

# Year-End Compliance Update for Retirement Plans

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**A**s 2020 draws to a close, this is a good time for employers sponsoring retirement plans to wrap up year-end compliance issues and prepare for the upcoming year. Here is a quick list of topics that plan sponsors may want to consider as 2021 approaches.

## Year-End Deadlines

As usual, plan sponsors should be aware of year-end deadlines for safe harbor notices, qualified default investment alternative (QDIA) notices, and automatic enrollment notices. These notices must be provided annually at least 30 days, and not more than 90 days, before the beginning of each plan year (by Dec. 1, 2020 for calendar year plans).

In addition, plan sponsors should be aware of any upcoming plan amendment deadlines. In general, discretionary plan amendments must be adopted by the last day of the plan year in which the optional change is to be effective (with some exceptions). Plan sponsors of calendar year plans that made discretionary design changes in 2020 generally must adopt conforming amendments by Dec. 31, 2020. Examples of discretionary plan design adjustments in 2020 requiring a plan amendment include changes in matching or fixed nonelective contribution formulas, vesting, eligibility, automatic enrollment, automatic increases, safe harbor plan status, and the elimination or addition of employer contributions.

However, plan sponsors don't have to amend their plans this year for optional provisions of the Setting Every Community Up for Retirement Enhancement (SECURE) Act and the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Even if the changes became operationally effective this year, the acts give plans until at least the end of the 2022 plan year to adopt conforming amendments.

## IRS Guidance on Birth/Adoption Withdrawals

Under the SECURE Act, employers are permitted to allow qualified birth or adoption distributions (QBOADs) as of Jan. 1, 2020. A plan that allows QBOADs permits plan participants to take distributions of up to \$5,000 as a penalty-free early withdrawal to help cover expenses related to the adoption or birth of a child. The maximum \$5,000 distribution must be made during the one-year period following the birth or adoption, and plan participants that make such a withdrawal are permitted to recontribute the distribution to the plan.

IRS Notice 2020-68 clarifies that the \$5,000 maximum distribution amount applies separately to each parent for every child born or every eligible adoptee that is adopted in a one-year period. For example, a husband and a wife who adopt two children would each be eligible to take up to a \$10,000 distribution that would otherwise qualify as a QBOAD. The Notice also clarified that "eligible adoptee" means any individual who has not attained age 18 or is physically or mentally incapable of self-support, but does not include a child of the taxpayer's spouse.

## Part-Time Employee Eligibility Changes for 401(k) Plans

Under the SECURE Act, 401(k) plans must allow long-term part-time employees who work at least 500 hours for three consecutive years to make elective deferral contributions. No employer contributions are required for these employees, unless they satisfy the plan's eligibility requirements for employer contributions.

In Notice 2020-68, the IRS clarified that, for eligibility purposes, 12-month periods beginning before Jan. 1, 2021 are not taken into account. Although this means that the earliest an employer will be required to enroll a part-time employee due to this provision is in 2024, an employer that excludes part-time employees from participating in its plan will have to begin tracking and retaining records for hours worked in periods beginning Jan. 1, 2021.

The new rule also affects vesting. Long-term part-time employees must be credited with a year of vesting service for employer contributions for each year that an employee completes 500 hours of service. This includes all years of service, even years before 2021. But the vesting credit will only be relevant if employer contributions are subject to a vesting schedule.

### **Pooled Employer Plans**

The SECURE Act created pooled employer plans (PEPs), which are authorized to begin operations as soon as Jan. 1, 2021. Employers who have no common interest or ownership can join together to provide a multiple-employer plan. To qualify, a PEP must designate a pooled plan provider (PPP) as a named fiduciary and plan administrator. In November 2020, the DOL issued final regulations outlining various requirements for PPPs. A PPP must, among other things, register with the DOL and Treasury Department before beginning operations.

### **Coronavirus-Related Withdrawals**

The CARES Act allows distributions for coronavirus-related reasons through December 30, 2020, for up to \$100,000 from 401(k) plans, 403(a) plans, 403(b) plans, government-sponsored 457(b) plans, and individual retirement accounts (IRAs). These distributions are not subject to the 10% early distribution penalty applicable to distributions made before age 59½, and may be repaid, in one or more contributions, within three years. In addition, income taxes may be paid ratably over three years.

### **Coronavirus-Related Loans from Qualified Plans**

The CARES Act temporarily increases the maximum loan limit and temporarily extends the repayment period for plan loans made to qualified individuals. Individuals with outstanding participant loans becoming due and payable in 2020 may suspend loan repayments through Dec. 31, 2020 under the CARES Act. Subsequent repayments must be adjusted to reflect the delay and any interest accruing during the delay. Notice 2020-50 provides a safe harbor method for administering permitted suspensions and extensions of participant loans.

### **Waiver of Required Minimum Distributions for 2020**

Under the CARES Act, the required minimum distribution (RMD) requirements for calendar year 2020 are waived for 401(k) plans, 403(a) plans, 403(b) plans, government-sponsored 457(b) plans, and IRAs. The temporary CARES Act waiver applies to anyone with an RMD due in 2020, including those who turned age 70½ in 2019 with a required beginning date of April 1, 2020.

### **Partial Plan Terminations**

Employers who had reductions in force or layoffs should consider whether a "partial plan termination" may have occurred. A plan may have a partial plan termination if more than 20% of its total plan participants ceased to be participants in a particular year because of an employer initiated action. The law requires all "affected employees" to be fully vested in their account balance as of the date of a full or partial plan termination.

### **Restatement Window for Pre-Approved Defined Contribution Plans**

The IRS recently announced that starting Aug. 1, 2020, employers with a pre-approved defined contribution plan will have a two-year time period to restate their plan documents. In general, the window to restate pre-approved plans opens every six years. Miller Johnson has an updated pre-approved 401(k) plan which can be adopted by clients.

### **Electronic Disclosures**

The DOL issued a final rule (<https://millerjohnson.com/publication/does-one-small-step-for-the-dol-one-giant-leap-for-plan-administrators-dol-issues-final-rule-on-retirement-plan-electronic-disclosures/>) on May 27, 2020 providing a voluntary safe harbor for retirement plan administrators to provide certain required documents to participants electronically by posting on a website under a "notice-and-access" framework or by sending an e-mail. Plan sponsors who want to take advantage of electronic delivery of retirement plan documents should consult with their recordkeepers and third-party administrators as soon as possible to determine how and when their systems can implement the new voluntary safe harbor.

### **Electronic Signatures**

The COVID-19 pandemic prompted the IRS to expand the use of digital signatures on certain tax forms that cannot be filed electronically. In addition, the IRS temporarily allowed certain retirement plan participants or beneficiaries the ability to make changes remotely via electronic signatures through Dec. 31, 2020 (see Remote Witness of Spousal Consents, below). However, the IRS has only released limited guidance on whether retirement plan documents, such as plan amendments, may be signed electronically.

The existing guidance relates to preapproved plans and determination letter applications. In IRS Revenue Procedure 2017-41, the IRS stated that an electronic signature is sufficient if it reliably authenticates and verifies the adoption, restatement, amendment, or modification of an adoption agreement. In addition, the IRS has acknowledged in past FAQs that an electronic signature may be sufficient for preapproved plans filing for a favorable determination letter. But neither IRS Revenue Procedure 2017-41 nor the IRS FAQs address nonpreapproved plans.

While IRS guidance on the topic is limited, the federal Electronic Signatures in Global and National Commerce Act (ESIGN) appears to permit electronic signatures for nonpreapproved retirement plan documents. ESIGN requires that an electronic signature process must be able to verify that the electronic signature is of the person that it claims to be.

Plan sponsors wishing to implement an e-signature process may look to the DOL's process for e-filing Forms 5500 as a model process. The DOL meets the verification standard by requiring an individual to log into the DOL website using a user name and PIN to electronically sign the Form 5500.

Many software vendors offer plan sponsor web portals that allow employees of the plan sponsor to log into the portal and access documents using a secure user name and password. It appears that a password-protected, third-party site would be a permissible method of enabling an individual to electronically sign plan documents. In fact, the IRS recognized this method in the context of e-signing plan loan applications in Treas. Reg. Section 1.401(a)-21 Ex. 3.

## Remote Witness of Spousal Consents

On June 3, 2020, the IRS issued Notice 2020-42, which temporarily permits spousal consents to be witnessed remotely amid the COVID-19 pandemic. The IRS temporarily dropped its "physical presence" requirement between Jan. 1, 2020 and Dec. 31, 2020. For spousal consents witnessed by a notary public, any live audio-video technology that is consistent with state remote notarization requirements may be used in lieu of the spouse's "physical presence" before the notary.

For consents witnessed by a plan representative, the parties may use live audio-video technology in lieu of "physical presence" if certain requirements are satisfied.

## Conclusion

The year 2020 brought about numerous legal developments affecting retirement plans. Employers sponsoring retirement plans should be aware of multiple different issues as they prepare for year-end compliance and new changes taking effect in 2021.

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IRS Allows Remote Witnessing of Retirement Plan Changes Through 2020 ([www.shrm.org/resourcesandtools/hr-topics/benefits/pages/irs-allows-remote-witnessing-of-retirement-plan-changes-during-2020.aspx](http://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/irs-allows-remote-witnessing-of-retirement-plan-changes-during-2020.aspx)), *SHRM Online*, June 2020

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