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2019 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 2019.

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
- July 31, 2018 on PBGC proposed valuation and notice requirements for insolvent plans
- September 21, 2018 on PBGC's final regulation for facilitated mergers

Comment: Treasury has approved seven applications under the new benefit suspension option.

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. 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.

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 — 1,707 investigations 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.

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.

The IRS provided 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.

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 final rules, at plan termination, PBGC will accept funds to cover missing participants — but will generally require the administrator to make a diligent effort to find former workers due a pension. PBGC will also accept funds for uncashed checks that have not been cashed by the "cash-by" date prescribed on the check or by a notice. Final changes to the program (see our January 2, 2018 *For Your Information*) modified their search requirements to generally match DOL guidance for terminating DC plans, but the DOL's requirement to search other employer plan records would not be required for DB plans that use a commercial locator service.

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.

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. If amendments are needed for mandated changes, be sure to meet the applicable 2019 deadline provided in the IRS' Required Amendments (RA) list — though note that deadlines may be deferred in the case of collectively bargained plans based on timing of expiring agreements. Our December 12, 2017 *For Your Information* discusses the following topics on the most recent RA list:

> **Cash balance and other hybrid plans.** Under final regulations for these plans, amendments needed to comply with the market-rate-of-return regulation were generally required by the end of the 2016 plan year, as reported in our November 16, 2015 *For Your Information*. The interest crediting rate under the plan may not be the only issue that required an amendment. Many plans need to adjust other provisions for going forward, such as lookback and stability periods, early and late retirement factors, and plan termination rules.
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> **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.

Additional amendments to attend to include changes in disability claim procedures (typically in documents, but not required for maintaining qualification) and possible compensation changes stemming from modifications in the 2017 Tax Cuts & Jobs Act. These include:

> **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*.

Moving expenses in compensation definitions. The Tax Cuts & Jobs Act 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 what 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 apply the 415 limits and identify HCEs. Also, changes may need to be made in data collection and payroll practices.

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. 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 VCPs are costly, the alternative of self-correction without filing is not permitted in this circumstance.

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.

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.

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!

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 $1,693 per day for failing to furnish them.

Communicating with Your Actuary

2019 presents an opportunity for continuing discussion on rational funding expectations, managing escalating PBGC premiums, and reviewing reasonability of valuation and withdrawal liability 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 after performing an experience study. 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 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.

For plans under Rehabilitation (RP) or Funding Improvement Plans (FIP), plan trustees should consider using stochastic modelling. Stochastic projections provide additional information to Trustees that allow Boards to be proactive to ensure their plans emerge from their RP or FIP and continue to improve funding.

Withdrawal liability assumption. The question of whether a plan's withdrawal liability discount rate must be set equal to the funding interest rate has been the subject of recent litigation. In all but one case, courts have ruled that different rates are appropriate due to the nature of the calculation and risks created by the withdrawal. Consult with legal counsel on this question and review the rates and rationale with your actuary.

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 $29 (for 2019) per plan participant and will continue to be indexed after 2019 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 as well as plan liabilities in general. 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 on "economically targeted" investments, also referred to as "environmental, social and governance" investing, has vacillated with each recent change in Administration. The most recent view says that fiduciaries' first priority must be the economic interests of the plan in providing retirement benefits — meaning those that have a material effect on the risk and return of an investment, based on appropriate investment horizons and consistent with the plan's funding and investment objectives. While ESG factors can be economically relevant, fiduciaries should not "too readily" treat them as such. An investment is not necessarily prudent because it promotes ESG factors or "arguably promotes general market trends or industry growth." Plan administrators and trustees should have a process for periodically reviewing all plan investment options. Our April 27, 2018 *For Your Information* discusses the most recent DOL guidance on ESG factors.

Create or update your investment policy statement. For plan investments, fiduciaries should consider adopting an investment policy statement (IPS) if they haven't done so already. If an IPS is already 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.

In Closing

Planning with trusted advisors to identify tasks and set compliance goals is an important first step for assuring smooth operations in 2019. 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[1]

Action Item	Due Date
January	
2017 Form 5500 basic information and Schedule MB posting (assumes October 15, 2018 filing)	January 13, 2019
Form 1099-R to participants (or write letter for 30-day extension)	January 31, 2019
Form 945 to IRS (to report income withheld on distributions)	January 31, 2019
February	
Form 945 (alternative date, if withholding deposits timely made)	February 11, 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 amortization extension	March 1, 2019
Request for prior year minimum funding amortization extension	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
Zone certification for 2019 year from enrolled actuary to IRS and trustees	March 29, 2019[2]

[1] 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. Refer to our Reporting and Disclosure Guide for additional information and deadline descriptions.

[2] Assumes actuary will provide before the weekend this year.

Action Item	Due Date
April	
Required minimum distributions for first time qualifying participants	April 1, 2019
Form 1099-R to IRS (if electronic; or file Form 8809 for 30-day extension)	April 1, 2019
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 15, 2019
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 29[2])	April 28, 2019
Annual Funding Notice	April 30, 2019
July	
Summary of material modifications if amendments adopted in 2018	July 29, 2019
Form 5330 excise tax on funding deficiency, nondeductible contribution, prohibited transaction, etc. (or file Form 5558 to request 6-month extension)	July 31, 2019
2018 Forms 5500 and 8955-SSA (or Form 5558 to request an extension)	July 31, 2019
Statement of deferred vested benefits (SSA information) to participants (unless on Form 8955-SSA extension)	July 31, 2019
August	
Summary plan report to employee organizations and contributing employers, if not on Form 5500 extension	August 30, 2019
September	
Minimum funding contribution (balance due for 2018 year)	September 15, 2019
October	
2018 Forms 5500, 8955-SSA, and SSA information (to participants), if on Form 5558 extension	October 15, 2019
PBGC premium due	October 15, 2019

Action Item	Due Date
November	
Notice of insolvency benefit level, if applicable for 2020 (if insolvency determination by September 3, 2019)[3]	November 2, 2019
Summary plan report to employee organizations and contributing employers, if on Form 5558 extension	November 15, 2019
Funding improvement plan or rehabilitation plan adoption	November 26, 2019
December	
Notice of funding waiver request for 2018	December 17, 2019
Notice of funding improvement plan or rehabilitation schedule	December 26, 2019
Minimum funding waiver request for 2018	December 31, 2019
Required minimum distributions	December 31, 2019
Triennial benefit statements/ annual alternative notice	December 31, 2019
Last day to adopt discretionary plan amendments for 2019	December 31, 2019
Request change in funding method	December 31, 2019
Request for approval of retroactive amendment reducing accrued benefits (to 2017 plan year)	December 31, 2019

[3] Required to be filed electronically. See our September 28, 2015 *For Your Information*.

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