Few retirement plans need year-end amendments

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Oct. 26, 2020

In this article

Most retirement plan sponsors won't face year-end amendment deadlines in 2020, but a few may need to adopt amendments to reflect changes in law or plan design. This GRIST summarizes the amendments that may be required by year-end for qualified defined contribution (DC) and defined benefit (DB) plans, 403(b) plans, and one amendment for some nonqualified deferred compensation (NQDC) plans.

2018 Required Amendments List

The Required Amendments List (RA List) includes statutory and administrative changes in plan qualification requirements taking effect during the plan year in which the RA List is published. Individually designed plans generally must adopt required amendments by the end of the second calendar year starting after the change first appears on a given year's RA List. The amendment timing rules differ for required amendments to preapproved plans.

The 2018 RA List (Notice 2018-91) did not identify any changes in plan qualification requirements with a Dec. 31, 2020, amendment deadline. However, each RA List automatically includes certain periodic updates, even though these items aren't specifically referenced on that RA List. Examples of these updates include changes in cost-of-living adjustments, spot segment rates used to determine the 417(e)(3) applicable interest rate, and 417(e)(3) applicable mortality tables for the year in which such changes are effective. Most plans incorporate these items by reference, eliminating the need for amendment. But plans that don't incorporate these items by reference must be amended by Dec. 31, 2020, for updates that took effect in 2018.

Starting in 2019 (Notice 2019-64), the RA List also includes required amendments to 403(b) plans, but amendments on that RA List are not due until Dec. 31, 2021.

Discretionary amendments

Discretionary amendments reflect optional plan design changes. Most discretionary amendments must be adopted by the end of the plan year in which the optional change takes effect, although some exceptions apply. Sponsors of calendar-year plans that made discretionary design changes in 2020 generally must adopt conforming amendments by Dec. 31.

However, sponsors don't have to amend their plans this year for optional provisions of the Setting Every Community Up for Retirement Enhancement (SECURE) Act (Division O of Pub. L. No. 116-94), the Bipartisan American Miners (Miners) Act (Division M of Pub. L. No. 116-94), and the Coronavirus Aid, Relief and Economic Recovery Security (CARES) Act (Pub. L. No. 116-136). 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 (see SECURE, Miners and CARES Acts amendments not due this year below).

Disaster relief

Two year-end amendment deadlines — one for nongovernmental employers and another for governmental employers — apply to sponsors that offered certain disaster relief from their retirement plans.

Nongovernmental employers

The Taxpayer Certainty and Disaster Tax Relief Act of 2019 (Division Q of Pub. L. No. 116-94) included retirement plan relief for major disasters declared from Jan. 1, 2018, through Feb. 18, 2020, except certain California wildfires for which Congress granted separate relief in the Bipartisan Budget Act of 2018 (Pub. L. No. 115-97). Employers that offered this relief must amend their plans by the end of the first plan year starting in 2020 — i.e., by Dec. 31, 2020, for calendar-year plans. Sponsors of governmental plans have an additional two years.

The relief is similar to what Congress provided for individuals affected by those wildfires and Hurricanes Harvey, Irma and Maria, as well as the coronavirus pandemic, and includes:

- Tax-favored qualified disaster distributions up to $100,000
- Option to repay unused hardship distributions taken to buy or build a home in the disaster area

- Temporary increase in the plan loan limit to the lesser of $100,000 or 100% of the vested benefit
- Suspension of certain plan loan repayments for one year (or until June 17, 2020, if later)

Governmental employers

The Tax Cuts and Jobs Act (TCJA) of 2017 (Pub. L. No. 115-97) allowed plans to offer up to $100,000 in qualified disaster distributions for major disasters declared during the 2016 calendar year. Governmental employers that offered the relief must adopt conforming amendments by the end of the first plan year beginning in 2020 (Dec. 31, 2020, for calendar-year plans). Nongovernmental employers had to amend their plans by the end of the first plan year beginning in 2018.

PBGC lump sum assumptions

Some private-sector DB plans may need to be amended if they determine lump sums using the old PBGC tiered (immediate and deferred) interest rates and mortality assumptions. Effective Jan. 1, 2021, PBGC will switch to the applicable interest and mortality assumptions under Internal Revenue Code (IRC) Section 417(e) to calculate *de minimis* lump sums and will stop publishing the tiered rates. Whether a plan needs amending depends on the language used to reference PBGC's assumptions. These amendments could raise anti-cutback concerns, so sponsors should consult with their legal counsel.

Plans may use PBGC's assumptions for more than just lump sum calculations. For example, some cash balance plans use the tiered rates for interest crediting. Sponsors should review their plans thoroughly for all such references when determining if amendments are needed.

Eliminating payment delays for nondeductible NQDC

IRC Section 162(m) limits a public company's ability to deduct certain compensation in excess of $1 million paid to "covered employees." Prior to the TCJA, individuals who were covered employees in one year weren't necessarily covered employees in future years and would cease being covered employees upon termination of employment. But after the TCJA, once an employee becomes a covered employee, the employee keeps that status for all future years, even after termination of employment.

Regulations under Section 409A allow employers to delay payment of NQDC that's subject to the 162(m) deduction limits until those limits no longer apply and the NQDC can be deducted. Many NQDC plans include provisions requiring this delay. Before the TCJA, these provisions typically resulted in payment of the compensation when the employee terminated employment (if not sooner). But with the TCJA's changes, the compensation could remain subject to 162(m) — and therefore not payable to the employee — long after termination of employment and possibly for the remainder of the employee's life.

In the preamble to proposed 162(m) regulations issued last year, IRS provided relief for NQDC plans that have these mandatory payment delays. Employers can amend their plans to remove these provisions without causing an impermissible acceleration of amounts subject to 409A or a material modification of compensation otherwise grandfathered under the TCJA's changes to 162(m). These amendments must be adopted by Dec. 31, 2020.

SECURE, Miners and CARES acts amendments not due this year

Employers don't need to amend plans this year for any provisions in the SECURE Act, Miners Act or CARES Act. Amendments for these laws generally aren't due until the end of the plan year starting in 2022 (unless IRS extends the deadline). However, governmental employers have an additional two years to adopt amendments for all three acts, and sponsors of collectively bargained plans have an additional two years to do so for the SECURE and Miners acts (but not the CARES Act). These deadlines apply to both required and discretionary amendments.

Related resources

Non-Mercer resources

- Required Amendments List website (IRS, Oct. 13, 2020)
- Pub. L. No. 116-136, the CARES Act (Congress, March 27, 2020)
- Div. M of Pub. L. No. 116-94, the Bipartisan American Miners Act (Congress, Dec. 20, 2019)
- Div. O of Pub. L. No. 116-94, the SECURE Act (Congress, Dec. 20, 2019)
- Div. Q of Pub. L. No 116-94, the Taxpayer Certainty and Disaster Tax Relief Act of 2019 (Congress, Dec. 20, 2019)
- Pub. L. No. 115-97, the Tax Cuts and Jobs Act of 2017 (Congress, Dec. 22, 2017)

Mercer Law & Policy resources

- PBGC bids a not-so-fond farewell to old lump sum rates (Sept. 15, 2020)
- IRS issues FAQs on SECURE and Bipartisan American Miners acts (Sept. 22, 2020)
- Offering CARES Act distributions to DB plan participants (July 14, 2020)
- Administering CARES Act's waiver of 2020 RMDs from DC plans (June 25, 2020)
- IRS issues 2019 RA List, guidance on hardship amendments (Dec. 17, 2019)

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