

Plan Administrators' 2018 Year-End Checklist

Plan administrators should review the following actions to be taken before the end of 2018 and focus on what to expect for 2019. The following checklist addresses plan amendments, notices and other considerations for qualified retirement plans (pages 1 through 3), welfare plans (pages 4 and 5), and stock-based and performance-based plans (page 6). A chart showing benefit and contribution limits for 2019 is on page 7.

Amendments and Considerations for All Qualified Retirement Plans

- [] **Discretionary Plan Amendments:** Plan amendments reflecting discretionary changes to a calendar year plan that were effective in 2018 must be ***adopted by December 31, 2018***. For example, an amendment increasing benefits is a discretionary change. For defined benefit plans, advance participant notice may be required if an amendment significantly reduces the rate of future benefit accruals (e.g., a pension plan freeze).
- [] **Fee Disclosure – Action Required Annually:** Department of Labor (DOL) regulations require plan service providers to disclose their fees to plan administrators. Plan fiduciaries should analyze the reasonableness of the fees being charged for plan services and assess potential conflicts of interest. Plan administrators also need to make sure that participants receive the appropriate disclosures on quarterly statements (e.g., a description of fees, expenses, and corresponding services).
- [] **New Rollover Notices:** The Internal Revenue Code requires administrators of qualified retirement plans to provide written explanations of the rules applicable to a recipient of an eligible rollover distribution. An IRS “safe harbor” notice may be used to satisfy this requirement. The IRS modified its safe harbor notices in September to reflect guidance issued on a waiver of the 60-day deadline for completing a rollover, certain legislative changes related to qualified plan loan offsets, and other clarifying changes. More information about the rollover notices can be found at <http://www.williamsmullen.com/news/irs-issues-updated-rollover-notices> or <https://www.irs.gov/pub/irs-drop/n-18-74.pdf>.
- [] **New Correction Procedures:** The Employee Plans Compliance Resolution System (EPCRS) permits plan sponsors to remedy mistakes and avoid the consequences of plan disqualification. The IRS updated the EPCRS procedures in September, requiring applicants to file submissions, including payment of the user fee, through [Pay.gov](http://www.pay.gov). Beginning January 1, 2019, and ending March 31, 2019, applicants have the choice to make VCP submissions by using [Pay.gov](http://www.pay.gov), or continuing to make paper submissions. Beginning April 1, 2019, all VCP submissions must be made using [Pay.gov](http://www.pay.gov). A plan sponsor can authorize a legal representative to sign and submit a VCP submission on its behalf using [Pay.gov](http://www.pay.gov).
- [] **Fiduciary Procedures:** Any entity sponsoring a retirement plan is a fiduciary of the plan and co-fiduciaries with other fiduciaries named in the plan, such as the plan administrator or the investment fiduciary. Investment fiduciaries responsible for selecting and monitoring plan investments should meet at least annually (preferably, quarterly) to review the performance of such investments and investment-related fees that are paid directly from plan assets. Minutes of such meetings and the investment decisions made by the fiduciaries should be maintained. Such fiduciaries should annually report to the corporate board or its delegate.

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Amendments and Considerations for Defined Contribution Plans

- [] **Safe Harbor Plans:** Safe harbor 401(k) amendments must be adopted before the beginning of the plan year. An employer that wishes to add or amend a safe harbor matching or nonelective contribution in a calendar year 401(k) plan for the 2019 year should adopt an amendment **by December 31, 2018.**
- [] **Hardship Distributions:** Under changes enacted as part of the Bipartisan Budget Act passed in the spring, certain rules applying to hardship distributions have been “eased.” The rule requiring a six-month suspension of elective deferrals following a hardship distribution has been removed. The rule requiring that a participant apply for a plan loan prior to applying for a hardship distribution also has been removed. Qualified non-elective contributions (QNECs), qualified matching contributions (QMACs), and earnings on a participant’s salary deferral contributions will be available for withdrawal. The changes can be made **effective January 1, 2019** and are optional. Proposed regulations provide that the elimination of the six-month suspension will be required for hardship distributions starting in 2020. If a plan sponsor wishes to adopt any of the changes, the 401(k) plan should be amended. The IRS has not yet published the deadline by which such amendments must be adopted. The IRS will announce the deadline at a later date.
- [] **Hurricane and Wildfire Disaster Relief:** The IRS issued separate announcements in 2017 and 2018 outlining streamlined loan procedures and liberalized hardship distribution rules for 401(k) plans, 403(b) tax deferred annuities, and governmental 457(b) arrangements so that victims of hurricanes and wildfires can access their retirement funds to assist with expenses incurred as a result of the storms and fires. If a retirement plan does not currently permit loans or hardship distributions, the plan sponsor could begin processing loans or hardship distributions now under the new rules. Plan sponsors offering special disaster distributions and loans should amend their plans for these optional provisions before the last day of the plan year beginning on or after January 1, 2019, **or December 31, 2019, for a calendar year plan.** For disasters that occurred in 2016, the amendment must be adopted **by December 31, 2018, for a calendar year plan.**
- [] **Forfeitures:** Employers should review whether forfeitures held in their defined contribution plans should be allocated to participants or used to pay expenses or reduce employer contributions within the plan year that forfeitures occurred. For a calendar year plan, forfeitures must be allocated or used **by December 31, 2018.**

Amendments and Considerations for Defined Benefit Plans

- [] **Mortality Tables:** Final regulations issued in October 2017, updating the mortality tables to be used for defined benefit pension plan funding and the valuation of lump sum and other accelerated distribution options, apply to plan years beginning **on or after January 1, 2018.** Plan sponsors should review plan provisions on mortality tables to ensure that the plan accurately reflects administrative practices. If the plan document incorporates the mortality table by reference to Internal Revenue Code section 417(e), this change may not require a plan amendment. However, if the plan document refers to the table name, an amendment may be needed by the last day of the 2018 plan year, or **December 31, 2018, for a calendar year plan.**
- [] **PBGC Premium Increase:** The Pension Benefit Guaranty Corporation per-participant flat rate premium for **plan years beginning in 2019** is \$80 for single-employer plans.

Notices for Defined Contribution Plans

- [] **QDIA Notice – Annual Notice and Action required 30 Days Before Initial Investment:** The DOL Qualified Default Investment Alternative (QDIA) safe harbor regulations shield plan administrators from fiduciary liability with respect to default investments. Plans using QDIAs must provide a notice to participants and beneficiaries that satisfies the regulations. An initial notice is required before the first investment in the QDIA. Plan administrators must also provide an annual notice at least 30 days in advance of each subsequent plan year. For calendar year plans, the annual notice must be provided **by December 1, 2018**.

- [] **401(k) Plan Notices – Action Required 30 Days Before Plan Year:** Sponsors of 401(k) plans are required to notify participants at least 30 days before the beginning of the 2019 plan year if the following features will apply to the 401(k) plan for the 2019 plan year. The applicable notices must be issued to participants **by December 1, 2018**, for a calendar year plan.
 - o **401(k) Safe Harbor Notice:** Plan sponsors that intend to make a safe harbor matching or non-elective contributions for 2019 must provide a safe harbor notice to participants.

 - o **QACA Notice:** A Qualified Automatic Contribution Arrangement (QACA) is an automatic contribution 401(k) plan that is deemed to pass nondiscrimination testing. The QACA safe harbor requires annual increases to the automatic enrollment amount and safe harbor employer contributions. Plan administrators must issue a QACA notice to participants.

 - o **EACA Notice:** An Eligible Automatic Contribution Arrangement (EACA) is another safe harbor automatic enrollment plan that specifically permits a participant to withdraw automatic contributions made within 90 days after the first automatic contribution. Plan administrators must issue an EACA notice to participants.

- [] **Diversification Notice - Action Required 30 Days Before Direction:** Defined contribution plans that permit participants to elect to invest in publicly-traded employer securities (*i.e.*, a company stock fund) must provide participants with a notice of diversification rights. Plan administrators must distribute the notice at least 30 days before the first date on which a participant may direct the investment of the proceeds of employer securities.

Notices for Defined Benefit Plans

- [] **Benefit Statements – Action Required in 2018:** Defined benefit plans are generally required to furnish participants with a pension benefit statement at least once every three years. An alternative notice method would be to instead send an **annual notice** telling the participant of the availability of the pension benefit statement and how to obtain it.

- [] **Annual Funding Notice – Action Required in 2019: Within 120 days after the end of the plan year (April 30 for calendar year plans),** defined benefit plans must provide the Pension Benefit Guaranty Corporation, participants, beneficiaries, unions, and contributing employers with detailed information about: (1) the funded status of the plan; (2) the plan's investments; (3) the group covered by the plan; and (4) a description of the rules for terminating the plan. Plans with fewer than 100 participants must provide the notice by the due date for filing the plan's IRS Form 5500. Additional notice requirements apply if the plan is subject to benefit restrictions for being underfunded.

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Considerations for Health and Welfare Benefit Plans

- [] **Preventive Services Coverage:** Non-grandfathered group health plans must cover certain preventive services with no cost sharing, including women’s preventive health services such as contraceptives. Each year, plan sponsors should confirm that their plans comply with the list of required preventive service, which is available at: <http://www.uspreventiveservicestaskforce.org/Page/Name/uspstf-a-and-b-recommendations/>.
- [] **Patient-Centered Outcomes Research Institute (PCORI) Fee:** A fee to fund the PCORI is assessed on health insurers and sponsors of self-insured health plans. Certain plans are exempt from this fee—such as health flexible spending accounts, limited dental and vision plans, employee assistance plans and wellness programs. Retiree-only plans are subject to this fee even though they may be exempt from other ACA requirements. The fee for plan years that end on or after October 1, 2018, and before October 1, 2019, is **\$2.45 per participant**, and must be paid on IRS Form 720 by July 31 of the calendar year following that plan year.
- [] **Nondiscrimination Rules Regarding Gender Identity:** Entities that operate a health program or activity that receives federal financial assistance, such as Medicare reimbursements, must comply with the Office of Civil Rights nondiscrimination regulations. Health plans sponsored by such covered entities may not have blanket exclusions on health services related to gender transition, restrict benefits for medically appropriate gender-specific care, and may not exclude gender transition services as cosmetic or experimental.
- [] **Wellness Programs and Disability-Related Inquiries:** Wellness programs must comply with Americans with Disabilities Act and Genetic Information Nondiscrimination Act regulations issued in 2016. If a wellness program asks for medical or disability-related information, a written notice describing the type of information that will be obtained and confidentiality procedures must be provided to employees.
- [] **Summary of Benefits and Coverage:** Insurers and group health plans must provide a Summary of Benefits and Coverage (SBC) for each coverage option offered by the insurer or plan. Participants who enroll mid-year must be provided an SBC within 90 days of enrollment. Calendar year plans have already complied, or are in the process of complying, with this requirement. The SBC should be provided at the beginning of open enrollment each year if renewal is not automatic or at least 30 days before the beginning of each plan year if renewal is automatic. Plans also must provide 60 days’ advance notice of changes to the content of an SBC.
- [] **Reporting Health Plan Coverage on Form W-2:** All employers must report the aggregate cost of the applicable employer-sponsored health insurance coverage on an employee’s Form W-2 for 2018.
- [] **Reporting Health Plan Coverage to the IRS and Employees:** Internal Revenue Code section 6056 requires Applicable Large Employers to report information about employer-sponsored health coverage to the IRS and to employees. An Applicable Large Employer is an employer that employs at least 50 full-time employees, including full-time equivalent employees. In addition, sponsors of self-insured health plans that provide minimum essential coverage must file an annual return with the IRS and provide statements to employees. Returns are due to the IRS **by February 28, 2019** (or April 1, 2019, if filing electronically). Statements to employees are **due January 31, 2019**.

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[] **Annual Notices for Group Health Plans:** In addition to the notices described above, employers must continue to provide participants with the following annual group health plan notices:

- Children's Health Insurance Program Reauthorization Act Notice
- Women's Health and Cancer Rights Act Notice
- Medicare Part D Notices and Reporting
 - Noncreditable/Creditable Coverage Notice (before October 15)
 - Notice to the Centers for Medicare and Medicaid Services (60 days after the beginning of the plan year)
- HIPAA Special Enrollment Notice

The following table summarizes the Forms 1094-B, 1095-B, 1094-C, and 1095-C reporting requirements.

Employer	Forms 1095-B and 1094-B	Forms 1095-C and 1094-C
Applicable Large Employer that does not offer health insurance	No	Yes
Applicable Large Employer that offers a fully-insured health plan	Forms are filed by the insurance carrier	Yes
Applicable Large Employer that offers a self-insured health plan	No	Yes
Small Employer that offers a full-insured health plan	Forms are filed by the insurance carrier	No
Small Employer that offers a self-insured health plan	Yes	No

Considerations for Stock-Based Plans and Executive Compensation

- [] **Section 162(m): Key Consequences of 2017 Tax Act:** Tax legislation enacted in December 2017 eliminated the performance-based compensation exception to the \$1 million cap on deductibility of annual compensation paid to certain executives of public companies. Certain grandfathering rules apply for existing agreements. Companies will not be required in 2019 or future years to seek shareholder approval or reapproval of the material terms of performance goals that appear in cash bonus or equity incentive plans for the purpose of satisfying Internal Revenue Code section 162(m). This tax change does not affect the securities or other considerations that may necessitate shareholder approval or disclosure of executive compensation arrangements.

Another significant change to Code section 162(m) under the 2017 tax act is expansion of the covered group of executives. Once an executive becomes subject to the \$1 million deduction limit, he or she remains subject to the deduction limit in all future years. This is the case even after the executive moves out of the group named in the proxy, and even after termination of employment.

Grandfathering of legacy agreements remains important. In general, amounts payable pursuant to a binding written contract in effect on November 2, 2017 are exempt from the changes imposed by the 2017 tax act if the contract is not materially modified on or after that date. Guidance on the parameters of the grandfather rules was issued earlier this year and imposed some limitations. Availability of grandfathered status should be determined on a case-by-case basis.

- [] **ISO Exercises and ESPP Share Transfer Reporting:** Employers whose employees exercised an incentive stock option (ISO) in 2018, or made an initial transfer in 2018 of shares acquired under an employee stock purchase plan (ESPP), are subject to information reporting. Employers will report information to employees and to the IRS relating to ISO exercises and initial transfers of ESPP shares on IRS Forms 3921 and 3922. The **IRS filing deadline is February 28, 2019** (paper filing), or **April 1, 2019** (electronic filing). Employers must **provide this year's employee statements by January 31, 2019**.

- [] **FICA Taxation of Nonqualified Deferred Compensation Plans:** Nonqualified deferred compensation plans are subject to special rules on the timing of FICA taxation. In general, amounts deferred are taken into account in the year those amounts are first vested – rather than at the time of payment. This rule often results in a smaller portion of the deferred benefit being subject to Social Security and (depending on plan design) Medicare taxes than would be the case if taxes were withheld and paid upon distribution. A number of factors affect the amount of compensation taken into account for a given year, and the proper year of taxation must be carefully assessed in the case of defined benefit-type nonqualified plans. Employers have until **December 31, 2018** to withhold and pay FICA taxes on deferrals that are subject to this rule in 2018.

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Contribution and Benefit Limits for 2019		
Description	2018 Limit	2019 Limit
Compensation Cap	\$275,000	\$280,000
Elective Deferral Limit for 401(k) plans, SEPs, 403(b) plans, and 457(b) plans	\$18,500	\$19,000
Catch-Up Contributions for Individuals Age 50 and Older	\$6,000	\$6,000
Defined Benefit Maximum Annual Accrual	\$220,000	\$225,000
Defined Contribution Maximum Annual Addition	\$55,000	\$56,000
Highly Compensated Employee Compensation Limit	\$120,000	\$125,000
Key Employee in Top-Heavy Plans Compensation Limit	\$175,000	\$180,000
ESOP Threshold for determining maximum account balance subject to 5-year distribution period		
Regular Limit	\$1,105,000	\$1,130,000
Lump Sum Distributions (Income Averaging)	\$220,000	\$225,000
SEP Compensation Threshold for Participation	\$600	\$600
SEP Contribution Maximum	\$55,000	\$56,000
SIMPLE IRA Maximum Pre-Tax Contribution	\$12,500	\$13,000
Catch-Up Contributions for SIMPLE IRAs or SIMPLE 401(k) plans	\$3,000	\$3,000
Social Security Taxable Wage Base	\$128,700	\$132,900
Health Flexible Spending Account Limit (Cafeteria Plans)	\$2,650	\$2,700
Health Savings Account Maximum Contributions		
Family Coverage	\$6,900	\$7,000
Single Coverage	\$3,450	\$3,500
Out-of-Pocket Maximum for Essential Health Benefits		
Family Coverage	\$14,700	\$15,800
Single Coverage	\$7,350	\$7,900

If you have any questions regarding this checklist, please contact any member of the Employee Benefits & Executive Compensation Section at Williams Mullen.

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