

Compensation and Benefits Insights

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2018 IRS Compliance Priorities Offer Glimpse Into Retirement Plans Under Scrutiny

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On September 28, 2017, the IRS released the Tax Exempt and Government Entities FY 2018 Work Plan (the “2018 Work Plan”), which summarizes areas of focus for the IRS as it relates to enforcement of noncompliance for employee benefit plans. The IRS’s fiscal year began October 1, 2017, so these enforcement priorities are currently applicable.

1. Compliance Strategies: The IRS will prioritize examinations of the following plans:
 - a. **Mergers/Acquisitions**: Plans that have transferred assets or liabilities to another plan as a result of a merger or acquisition.
 - i. *Note*: This can be flagged based on Form 5500 reporting.
 - b. **Discrimination**: Plans that failed gateway testing, actual deferral percentage testing, actual contribution percentage testing, failed to properly provide timely notices to participants, and/or failed to provide the required safe harbor contribution to all eligible participants.
 - c. **Participation/Coverage**: Plans that do not satisfy minimum age/service requirements or meet statutory requirements in form but fail eligibility in operation.
 - d. **Distributions**: Plans that fail to make minimum required distributions under Section 401(a)(9) of the Internal Revenue Code of 1986, as amended (the “Code”), or distributions in accordance with plan terms.

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.

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- e. **Trust Investments In Small Plans:** Plans that fail to properly value assets at fair market value and/or properly reflect all plan assets in the name of the trust (e.g., real estate investments).
- f. **Benefit Accruals:** Plans that fail to satisfy Code Section 411(b) benefit accrual rules.
- g. **Contributions/Earnings Allocations:** Plans that made erroneous allocations of contributions and/or forfeitures due to the use of incorrect definition of compensation and/or fail to make all matching contributions per plan terms.
- h. **Elective Deferrals:** Plans that fail to withhold the proper amount of elective deferrals per plan terms.

Identifying noncompliant plans in the areas identified above may prove difficult given that, with the exception of transferred assets, Form 5500 does not require reporting of such matters. For this reason, the optional “IRS Compliance Questions” of Schedule R to the Form 5500 may be required to be completed for future years in order to carry out these compliance initiatives.

- 2. **Sources/Referrals Regarding Noncompliance:** Sources listed by the IRS include (but are not limited to):
 - a. The IRS will continue to investigate and pursue allegations of noncompliance by a retirement plan received from sources within and outside the IRS.
 - b. The IRS will continue to review plan returns for indicators that may suggest noncompliance (e.g., data/information on a Form 5500 that significantly varies from prior year submissions).
- 3. **Continuing Compliance Checks:** The IRS will continue to use compliance checks in the following areas:
 - a. Plans with partial termination;
 - b. Plans with non-participant loans;
 - c. 403(b) Plans;
 - d. 457(b) Plans with excess deferrals;
 - e. SEP plans with required minimum distribution failures; and
 - f. SIMPLE IRA plans sponsored by more than 100 employees.

Takeaway for Employers

The IRS’s work plans for prior years specifically described audit initiatives and the number of resources targeted to only a handful of “specialty” risk areas. Shifting from past practice, the 2018 Work Plan provides a wider variety of issues that will be targeted by the IRS without an indication as to the resources dedicated to each area.

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Nonetheless, the 2018 Work Plan can provide helpful insight for employers that may have compliance issues on the list. For example, if an employer will be involved in a merger or transaction involving a transfer of plan assets or liabilities, it should be aware of the heightened audit risk. In addition, to the extent a plan sponsor is aware of operational failures associated with its plans that are enumerated on the compliance list, it may wish to take extra caution in correcting these errors as quickly as possible, including correction under the IRS's employee plans correction resolution system, if applicable. King & Spalding is available to assist employers in identifying and reviewing any such areas of concern.

IRS Clarifies 401(k) Plan Loan Cure Period Rules

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On September 8, 2017, the IRS released a Chief Counsel Advice memorandum addressing the cure period rules for loans from qualified retirement plans under Section 72(p) of the Internal Revenue Code of 1986, as amended (the "Code"). Chief Counsel Advice memorandum 2017-36022 (the "CCM") provides two examples of how missed loan repayments under 401(k) plans can be cured without violating Code Section 72(p) and resulting in a taxable distribution to the participant.

Plan Loans

Code Section 72(p) permits loans to participants from "qualified employer plans" (most commonly, 401(k) plans) without the loans being treated as a taxable distributions from the plans, provided the terms of the loans meet the requirements of Code Section 72(p) (e.g., limits on the amount and term of the loan).

Generally, if a loan is not repaid in accordance with its terms (i.e., an installment payment is missed), a deemed taxable distribution to the participant occurs unless the missed payment is made during a cure period that does not extend beyond the last day of the calendar quarter following the calendar quarter when the payment was due.

CCM Examples

The examples in the CCM assume the following facts: (i) the 401(k) plan permits loans and allows for a cure period to make up a missed installment payment by the last day of the calendar quarter following the calendar quarter in which it was due and (ii) the participant receives a plan loan on January 1, 2018 which complies with Code Section 72(p), with the last installment payment due on December 31, 2022.

1. Makeup Installment Payments

The participant timely makes installment payments from January 31, 2018 through February 28, 2019, but misses the March 31, 2019 and April 30, 2019 payments. The participant then makes payments on May 31, 2019 (which is applied to the missed March payment) and June 30, 2019 (which is applied to the missed April payment). On July 31, 2019, the participant makes a payment equal to three installment payments (which are applied to the missed May and June payments and the required July 31 payment).

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In all, there are four missed installment payments (March, April, May and June), but all are made within their respective cure periods. The cure period for the missed March payment ends June 30, so the May payment timely cures that missed payment. The cure period for the missed April, May and June payments ends September 30, so the June and July payments timely cures those missed payments.

In the CCM, the IRS clarifies that this schedule of makeup payments does not violate Code Section 72(p) and, as a result, no deemed distribution occurs as a result of any of the missed payments.

2. Replacement Plan Loan

The participant timely makes installment payments from January 31, 2018 through September 30, 2019, but misses the October 31, 2019, November 30, 2019 and December 31, 2019 installment payments. On January 15, 2020, the participant refinances the loan, with the new loan balance including the three missed installment payments. The new loan must be repaid in equal monthly installments through the end of the original loan's repayment term, December 31, 2022.

The cure period for the three missed loan repayments ends March 31, 2020. Because the refinanced loan pays off the entire outstanding balance of the original loan on January 15, 2020 (including the missed payments), all of the installments are timely repaid during their respective cure periods. As a result, the IRS indicates in the CCM that in this scenario, there is no violation of Code Section 72(p), and that no deemed distribution would occur.

Takeaway for Employers

Although the CCM may not be used as precedent, it provides helpful insights as to the IRS's interpretation of the flexibility permitted by 401(k) plan loan cure periods. Employers should be mindful that in order to take advantage of the relief summarized in the CCM, the 401(k) plan must expressly permit a cure period.

Loan cure periods avoid the unfortunate outcome of the entire loan balance (not just the missed payment) being deemed a taxable distribution upon a missed payment. King & Spalding is happy to assist with any questions employers may have regarding 401(k) plan loan rules.

November and December 2017 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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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 two months. 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.

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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
November 1 (by the first day of open enrollment)	Summary of Benefits and Coverage for Health Plans that Require Reapplication	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 written application materials are required for renewal.	Group Health Plans and Health Insurance Issuers
November 14 (within 45 days after the close of the third quarter)	Benefit Statements for Participant-Directed Plans	Deadline for plan administrator to send benefit statement for the third quarter of the plan year to participants in participant-directed defined contribution plans.	Defined Contribution Plans with participant-directed investments
	Quarterly Fee Disclosure	Deadline for plan administrator to disclose fees and administrative expenses deducted from participant accounts during the third quarter of the plan year. Note that the quarterly fee disclosure may be included in the quarterly benefit statement or as a stand-alone document.	
November 15 (the 15th day of the 11th month after the end of the plan year)	IRS Forms 990 and 990-EZ	Deadline for tax-exempt trusts associated with qualified retirement plans and voluntary employee beneficiary associations (VEBAs) to file Forms 990 or 990-EZ with the IRS for prior year if the trustee obtained a second 3-month extension by filing a Form 8868.	Qualified Retirement Plans* Voluntary Employee Beneficiary Associations

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

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Deadline	Item	Action	Affected Plans
November 15	Transitional Reinsurance Report and Second Installment Fee (if applicable)	Deadline for sponsors of self-insured health plans (including retiree plans) to report the number of “covered lives” under the plan. If the entity chose to pay the 2016 fee in installments, it must pay the remaining \$5.40 for each covered life by this date.	Self-insured Group Health Plans (including retiree 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
	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

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Deadline	Item	Action	Affected Plans
	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
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

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Deadline	Item	Action	Affected 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
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

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Deadline	Item	Action	Affected Plans
	Wellness Program Notice	Although no specific deadline is provided, 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