

# Compensation and Benefits Insights



**JANUARY 2019**

## Notice 2018-97

**Authors,** *Lucretia Messiah*, New York, +1 212 556 2159, [lmessiah@kslaw.com](mailto:lmessiah@kslaw.com), *Laura Westfall*, New York, +1 212 556 2263, [lwestfall@kslaw.com](mailto:lwestfall@kslaw.com)

On December 7, 2018, the Internal Revenue Service issued [Notice 2018-97](#) (the “Notice”) providing initial guidance on Section 83(i) of the Internal Revenue Code (“Section 83(i”). Section 83(i), which was enacted by the Tax Cuts and Jobs Act (the “Act”), generally allows certain employees to defer recognition of income attributable to the receipt or vesting of qualified stock. (For more information on the Act, please refer to our [December 2017](#) newsletter). The Notice provides guidance on (i) the application of the requirement in Section 83(i) that grants be made to at least 80% of eligible employees; (ii) the application of federal income tax withholding to the deferred income related to the qualified stock; and (iii) the ability of employers to opt-out of permitting employees to elect Section 83(i)’s deferred tax treatment.

Section 83(i) permits a private company to offer its rank and file employees the opportunity to elect to defer income tax inclusion on certain compensatory stock options and restricted stock units (“RSUs”) (together, the “qualified stock”) for up to five years. In order for the employees to qualify for this deferral opportunity, the company must have a written plan under which, in the relevant calendar year, at least 80% of all employees providing services to the company in the U.S. (or any U.S. possession) are granted qualified stock (in more than a de minimis amount), with the same rights and privileges. Section 83(i)’s 80% requirement cannot be satisfied by the employer granting a combination of stock options and RSUs; instead, the employer must grant either all stock options or all RSUs for the year. An employer offering qualified stock is subject to certain reporting and notice requirements and penalties for failure to comply.

### 80% Requirement

## 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](mailto:kraskin@kslaw.com)

# Compensation & Benefits Insights

---

As mentioned above, Section 83(i) requires at least 80% of all employees providing services to the company in the U.S. (or any U.S. possession) to be granted qualified stock (in more than a de minimis amount), with the same rights and privileges in a calendar year. The Notice clarifies that the determination of whether an employer satisfies the 80% requirement must be made on a calendar year basis, based solely on the qualified stock granted in that calendar year, without regard to awards granted in prior calendar years (i.e., the requirement is not applied on a cumulative basis). In addition, in calculating whether the 80% requirement is satisfied, an employer must consider all employees employed at any time during the calendar year in question, as well as the total number of employees receiving qualified stock during such year (in each case, without regard to part-time employees and excluded employees).

## Federal Income Tax Withholding

The Notice also provides guidance on the application of federal income tax withholding rules to deferred income relating to the qualified stock. The Notice confirms that such qualified stock must be treated as wages for income tax withholding purposes, and that the employer is required to withhold taxes at the maximum current rate of tax withholding (37% in 2019) in the year of income inclusion, determined without regard to any allowances or dollar amounts claimed on the employee's Form W-4, Employee's Withholding Allowance Certificate. The Notice also clarifies that Section 83(i) does not change the timing of other payroll taxes, including FICA and FUTA taxes and state income withholding taxes.

To ensure that the withholding requirements are met, an employee making a Section 83(i) election with respect to qualified stock must agree in the election that all qualified stock subject to the election ("deferral stock") will be held in a qualifying escrow arrangement until certain conditions are met. The Notice states that future guidance may establish alternate or substitute mechanisms to ensure a corporation's income tax withholding requirements are satisfied.

**INSIGHT:** In order for an employee to be eligible to make a Section 83(i) election, such employee and his or her employer must agree to deposit the deferral stock into an escrow arrangement that satisfies Section 83(i)'s requirements. As a practical matter, this means that an employer can effectively preclude its employees from making Section 83(i) elections by declining to establish escrow arrangements that satisfy Section 83(i)'s requirements.

## Ability of Employers to Opt-Out

The Notice also confirms that companies can opt-out of the requirements under Section 83(i). In addition to preventing its employees from making Section 83(i) elections by declining to establish a qualifying escrow arrangement, as discussed in the "Insight" above, the Notice specifically provides that an employer may state in the terms of a stock option or RSU that no election under Section 83(i) will be available with respect to stock received on exercise of the stock option or settlement of the RSU. Such a designation would inform employees that Section 83(i) election cannot be made with respect to the underlying stock, even if that stock would otherwise constitute "qualified stock" for purposes of Section 83(i).

# Compensation & Benefits Insights

The Notice states that the Treasury Department and the IRS intend to incorporate the guidance in the Notice into future regulations, that with respect to issues addressed in the Notice, will apply to any taxable year ending on or after December 7, 2018. Stay tuned!

## February and March 2019 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

**Author,** *Tabitha Crosier*, New York, +1 212 556 2215, [tcrosier@kslaw.com](mailto:tcrosier@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 February through March 2019. 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.

Deadline	Item	Action	Affected Plans
February 14 (within 45 days after the close of the fourth quarter of previous plan year)	Quarterly Fee Disclosure	Deadline for plan administrator to disclose fees and administrative expenses deducted from participant accounts during the fourth quarter of the previous plan year. Note that the quarterly fee disclosure may be included in the quarterly benefit statement or as a stand-alone document.	Defined Contribution Plans that allow participants to direct investments
	Benefit Statements for Participant- Directed Plans	Deadline for plan administrator to send fourth quarter benefit statement for previous plan year to participants in participant-directed defined contribution plans.	
February 28 (if filing paper forms)	IRS Form 1099- R	Deadline for employer to file IRS Form 1099-R. If the form is filed electronically, the deadline can be extended until April 1.	Qualified Retirement Plans

# Compensation & Benefits Insights

Deadline	Item	Action	Affected Plans
	IRS Form 1094-B Transmittal Forms	Deadline for providers of minimum essential coverage to transmit forms to IRS reporting the months during the year that individuals enrolled in the group health plan satisfied the individual mandate by enrolling in minimum essential coverage. If the form is filed electronically, the deadline can be extended until April 1.	Self-Insured Group Health Plans and Group Health Plan Insurers
	IRS Form 1094-C Transmittal Forms	Deadline for plan sponsors that employed an average of at least 50 full-time employees in 2018 (also known as “Applicable Large Employers” or “ALEs”) to transmit forms to IRS reporting whether the ALEs offered an opportunity to enroll in (and whether employees did enroll in) minimum essential coverage under the ALE’s sponsored plan. If the form is filed electronically, the deadline can be extended until April 1.	Applicable Large Employers
March 1 (60 days after the beginning of the plan year)	Medicare Part D Creditable Coverage Disclosure	Deadline for employers that provide prescription drug coverage to Medicare Part D eligible individuals to disclose to the Centers for Medicaid and Medicare Services (CMS) whether the coverage is “creditable prescription drug coverage” by completing the Online Disclosure to CMS Form at <a href="https://www.cms.gov/Medicare/Prescription-Drug-Coverage/CreditableCoverage/CCDisclosureForm.html">https://www.cms.gov/Medicare/Prescription-Drug-Coverage/CreditableCoverage/CCDisclosureForm.html</a>	Health and Welfare Plans that provide prescription drug coverage to Medicare Part D eligible individuals
March 4	IRS Form 1095-B Individual Statements	Deadline for providers of minimum essential coverage to distribute forms used to report to responsible individuals the months during the year that the individuals satisfied the individual mandate by enrolling in minimum essential coverage. This deadline was extended from its original deadline of January 31.  Note that self-insured ALEs can report this information on Form 1095-C. Fully insured plan sponsors that are not ALEs are not required to	Self-Insured Group Health Plans and Group Health Plan Insurers

# Compensation & Benefits Insights

Deadline	Item	Action	Affected Plans
		distribute Form 1095-B, which are distributed by the group health plan insurers	
	IRS Form 1095-C Individual Statements	Deadline for ALEs to provide a written statement to employees indicating whether the ALEs offered an opportunity to enroll in (and whether the employee did enroll in) minimum essential coverage under the ALE's sponsored plan. This deadline was extended from its original deadline of January 31.	Applicable Large Employers
March 15	Plan Contribution Deadline	Deadline for corporate employer contributions to be made to plan trusts in order for such amounts to be deductible on corporate tax returns (assuming the employer is operating on a calendar-year fiscal year). Note that this deadline may be extended if an extension is obtained for the corporate tax return.	Qualified Retirement Plans
March 15 (2 ½ months after the plan year)	Excess Contributions	Deadline for plan administrator to distribute any excess contributions and earnings from the prior year to avoid 10% excise tax on employer (other than eligible automatic contribution arrangements (EACAs)).	401(k) Plans Other Than EACAs
March 31 (last day of 3rd month following the end of the prior plan year)	Certification of Adjusted Funding Target Attainment Percentage (AFTAP)	Deadline for actuary to certify AFTAP to avoid presumption that AFTAP is 10 points less than prior year AFTAP.	Defined Benefit Plans