 For Your Information.](#) Discretionary plan amendments may be needed to the extent prior plan language or administrative practice conflicts with the plan sponsor's intended approach.

Hurricane and disaster relief amendments. IRS issued several rounds of disaster relief that allowed plan sponsors to issue hardship distributions and loans before the plan document was amended to provide them, if the plan document is then amended to conform to plan operations. In addition, the TCJA added some special tax benefits for disaster distributions, including a repayment option. The BBA also added specific relief for 2017 California wildfires including rollovers and special loan rules. Discretionary amendments would be needed by the end of the first plan year for which any of these special rules are permitted.

If you had groups affected by natural disasters and used any of the special relief from Congress or IRS about plan distributions or loans, be sure to attend to any required amendments — some due in 2018 — needed to support your response.

Disability claims procedures. Retirement plans that make their own determinations of disability rather than relying on a determination by the employer's long-term disability plan or the Social Security Administration, need to amend their claim procedures to meet DOL requirements that went into effect on April 1, 2018, as noted in our [January 9, 2018 For Your Information.](#)

Make sure your summary plan description matches your plan document. An SPD is not just a disclosure that is required under ERISA. A well-drafted SPD also plays an important role in minimizing disputes with claimants that can result in successful challenges of 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.

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.

Fee Disclosures

ERISA 408(b)(2) fee disclosure notices to plan sponsors by covered service providers initially went out in 2012. Notices are not required to be sent annually so it's important that plan sponsors review current arrangements, especially in light of rising plan balances, to validate that fee arrangements are still reasonable. Depending on when plan services were last put out to bid, it may be time to revisit. Whether or not electing to rebid plan services, it is equally important to document why the decision was made to stay with the current provider as it is to document there was a need for a change. Courts have held that plan fiduciaries that follow a prudent process designed to ensure that the actions taken were for the exclusive benefit of the plan participants have not breached fiduciary duties even if the outcome could have been better. In addition, plan sponsors may wish to consider fiduciary training for the individuals responsible for making decisions about plan assets.

Plan Features to Boost Retirement Savings

If you share the concern that your employees may not have sufficient funds to last through retirement, the timing may be right to add provisions such as auto-enrollment or auto-escalation to boost participant savings rates. If you're thinking of amending a 401(k) plan to add an automatic enrollment or auto-escalation feature (or of revamping one that is already in place), you will need to act soon. Plans generally need to furnish notices to participants describing the automatic contribution arrangement that will be in effect 30 to 90 days before the start of the plan year.

You may also consider adding annuities to your retirement plans now that the IRS and DOL have made it easier to do so. In 2014, the IRS issued final regulations on qualifying longevity annuity contracts that, if properly structured, enable a participant to start payments at an advanced age — as late as 85 — and exclude the value of the annuity from required minimum distribution calculations. Our [July 10, 2014 For Your Information](#) explains the option.

And if your workforce includes a significant number of individuals struggling to pay off student loans, a new approach to plan contributions would match student loan repayments with nonelective plan contributions to the plan for those participants who are losing out on matching contributions because they cannot afford to make deferrals. The idea has attracted a great deal of attention on the heels of the release of a private letter ruling. Our [August 30, 2018](#) *For Your Information* explains how this works. Hopes are high that IRS will soon release guidance that will offer reliance more broadly and address some unanswered questions.

In Closing

Planning with trusted advisors to identify tasks and set compliance goals for the coming year is an important first step for assuring smooth operations in 2019. In addition to the above referenced testing and reporting requirements, you may want to perform an annual “checkup” (i.e., a review of operational practices and fiduciary responsibilities). The checkup should address plan expenses, design considerations, participant fees and investments, and confirm compliance with the terms of the plan document and investment policy statement, if any. Review compliance test results with an eye toward making necessary plan design changes to improve testing results or eliminate testing altogether. You may elect to conduct your own review or contract with an independent party. Regardless of who performs the review, identifying problems and initiating corrections in advance of any audit by a government agency is the preferred course of action.

Calendar of Significant Defined Contribution Plan Compliance Tasks¹

Action Item	Due Date
January	
Form 945 to IRS (to report income withheld on distributions)	January 31, 2019
Form 1099-R, 1099-DIV to participants (or write letter for 30-day extension)	January 31, 2019
February	
Form 945 (alternative date if withholding deposits timely made)	February 11, 2019
Fourth quarter benefit statements	February 14, 2019
Form 1099-R to IRS (if paper; or file Form 8809 for 30-day extension)	February 28, 2019
March	
Notice of intent to request prior year funding waiver (money purchase pension plans)	March 1, 2019

¹ Assumes calendar plan and sponsor tax 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, distributions and other Title I ERISA obligations. If a deadline is not extended to the next business day, be sure to take appropriate action in advance of the deadline.

Action Item	Due Date
ADP/ACP test corrective distributions to avoid excise taxes, unless EACA for full year 2018	March 15, 2019
Request for prior year minimum funding waiver (money purchase pension plans)	March 15, 2019
Report U.S. 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, 2019
April	
Required minimum distributions for first time qualifying participants including 5% owners	April 1, 2019
Form 1099-R to IRS (if electronic; or file Form 8809 for 30-day extension)	April 1, 2019
Form 5330 excise tax on prior year (2017 testing year) excess contributions and excess aggregate contributions	April 1, 2019
Distribution of all excess 2018 deferrals (over \$18,500 plus \$6,000 catch-up)	April 15, 2019
File IRS Form 990-T to report and pay any unrelated business income tax owed by the Trust (or file for 6-month filing extension on Form 8868). This tax is sometimes triggered if the plan's trust earns income from certain plan investments (for example, limited partnership interests).	April 15, 2019
May	
First quarter benefit statements	May 15, 2019
June	
EACA corrective distributions (to avoid 10% excise tax on ADP/ACP refunds)	June 30, 2019
July	
Summary of material modifications if amendments adopted in 2018	July 29, 2019
2018 Form 5500 and 8955-SSA (or file Form 5558 to request an extension if not relying on corporate tax return extension)	July 31, 2019
Form 5330 excise tax on funding deficiency for money purchase pension plans, nondeductible contribution, prohibited transaction, etc. (or file Form 5558 to request 6-month extension)	July 31, 2019
Statement of deferred vested benefits (SSA information) to terminated participants (unless on Form 8955-SSA extension)	July 31, 2019
Annual participant statement (if no right to direct investments and not on extension for Form 5500)	July 31, 2019

Action Item	Due Date
August	
Second quarter benefit statements	August 14, 2019
Participant fee disclosures in plans with participant directed investments	August 30, 2019 (up to 14 months from last mailing, if later)
September	
Minimum funding contribution due (money purchase pension plans)	September 15, 2019
Summary annual report, if no 5500 extension	September 30, 2019
October	
Earliest day to send out safe harbor notices for 401(k)/401(m) nondiscrimination safe harbor plans (including notice of qualified automatic contribution arrangement) and plans with eligible automatic contribution arrangements.	October 3, 2019
Retroactive amendment to correct prior year coverage/nondiscrimination failures	October 15, 2019
Annual participant statement (if no right to direct investments and either using Form 5558 extension for Form 5500 or corporate return extension for 5500)	October 15, 2019
2018 Form 5500, 8955-SSA, and SSA information to participants, if on Form 5558 extension or corporate return extension for 5500	October 15, 2019
QSLOB Form 5310-A modification or revocation election (if changing QSLOB for the 2018 plan year.)	October 15, 2019
November	
Third quarter benefit statements	November 14, 2019
December	
Deadline for participant notices including: auto-enrollment, QDIA, safe harbor	December 2, 2019
Summary annual report if Form 5500 extension using either Form 5558 or corporate return extension	December 15, 2019
Required minimum distributions	December 31, 2019
Corrective distributions for 2018 plan year	December 31, 2019
Last day to adopt discretionary plan amendments for 2019	December 31, 2019

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