

# Compensation and Benefits Insights



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## Section 402(f) Model Rollover Notices Updated

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The IRS recently updated its two model safe harbor explanations that can be used to satisfy the requirement under Section 402(f) to provide notices setting forth certain information to participants who are eligible for rollover distributions. Specifically, [Notice 2018-74](#) modified the safe harbor explanations last amended in 2014 ([Notice 2014-74](#)). The recent amendments were made to incorporate the changes from the Tax Cuts and Jobs Act of 2017 ("TCJA"), as well as other recent guidance, into the safe harbor explanations.

As background, Section 402(f) includes certain notification requirements for participants in a qualified plan who are eligible for plan rollover distributions ("section 402(f) notice"). The section 402(f) notice must explain the rules for how to elect a direct rollover to another retirement plan, including the timing requirements and tax deferral implications. The first safe harbor explanation provided in Notice 2018-74 incorporates the rules for distributions from an account that is not a designated Roth account, and the second safe harbor explanation addresses the requirements for distributions from a designated Roth account.

The changes made to the safe harbor explanations in Notice 2018-74 reflect certain legislative changes and guidance issued since the Notice was last amended, including:

1. the extended rollover deadline for qualified plan loan offset amounts enacted under TCJA;
2. the exception to the 10% additional tax under § 72(t) for phased retirement distributions to certain federal retirees;

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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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3. the expanded exception to the 10% additional tax under § 72(t) for specified federal employees who have reached age 50; and
4. the self-certification procedures under Revenue Procedure 2016-47 for claiming eligibility for a waiver of the deadline for making rollovers.

The updated safe harbor explanations also include other modifications:

- clarifying that the 10% additional tax under § 72(t) for early distributions applies only to amounts includable in income;
- explaining how the rollover rules apply to governmental § 457(b) plans that include designated Roth accounts;
- clarifying that the general exception to the 10% additional tax under § 72(t) for payments from a governmental plan made after a qualified public safety employee separates from service (if the employee will be at least age 50 in the year of the separation) is not available for payments from IRAs; and
- recognizing the possibility that taxpayers affected by federally declared disasters and other events may have an extended deadline for making rollovers.

The requirements of the section 402(f) notice may be satisfied by using language different from what is provided in the model, but any notice must include all of the required information under Section 402(f) and be written in a format that is easy to understand. In addition, the model notices provided in Notice 2018-74 may be used to satisfy the section 402(f) notice requirement, but plan administrators should note that any changes to the law after September 18, 2018 will need to be incorporated into a revised notice.

King & Spalding would be happy to answer any questions you have about Notice 2018-74.

## IRS Private Letter Ruling on Student Loan Repayment Benefit Under 401(k) Plan

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### Background

In recent years, employers have taken extra steps to help their employees save for retirement. Some examples of these efforts include implementing automatic enrollment and/or automatic elective deferral increases for their 401(k) plans. Despite these and other attempts to make saving for retirement easier, many employees are still unable to save because they are saddled with student loan debt. Employers have begun to recognize this and some are trying to help.

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Several creative alternatives have been considered to help employees with student loan debt, such as offering direct payment of outstanding loans or providing additional compensation based on the amount of debt being paid. One employer seeking a solution to help its employees who are burdened by student loan debt sought approval from the Internal Revenue Service (“IRS”) to permit it to make employer nonelective contributions to a 401(k) plan conditioned on student loan repayments (“SLR nonelective contributions”).

## Private Letter Ruling

As a result, the IRS issued a private letter ruling (“PLR”) on August 17, 2018 ([PLR 201833012](#), May 22, 2018) in response to the employer’s proposal to amend its 401(k) plan (the “Plan”) to allow for a student loan benefit program. Under the terms of the Plan prior to its amendment, employees could make elective deferrals and if an employee made deferrals of two percent or more during a pay period, the employer would make a five percent matching contribution during such pay period based on the employee’s eligible compensation.

The employer requesting the ruling wished to amend its Plan such that it would make an SLR nonelective contribution of five percent for any employee who makes a student loan payment that is equal to at least two percent of the employee’s compensation during a pay period. According to the proposed amendment, an employee who participates in the student loan benefit program could continue making elective deferrals, but would not be eligible to receive the matching contribution described above.

Under the amendment, employees would be able to enroll in the student loan benefit program even if they did not otherwise make elective deferrals under the Plan. In addition, if there is a pay period where the participant does not make a student loan payment of at least two percent of his or her eligible compensation, but makes an elective deferral of at least two percent, the employee will receive the matching contribution at the end of the plan year (“true-up matching contribution”). The SLR nonelective contribution would not be treated as a matching contribution for testing purposes under Section 401(m), but the true-up matching contribution would be.

The employer sought confirmation from the IRS that the proposed amendment to its Plan would not violate the “contingent benefit” prohibition under Section 401(k)(4)(A) and Treas. Reg. 1.401(k)-1(e)(6). Section 401(k)(4)(A) and Treas. Reg. 1.401(k)-1(e)(6) provide that an employer cannot condition “other benefits” on an employee’s making or not making 401(k) elective deferrals. This rule does not apply to employer matching contributions under Section 401(m).

The IRS held that the student loan benefit in this case was not conditioned on the employee electing to have the employer make or not make contributions under a cash or deferred arrangement and therefore, the amendment would not violate the “contingent benefit” prohibition. Further, the IRS stated that “because an employee who makes student loan repayments and thereby receives SLR nonelective contributions is still permitted to make elective contributions, the SLR nonelective contribution is not conditioned (directly or indirectly) on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving cash.”

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## Next Steps

Although PLRs apply specifically to the taxpayer who requests it, the ruling in this PLR may encourage other employers to consider implementing a similar program that gives them a way to compensate employees making student loan repayments on a pre-tax basis.

However, several questions were left unanswered by this PLR that need to be addressed. For example:

- How will the SLR nonelective contributions be characterized for nondiscrimination testing purposes?
- How does the employer verify the amount of student loan repayments made by the program participants?
- What are the plan document requirements for a plan with a student loan benefit program?
- Similarly, would a plan sponsor using a volume submitter 401(k) plan be able to implement the program without having an individually-designed plan in place?

We will continue to monitor the developments in this area as they occur. In the meantime, King & Spalding would be happy to help you develop a similar student loan benefit program that complies with the IRS qualification rules.

## October and November 2018 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 usually 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.

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Deadline	Item	Action	Affected Plans
October 15	Medicare Part D Creditable Coverage Notice to Individuals	Deadline for employers that provide prescription drug coverage to Medicare Part D eligible individuals to provide a written disclosure notice to Medicare eligible individuals and their dependents covered under the plan indicating whether their prescription drug coverage is creditable coverage.	Health and Welfare Plans that provide prescription drug coverage to Medicare Part D eligible individuals
October 15 (2 ½ months after extension granted)	Form 5500	Deadline for plan administrator to file Form 5500 for prior year if deadline was extended by filing a Form 5558.	Retirement Plans  Health and Welfare Plans
	IRS Form 8955-SSA	Deadline for plan administrator to file Form 8955-SSA if deadline was extended by filing a Form 5558.	Retirement Plans
October 15 (9 ½ months after the previous plan year)	PBGC Premium Filing	Deadline for plan administrator to pay flat-rate or variable PBGC premium for current plan year.	Defined Benefit Plans

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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.	

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Deadline	Item	Action	Affected Plans
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