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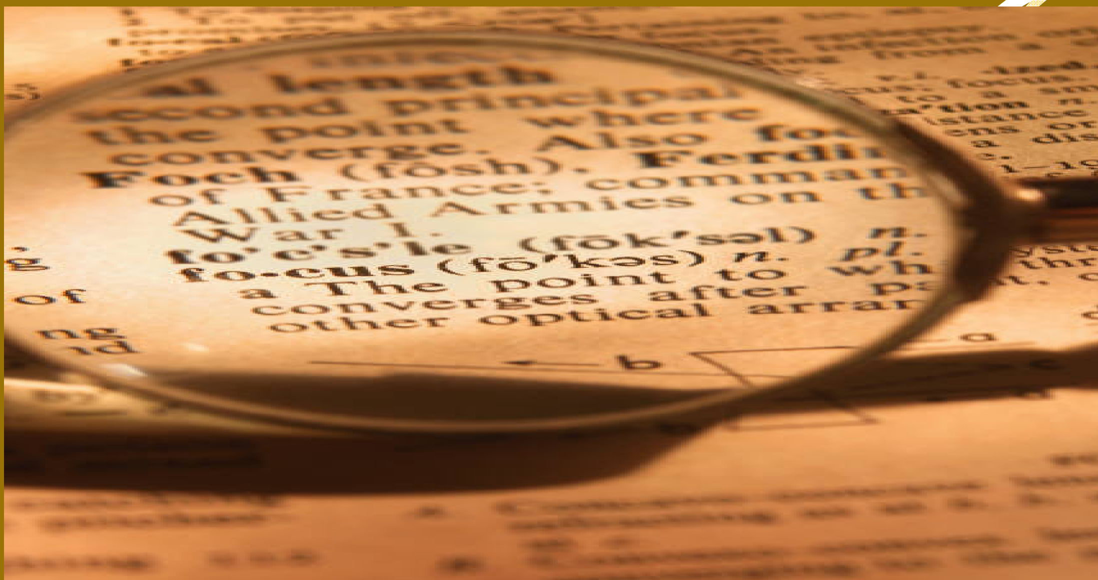

This Issue

Focus on Safe Harbor 401(k) Plans

The IRS has launched an examination project focused on 401(k) plans that operate under a safe harbor design. A 2010 IRS compliance check revealed that a high percentage of employers sponsoring safe harbor 401(k) plans may not be making the required contributions to those plans. To help safe harbor plan sponsors vet their plans, and for employers who are considering a safe harbor design, here is a review of the safe harbor requirements.

A safe harbor design allows a 401(k) plan to avoid annual nondiscrimination testing on pretax salary deferrals and employer matching contributions. Typically, a 401(k) plan that fails nondiscrimination testing must refund contributions to highly paid employees or re-characterize them as after-tax contributions if the plan allows. Highly compensated employees' annual contributions are reduced, and they are forced to pay income taxes they weren't expecting.

The Trade-off -- Required Contributions

In exchange for relief from the nondiscrimination testing requirements and higher contributions for highly compensated employees, a safe harbor plan sponsor must either (1) make a non-elective contribution of at least 3% of compensation for each non-highly compensated employee eligible to participate in the plan or (2) make matching contributions under a qualifying matching formula. The basic matching formula is 100% of the first 3% of compensation deferred, plus 50% of deferrals between 3% and 5% of compensation.

The rules are a little different for a plan with a qualified automatic contribution arrangement (QACA). For these plans, the safe harbor matching contribution formula is a 100% match on the first 1% of compensation deferred and a 50% match on deferrals between 1% and 6%. Participants may be required to have two years of service before becoming vested in QACA contributions. The minimum employee deferral percentage must start at not less than 3% and, after two plan years of participation, increase at least one percentage point annually to no less than 6% (with a maximum of 10%) unless the participant elects otherwise.

Review your employer contributions for the year so far and the contributions you plan to make for the remainder of the year to determine whether you are on track to meet the applicable requirements. You can reduce or stop safe harbor matching contributions during a plan year if you give your participants at least 30 days' notice so they can change their elective deferrals if they want to, but you'll have to perform annual nondiscrimination testing for the entire plan year. (*continued on page 2*)

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Other Safe Harbor Requirements

You must provide a notice of rights and obligations under your safe harbor plan to all eligible employees between 30 and 90 days before the start of each plan year. Employees who will become eligible during the year must be given reasonable advance notice. In addition:

- All safe harbor contributions are immediately 100% vested.
- You can't set conditions on the receipt of safe harbor contributions -- for example, that plan participants be employed on the last day of the plan year or work at least 1,000 hours during the plan year. (However, the plan can have minimum age and service requirements that employees must meet before they are eligible for plan participation.)
- Safe harbor contributions generally can't be available for in-service withdrawal before age 59½.
- Plan documents must state whether safe harbor or non-safe harbor testing will be used.

Changing Plan Design

If your 401(k) plan isn't currently a safe harbor plan but you are thinking it would be advantageous to operate under a safe harbor design, be aware that safe harbor provisions cannot be added to an existing 401(k) plan during a plan year. Rather, you must amend your plan to add a safe harbor design for the next plan year. The amendment must be adopted before the first day of the new plan year.

"Review your employer contributions for the year . . . to determine whether you are on track to meet the applicable requirements."

Retaining Plan Records

Most retirement plan sponsors are well aware of their reporting and disclosure responsibilities under the pension law (ERISA). You may be less aware that, as a plan administrator, you also have an obligation to retain all the records supporting the information included in your plan's Form 5500 (Annual Return/Report of Employee Benefit Plan) and other reports and disclosures.

Having an established document retention system that allows you, as the plan administrator, to periodically review, update, preserve, and dispose of documents in an organized fashion fosters good administration and helps the plan comply with pension law.

Government Reports and Supporting Records

Government reports, such as Form 5500, and the records used to prepare them generally must be kept for at least six years after the filing date. What supporting records does your plan need to retain? Basically, whatever records a government auditor might need to verify the accuracy of the original report. These include, but aren't limited to, financial records; service provider information; hours of service and vesting determinations; corporate income-tax returns (to reconcile deductions); the plan's fiduciary bond; documents relating to plan loans, withdrawals, and distributions; and nondiscrimination and coverage test results.

Other Records

Other records that should be maintained and updated on a more or less permanent basis include the plan document; applicable IRS opinion, advisory, or determination letters; insurance contracts; Summary Plan Descriptions, Summaries of Material Modifications, and other employee communications; resolutions, benefit determinations, and distributions; and information about plan participants. For participants, you should retain eligibility determination and hire and termination information, beneficiary designations, notarized spousal consents and waivers, loan and hardship withdrawal documentation, vesting data, and compensation used for nondiscrimination testing, elective deferrals, and matching contributions.

Amending Your Plan

One of the most frequent compliance errors IRS examiners find when conducting Employee Plan (EP) Examinations is the failure of 401(k) plan sponsors to amend their plan documents to comply with current law. Such a failure can mean plan disqualification.

Amendment Basics

401(k) plans must be updated periodically to conform to changes in federal tax or pension law (ERISA) and to reflect official guidance issued by the IRS. At the end of each year, the IRS publishes a Cumulative List of Changes in Plan Qualification Requirements that includes amendment requirements and deadlines. (***Continued on Page 3)***

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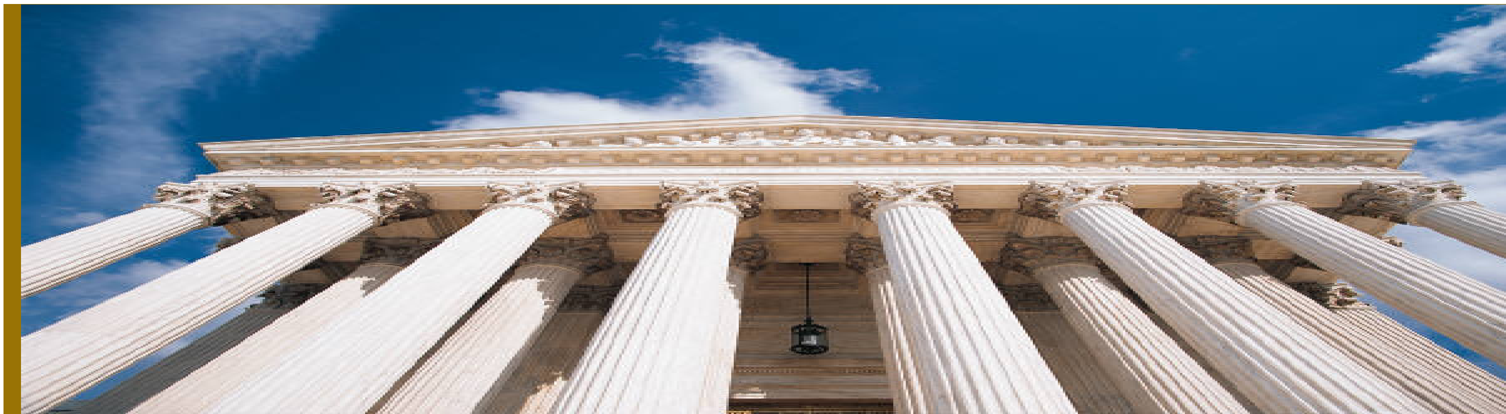

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Currently, the most common law changes that employers have failed to amend their plans for are GUST (an acronym that stands for a series of tax laws), the good faith amendments for the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), and the final and temporary required minimum distribution regulations under Internal Revenue Code Section 401(a)(9).

Individually designed 401(k) plans must be routinely amended and restated every five years, and preapproved plans every six years. There is a revolving remedial amendment cycle for amending and restating a plan. If you use a preapproved plan document, the institution that maintains the plan document will contact you when you need to update your plan.

Between remedial amendment cycles, interim and good faith amendments are required to keep a written plan current. Discretionary amendments are used for non-required changes to the plan -- for example, adding or changing features -- made between remedial amendment cycles.

Avoiding the Error

The following are some suggestions for staying on top of required amendments and avoiding possible plan disqualification:

o Keep a calendar or tickler file of when amendments must be completed.

o Review your plan document each year for possible amendments.

o Check that your plan is operating in accordance with your plan's documents. If it isn't, amendments may be in order.

o Make sure the plan document and Summary Plan Description (SPD) match. If you've amended the plan document, compare the new language against your old SPD language and make any necessary changes to the SPD.

o Regularly review your plan with your employee benefit plan advisor.

Get Ready To Provide Health Care Benefits Information

Under the Patient Protection and Affordable Care Act, employers that sponsor group health plans, along with their insurers, must provide health plan participants and beneficiaries with clear and understandable information about their plans so that they can make informed decisions when choosing coverage. Below, we discuss what this new "Summary of Benefits and Coverage" (SBC) disclosure may mean for you.

For employer-sponsored group health plans, the insurance issuer is required to provide the SBC to the sponsoring employer. The employer and the insurer are responsible for providing the SBC to plan participants and beneficiaries. In the case of a self-insured group health plan, the plan administrator must provide the SBC to participants and beneficiaries.

An SBC generally is not required for standalone dental and vision plans, health flexible spending arrangements (FSAs), and health savings accounts (HSAs). Health reimbursement arrangements (HRAs), however, are subject to the SBC rules.

When Disclosures Are Required

You generally must provide enrolling or re-enrolling employees and beneficiaries with the SBC beginning on the first day of the first open enrollment period or first plan year that begins on or after September 23, 2012. Thus, for most employers, initial SBCs are required for the 2013 open enrollment period. The SBC also must be furnished to COBRA beneficiaries during the open enrollment period. Your insurer should make the appropriate SBC(s) available to you. (***Continued on Page 4)***

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Employees and beneficiaries entitled to special enrollment rights (for example, under HIPAA) must receive the SBC within 90 days after enrollment. Plans and insurers that automatically renew coverage, rather than requiring re-enrollment, must furnish the SBC no later than 30 days prior to the first day of the new plan or policy year. You also must provide the SBC to employees and beneficiaries who request the SBC or summary information about health coverage as soon as is practicable but no later than seven business days following receipt of the request.

The SBC should be a part of any written application materials. A separate SBC must be provided for each benefit package option (e.g., PPO versus HMO) you offer employees. However, you may, but don't necessarily have to, furnish an SBC for each coverage tier (for instance, self-only or family coverage) or cost-sharing selection (such as deductibles, copayments, and coinsurance) under a benefit package.

SBC Content

Basically, the SBC should contain uniform definitions of standard insurance and medical terms; a description of coverage, including cost sharing for each category of benefits; any exceptions, reductions, and limitations on coverage; coverage examples of common benefit scenarios; a statement that the SBC is only a summary and that the plan or policy controls; contact information for questions and obtaining a copy of the plan documents, insurance policy, certificate or contract of insurance; and an Internet address (or similar contact information) for obtaining a list of network providers, prescription drug coverage information, and the insurance and medical terms glossary. The DOL has a sample SBC on its website, www.dol.gov.

Failure to comply with the SBC requirements can result in a daily penalty of up to $1,000 per willful failure, per participant and an excise tax of $100 per day for each participant who should have received the SBC.

Benefit Notes

Small Plan Compliance Failures

A study by the IRS's LESE (Learn, Educate, Self-Correct, and Enforce) project found that small retirement plans (less than $5 million in assets) are missing the mark in several compliance areas. The project looked at plans that had investments in real estate and either offered participant loans or filed a Form 5500 Schedule D (DFE/Participating Plan Information). Among the failures: 25% of the plans had at least one prohibited transaction and 25% had real estate investments that weren't valued at fair market value. Problems with plan loans included failure to follow the plan loan provisions, to document loans and loan payments, and to prohibit loans to the employer or related entities.

Contribution Benchmarks

Preliminary information from the IRS's Section 401(k) Compliance Check Questionnaire gives plan sponsors some benchmarks for assessing their 401(k) plans' contribution features in comparison to other plans. The findings: 54% of 401(k) plans have a one-year-of-service requirement for participation, 64% contain an age-21 eligibility requirement, 41% let participants change elective deferrals at any time, and 96% allow participants age 50 and older to make catch-up contributions. Only 22% of the 401(k) plans surveyed permit designated Roth contributions. As for employer contributions, 68% of plan sponsors make matching contributions, 65% provide employer non-elective contributions (such as a profit sharing contribution), and 58% of plans have a one-year-of-service requirement for receiving matching contributions.

Social Security Benefit Statements

In February, the Social Security Administration (SSA) resumed mailing annual paper benefit statements to workers age 60 and older who are not already receiving Social Security benefits. The SSA has also introduced an online statement service to provide workers of all ages immediate access to their statement information and plans to resume first-time "welcome" mailings to workers at age 25 that will explain how to access online statements.

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