

Compensation and Benefits Insights

NOVEMBER 2016

EPCRS Is Updated To Reflect Recent Revisions

Author, *James P. Cowles**, Atlanta, +1 404 572 3455,
jcowles@kslaw.com

After many updates and revisions, the IRS has finally issued [Revenue Procedure 2016-51](#), a complete revision of the Employee Plans Compliance Resolution System that incorporates all previous changes and makes a few additional changes (“EPCRS”).

Background:

The IRS released the new EPCRS guidance on September 29, 2016, and it is effective on January 1, 2017. EPCRS is an IRS program that allows plan sponsors to correct certain retirement plan errors and avoid substantial penalties, including possible plan disqualification. EPCRS was initially established by the IRS in 1998 (Revenue Procedure 1998-22) and has become a familiar tool that many practitioners and/or plan sponsors have used to correct operational or plan document failures in qualified retirement plans.

Generally, EPCRS provides for the following three separate correction programs:

- 1) Self-Correction Program (SCP) – A program in which a plan sponsor may “self-correct” certain operational failures (without submitting any documentation to the IRS);
- 2) Voluntary Correction Program (VCP) – A program in which a plan sponsor may correct certain operational or plan document failures with the approval of the IRS (which requires submitting certain documentation to the IRS and the payment of fees); and
- 3) Audit Closing Agreement Program (Audit CAP) – A program in which a plan sponsor may correct operational or plan document failures that were identified during an IRS audit (also with the payment of potentially significant fees to the IRS).

Our Practice

We advise public, private, taxable and tax-exempt clients on a wide variety of issues related to the design, preparation, communication, administration, operation, merger, split-up, amendment and termination of all forms of employee benefit plans and executive compensation programs and related funding vehicles. The firm has defended clients in significant high-profile ERISA litigation matters, including 401(k) plan “stock drop” cases and other breach-of-fiduciary-duty class actions.

Contact

Kenneth A. Raskin

Chair of the Employee
Benefits & Executive
Compensation Practice
New York
+1 212 556 2162
kraskin@kslaw.com

Compensation and Benefits Insights

This Article identifies only the significant changes that were made by the most recently issued EPCRS program.

Significant Changes to EPCRS:

- A) Current Favorable Determination Letter no longer required for individually designed plans to enter SCP.
Currently, individually designed plans must be subject to a current favorable determination letter (“FDL”) to be eligible to correct significant operational failures under SCP. However, effective January 1, 2017, the FDL is no longer required to be “current” (i.e. updated for current law). This change conforms to the recent elimination of the FDL program for ongoing individually designed retirement plans. For more information on the elimination of the FDL program, refer to our August 2016 Compensation and Benefits Insights [here](#). Pre-approved plans (generally, prototype and volume submitter plans) must have a current opinion letter to be eligible for SCP.
- B) VCP corrections that include a plan amendment no longer require an FDL application Previously, if a plan amendment was required to correct a failure under either VCP an application for an updated FDL was also required (pursuant to Form 5300). An FDL application is no longer required, nor permitted, as part of a VCP correction. Additionally, the IRS clarified that a compliance statement, issued as a result of a VCP or Audit CAP correction, in no way constitutes a determination as to the qualification of an amendment adopted as part of a corrective action.
- C) Fees and Sanctions. The user fees for correction under EPCRS will be published annually in a separate revenue procedure. Additionally, Audit CAP fees will be determined on a facts-and-circumstances basis. Currently, Audit Cap sanctions are a negotiated percentage of the amount that is approximately equal to the tax the IRS could collect upon plan disqualification.

[INSIGHT: The facts and circumstances determination of the Audit CAP sanction will provide for additional negotiation room with regard to the fee amount, but will also introduce more uncertainty as to the amount of the possible sanction.]

If you have any questions, or if King & Spalding can assist you in any way, please contact us.

*Non-lawyer Employee Benefits Consultant

PBGC Proposed Rule Expands Missing Participants Program for Defined Contribution Plans

Author, Mark Kelly, Atlanta, +1 404 572 2755, mkelly@kslaw.com

Since 1996, the PBGC’s Missing Participants Program (the “Program”) has helped connect missing participants with benefits they are entitled to receive from terminated single-employer defined benefit pension plans. Recently, the PBGC issued [proposed regulations](#) and [FAQs](#) that would significantly expand the Program to include terminated defined contribution plans (“DC Plans”), such as 401(k) and profit sharing plans. The proposed regulations also modify the missing participant rules for defined benefit plans, and add provisions applicable to small professional service defined benefit plans (which are not covered by PBGC insurance) and multiemployer plans covered by the PBGC. Participation in the Program will be voluntary for DC Plans, and will be generally effective with respect to plan terminations occurring after the 2017 calendar year.

Compensation and Benefits Insights

Under the Program, a terminating DC Plan has a choice whether to be a “transferring” plan or a “notifying” plan. A transferring plan is a plan that transfers the missing participant’s benefit to the PBGC; the PBGC then assumes responsibility for periodically searching for and distributing the benefit to the missing participant. The PBGC will accept account transfers of any size. However, if a plan elects to be a transferring plan, it must transfer the benefits of all missing participants to the PBGC. This is to prevent “cherry-picking” (i.e., the possibility that all small accounts would be transferred to the PBGC while larger accounts that can generate larger fees would be transferred to commercial IRA providers). Transferred accounts will grow with interest at the Federal mid-term interest rate. With respect to account balances over \$5000, the participant can elect to receive distributions in either a lump sum payment or an annuity. For transferring plans, the PBGC is initially proposing a one-time fee of \$35 per participant, which will be waived for benefit transfers of \$250 or less. Unlike commercial IRA providers, accounts transferred to the PBGC will not be subject to on-going maintenance fees or charges for distributions; fiduciaries will need to carefully consider the cost difference when deciding whether to transfer missing participant accounts to the PBGC pursuant to the Program versus to a commercial IRA provider.

A notifying plan, on the other hand, is a plan that notifies the PBGC regarding the IRA provider to whom the employer has transferred a missing participant’s benefit. Any participants that the PBGC cannot locate immediately will be added to the searchable PBGC data base of missing participants so that participants or their beneficiaries can easily find out where their benefit is held. There would be no fee for notifying plans and no requirement that a notifying plan provide IRA information with respect to all missing participants. While participation in the Program is currently voluntary, the proposed regulations indicate that the PBGC may consider in later guidance whether to make reporting mandatory for non-transferring plans.

The proposed regulation makes some other notable changes and clarifications applicable to DC Plans including:

- Modifying the criteria for being “missing” to include participants who fail to elect a form or manner of distribution, even though their whereabouts is known.
- Confirming that the “diligent search” required with respect to missing DC Plan participants is satisfied if conducted in accordance with the DOL’s Field Assistance Bulletin No. 2014-01. In general, this requires a plan fiduciary to (i) use certified mail when attempting to notify a participant of his benefit, (ii) contact the participant’s employer and fiduciaries of other employer plans, (iii) contact the participant’s designated beneficiaries, and (iv) make use of free internet search tools. Other search steps may be required depending on the size of the participant’s account balance and the cost of further search efforts.

While the proposed regulation greatly expands the potential reach of the Program, limitations remain. For instance, the Program is only available to locate missing participants upon plan termination; it will not help locate missing participants in on-going plans. Further, while the Program will be available to most single-employer and multi-employer DC Plans, governmental and church plans will not be covered.

King & Spalding is available to assist you with issues relating to your retirement plans, including application of the Missing Participants Program.

Compensation and Benefits Insights

December 2016 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

Author, *Ryan Gorman*, Atlanta, +1 404 572 4609, rgorman@kslaw.com

Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for the next month. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is generally delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

Deadline	Item	Action	Affected Plans
December 1 (at least 30 but no more than 90 days before the beginning of the plan year)	Safe Harbor Notice	Deadline for plan administrator to distribute a notice of intent to use a safe harbor formula to participants and beneficiaries. This notice must be provided within a reasonable period of time before the beginning of the plan year. The regulations provide a safe harbor of not less than 30 days but not more than 90 days before the beginning of the plan year.	401(k) and 401(m) Plans
	Contingent Safe Harbor Notice	Deadline for plan administrator to distribute a notice to participants and beneficiaries specifying that the plan may be amended during the following plan year to include a 3% employer non-elective safe harbor contribution.	401(k) and 401(m) Plans

Compensation and Benefits Insights

Deadline	Item	Action	Affected Plans
	Auto-Enrollment Notice	Deadline for plan administrator to provide annual auto-enrollment notice for plans with qualified automatic contribution arrangements (QACA) or eligible automatic contribution arrangements (EACA). This notice must be provided sufficiently early so that the employee has a reasonable period of time after receipt to make QACA or EACA elections. The preamble to the regulations notes that this timing requirement is deemed to be satisfied if the notice is given at least 30 days but not more than 90 days before the beginning of each plan year.	401(k) Plans with QACA or EACA
December 1 (at least 30 days before the end of the plan year)	Qualified Default Investment Alternative (QDIA) Annual Notice	Deadline for plan administrator to provide annual QDIA notice to participants or beneficiaries.	Defined Contribution Plans with participant-directed investments
	Safe Harbor Follow-Up Notice	Deadline for plan administrator to distribute a notice to participants and beneficiaries informing them that the 3% employer non-elective safe harbor contribution will be made for the current plan year. This notice may be combined with the Contingent Safe Harbor Notice for the following plan year.	401(k) and 401(m) Plans
December 1 (at least 30 days prior to the first day of the new plan or policy year)	Summary of Benefits and Coverage for Health Plans that Automatically Renew Coverage	Deadline for group health plan administrator (for self-insured plans) or group health plan administrator or insurer (for fully insured plans) to provide a Summary of Benefits Coverage (SBC) if coverage automatically renews each year.	Group Health Plans and Health Insurance Issuers

Compensation and Benefits Insights

Deadline	Item	Action	Affected Plans
December 1 (no later than 30 days before participant becomes eligible to diversify employer stock)	Diversification Notice	Deadline for plan administrator to provide diversification notice to participants who will first be eligible to divest employer securities on January 1.	Defined Contribution Plans with participant-directed investments in employer stock
December 15 (2 months after the extension for filing Form 5500)	Summary Annual Report (SAR)	Deadline for plan administrator to distribute SAR for prior year to participants and beneficiaries, if the IRS granted a 2-month extension for Form 5500 on or before the original Form 5500 deadline.	Defined Contribution Plans
December 31 (last day of plan year following plan year for which contributions were made)	Correction of Excess Contributions & Excess Aggregate Contributions	Deadline for plan administrator to make corrective employer contributions or distribute excess contributions (ADP test failure) and excess aggregate contributions (ACP test failure) for the prior year.	401(k) and 401(m) Plans
December 31 (last day of plan year)	Discretionary Amendments	Deadline for plan sponsor to adopt discretionary plan amendments for calendar-year plans.	Qualified Retirement Plans*
	Adjusted Funding Target Attainment Percentage (AFTAP) Certification	Deadline for actuary to certify a specific AFTAP if a range certification was previously issued.	Defined Benefit Plans

* Qualified Retirement Plans include all defined benefit and defined contribution plans that are intended to satisfy Internal Revenue Code §401(a).

Compensation and Benefits Insights

Deadline	Item	Action	Affected Plans
December 31 (at least annually)	ERISA §404(c) Disclosures	Deadline for plan administrator to distribute notices to participants and beneficiaries if the employer wants to limit fiduciary liability for participant-directed investment decisions.	Defined Contribution Plans with participant-directed investments
	Annual Fee Disclosure to Participants	Deadline for plan administrator to make annual disclosure of certain fees for participant directed individual account plans to be provided to participants and beneficiaries.	
	Pension Benefit Statements	Deadline for plan administrator of a defined benefit plan using alternative notice for pension benefit statements to notify participants of availability of a pension benefit statement and instructions on how to obtain it.	Defined Benefit Plans
December 31 (at least annually as a part of any yearly informational packet)	WHCRA Notice	Deadline for group health plans to distribute Women's Health and Cancer Rights Act (WHCRA) notice for new plan year to all participants and beneficiaries advising them of available mastectomy benefits under WHCRA and any deductibles and co-insurance limits applicable to such benefits.	Health and Welfare Plans
	Children's Health Insurance Program Reauthorization Act (CHIPRA) Notice	Deadline for employer to notify employees of potential opportunities for premium assistance from the state in which the employee resides.	Group Health Plans in states that provide premium assistance under Medicaid or CHIP

Compensation and Benefits Insights

Deadline	Item	Action	Affected Plans
	Wellness Program Notice	Effective as of the first day of the plan year that begins on or after January 1, 2017. No specific deadline is provided. However, the notice must be provided before employees provide any health information for the program and with enough time to decide whether to participate in the program.	Group Health Plans offering wellness programs
December 31	Required Minimum Distributions	Deadline for plan administrator to distribute current year's required minimum distributions under IRC §401(a)(9).	Qualified Retirement Plans