

Considerations for Sponsors of Qualified Plans for Year Ending 2021, Year Beginning 2022

A Practical Guidance® Article by Elizabeth G. Kennedy, Morgan Lewis & Bockius, LLP



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With summer winding down, there may be no better time for sponsors of individually designed qualified retirement plans to begin thinking about year-end requirements and preparing for changes in the new year. Thankfully, required changes that must be adopted by the end of 2021 are minimal, and many plan sponsors have likely already amended their plans. This article sets forth items for consideration as plan sponsors head toward the end of 2021 and the start of 2022.

2021 Year-End Plan Amendments

2019 Internal Revenue Service (IRS) Required Amendment List

Some plan sponsors will have to adopt amendments to comply with changes to certain qualification rules by December 31, 2021. Specifically, a plan sponsor may have to adopt an amendment conforming to final regulations updating the 401(k) and 403(b) hardship rules, and the sponsor of a collectively bargained hybrid defined benefit plan may have to adopt an amendment conforming to final regulations that include the use of a market rate of return.

[Read more about these required changes >>](#)

Retroactive Amendment to Adopt a Nonelective Safe Harbor Formula

The plan sponsor of a non-safe harbor 401(k) plan may adopt an amendment introducing a safe harbor formula that uses a minimum 3% nonelective contribution as late as 30 days before the end of the plan year in which the formula goes into effect. Thus, a plan sponsor that would like to institute a nonelective safe harbor plan effective as of the first day of the 2021 plan year may do so by adopting a plan amendment providing such as late as 30 days before the end of the 2021 plan year.

The Setting Every Community Up for Retirement Enhancement (SECURE) Act expanded this to provide that, effective for plan years beginning after December 31, 2019, a plan sponsor may adopt a nonelective contribution safe harbor any time prior to the end of the plan year in which the formula goes into effect, provided that the nonelective contribution is equal to at least 4%.

Amendments to Safe Harbor 401(k) Plans

The plan sponsor of a safe harbor 401(k) plan that would like to make changes beginning in 2022 must generally adopt an amendment providing these changes no later than the last day of the 2021 plan year.

There are exceptions, however, under which a plan sponsor may adopt 2022 changes during 2022:

- Where a plan sponsor reduces or suspends future safe harbor contributions because it is operating at an economic loss, or where it provided in its last-issued safe harbor notice (or in a similar notice if the safe

harbor notice requirements no longer apply) a statement about the possibility of reducing or suspending safe harbor contributions midyear, and the plan sponsor (1) provides a supplemental notice to eligible employees at least 30 days before the effective date of the reduction/suspension, and (2) provides in the plan amendment that the plan will pass the actual deferral percentage (ADP) test (and if applicable, the actual contribution percentage (ACP) test) for the entire plan year using the current-year testing method.

- For the purpose of establishing a designated Roth contribution feature or a hardship distribution provision within its plan.
- To adopt any change as discussed in IRS Notice 2016-16 ([read more about these changes](#)).
- As provided by the IRS in future published guidance.

Discretionary Changes to Any Qualified Plan

Changes not mentioned above that a plan sponsor elects to make to a plan must generally be adopted no later than the end of the plan year in which they become effective.

Participant Notices

ACA, EACA, and Safe Harbor Notices

Section 401(k) plans that include an automatic contribution arrangement (ACA) or eligible automatic contribution arrangement (EACA), or that avoid the ADP/ACP nondiscrimination tests by comporting with the safe harbor requirements under Section 401(k)(12) or (13) of the Internal Revenue Code (IRC), must send annual participant notices at least 30 days before the beginning of the 2022 plan year.

A plan sponsor of a safe harbor 401(k) plan that wishes to adopt any changes to the plan may have to describe those changes in this year's safe harbor notice. A plan sponsor of a safe harbor 401(k) plan that anticipates it may encounter financial hardship in 2022 may wish to consider including a statement in its safe harbor notice that the plan may be amended during the plan year to reduce or suspend safe harbor contributions, which reduction/suspension will not apply until at least 30 days after the notice is provided. Including this statement will help ensure that the plan sponsor will not violate the prohibition on midyear amendments if it finds it must amend the plan sometime during 2022 to reduce or suspend contributions.

Beginning for plan years after December 31, 2019, under the SECURE Act, safe harbor plans that provide a safe harbor contribution equal to a minimum 3% nonelective contribution are no longer required to provide a safe harbor

notice in order to avoid *the ADP nondiscrimination test*. However, a traditional safe harbor plan meeting the criteria of IRC Section 401(k)(12) must still provide the notice in order to avoid *the ACP nondiscrimination test* for any non-safe harbor matching contributions under the plan that are structured to meet the safe harbor provision under IRC Section 401(m)(11). (IRC Section 401(m)(11) provides that non-safe harbor matching contributions will be treated as meeting the ACP test if:

1. The non-safe harbor match does not exceed 6% of an employee's compensation
2. The rate of the matching contribution does not increase as the rate of the employee's contribution/elective deferral increases –and–
3. The matching contribution for any highly compensated employee at any given rate of employee contribution/deferral does not exceed the matching contribution for any non-highly compensated employee.)

No such notice requirement exists (or existed even prior to the SECURE Act) with respect to non-safe harbor matching contributions that are structured to meet the safe harbor provision under IRC Section 401(m)(12) under a qualified ACA (QACA) safe harbor plan. Thus, no safe harbor notice need be provided under a QACA that provides a minimum 3% nonelective safe harbor contribution.

QDIA Notice

A qualified default investment alternative (QDIA) notice, often sent by a plan's recordkeeper, must also be sent to participants and beneficiaries at least 30 days before the beginning of the 2022 plan year.

Changes for 2022

Updated Life Expectancy Tables for IRC Section 401(a)(9) Required Minimum Distributions

Effective for distribution calendar years beginning on and after January 1, 2022, updated life expectancy and distribution tables will be used to determine required minimum distribution amounts under defined benefit and defined contribution qualified plans, as well as individual retirement accounts (IRAs) and IRC Section 457, 403(a) and 403(b) plans. This is the applicability date of final Treasury regulations that were issued on November 12, 2020, after the US Department of the Treasury determined that the tables should be revised to reflect current mortality data. These final regulations revise regulations that were issued in 2002 based on mortality rates for 2003. The effect of the changes is that required minimum distributions will generally be reduced, allowing participants to retain larger account

balances to cover longer life spans, as well as to decrease yearly tax liability.

The updated life expectancy tables may also impact the application of the additional 10% tax on early distributions since plans are permitted to use these tables to determine whether the exception under IRC Section 72(t) applies. The exception provides that the 10% tax will not apply if the distribution is taken as a series of substantially equal period payments made for the life (or life expectancy) of the employee or joint lives (or joint life expectancies) of the employee and his/her beneficiary.

The Treasury Department and the IRS anticipate that they will review the tables (with possible updates) in the future at the earlier of 10 years or whenever a new study of individual annuity mortality experience is published.

Plan sponsors need not worry about having to amend their plans for these changes—life expectancy and distribution period tables are virtually never contained in plan documents. But they may want to check with their recordkeepers to make sure the recordkeepers have set up their systems to calculate required minimum distributions according to the new regulations.

Lifetime Income Illustration

Plan sponsors of defined contribution plans must begin providing lifetime income illustrations to participants at least annually.

[Read more about this change >>](#)

Expiration of One-Year Toll Under COVID-19 Relief

Guidance issued in 2020 by the US Department of Labor's Employee Benefits Security Administration provides relief for plan sponsors and participants/beneficiaries in meeting disclosure and other activity deadlines under a plan. This relief may extend no longer than one year by statute. Therefore, any period of relief that began in 2021 must end no later than (one year later) in 2022.

[Read more >>](#)

Expiration of Temporary Relief from Requiring In-Person Participant Elections and Spousal Consent

As of this publication date, temporary relief that the IRS provided from the requirement that certain plan elections be witnessed in person will expire on July 1, 2022.

[Read more >>](#)

Deadline to Formally Adopt CARES Act and SECURE Act Amendments

Optional and mandatory changes under the Coronavirus Aid, Relief, and Economic Security (CARES) Act and the SECURE Act must be adopted by the last day of the 2022 plan year.

Related Content

- [SECURE Act \(Pub. L. No. 116-94\)](#)
- [CARES Act \(Pub. L. No. 116-136\)](#)
- [DOL Disaster Relief Notice 2020-01](#), [DOL Disaster Relief Notice 2021-01](#)
- [I.R.S. Notice 2021-40](#)

Practical Guidance

Practice Notes

- [Coronavirus \(COVID-19\) Resource Kit](#)
- [Employee Benefits & Executive Compensation Key Legal Developments Tracker](#)
- [Employee Benefit Plan COVID-19 Relief Chart and Tracker](#)
- [Lifetime Income Benefit Rules for Defined Contribution Plans under the SECURE Act](#)
- [Qualified Retirement Plan Fundamentals](#)
- [Required Minimum Distribution Rules for Defined Benefit Plans](#)
- [Required Minimum Distribution Rules for Defined Contribution Plans](#)
- [Safe Harbor 401\(k\) Plan Resource Kit](#)

Forms

- [Board Resolutions \(CARES Act Plan Amendment\) \(401\(k\) Plan\)](#)

Articles

- [Benefit Statement Changes Begin in September. Is Your Plan Administrator Ready?](#)
- [COBRA Subsidy Rules under the American Rescue Plan Act: Client Alert Digest](#)
- [Retirement Plan Provisions of the CARES Act](#)
- [SECURE Act Brings Numerous Retirement Plan Changes](#)

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