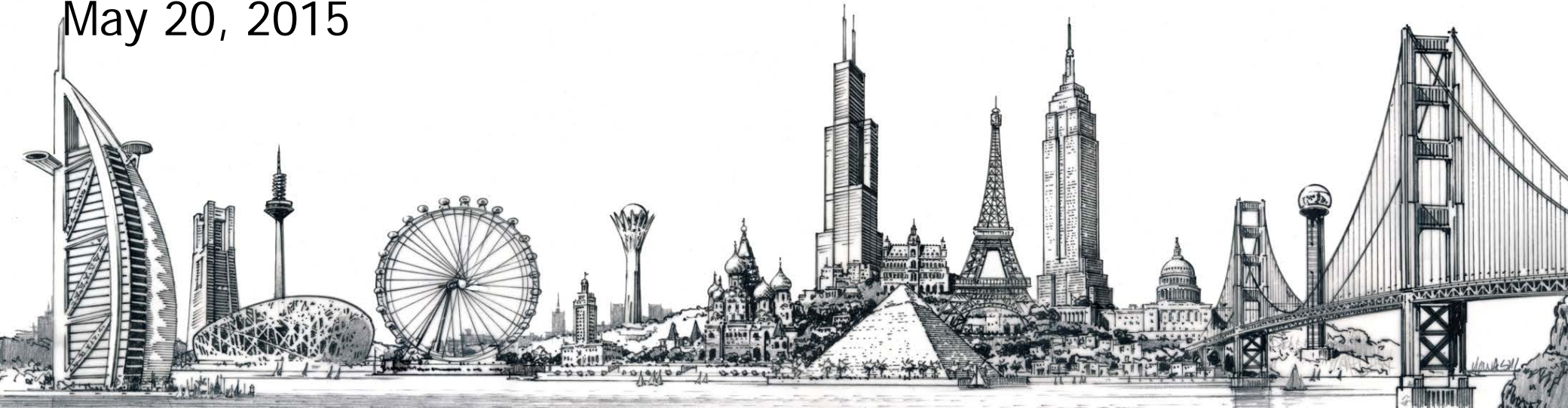


Morgan Lewis

RETIREMENT PLAN ADMINISTRATIVE COMPLIANCE CALENDAR

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Overview of Today's Training

- Month-by-month outline of plan administrator's reporting, disclosure, and other obligations.
- Obligations for tax-qualified IRC 401(a) defined benefit and defined contribution plans and IRC 403(b) plans.
- Some obligations are not tied to a particular month, e.g., the distribution of a new summary plan description. We will, however, include a discussion of these obligations within the month in which we recommend they at least be considered.
- For ease of presentation, we assume the plan is a single employer plan that operates on a calendar plan year basis.
- To keep within presentation time, we will not discuss reporting and disclosure requirements for certain specific nonrecurring events, such as plan terminations.
- We will include plan administrator responsibilities that are often delegated to others, such as a third-party administrator.

Introduction to Plan Administration

- ERISA defines “administrator” as:
 - the person specifically so designated by the terms of the instrument under which the plan is operated;
 - if an administrator is not so designated, the plan sponsor; or
 - in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as Secretary [of Labor] may by regulation prescribe.

Introduction to Plan Administration (cont'd)

- ERISA defines “plan sponsor” as:
 - the employer in the case of an employee benefit plan established or maintained by a single employer;
 - the employee organization in the case of a plan established or maintained by an employee organization; or
 - in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

Introduction to Plan Administration (cont'd)

- Because the employer is defined as the plan administrator if the plan instruments do not otherwise define administrator, the employer may have the responsibilities that the statutes assigns to the “plan administrator.”
- In the case of small plans, and plans governed by a prototype document, it is fairly common for the employer to be defined as the “plan administrator.”
 - As will be noted, the plan administrator is a fiduciary. Thus, if the employer is defined (purposely, or by default) as the “plan administrator,” the corporate or other legal entity (acting through its board of directors, typically) will constitute a fiduciary.
 - Employers should be aware of this result, and should understand its implications.

Introduction to Plan Administration (cont'd)

- As just noted, the plan administrator is a fiduciary of the plan by virtue of the nature of his or her work, that is, to exercise discretionary authority and responsibility with respect to management of the plan.
- Duties are dictated by the plan document, but in general include:
 - tracking employee service for plan eligibility, vesting, and benefit accrual
 - ensuring that eligible employees (on initial hire or on rehire) become participants in the plan on a timely basis
 - calculating an employee's compensation
 - transmitting contributions to the plan on a timely basis
 - identifying highly-compensated employees
 - conducting any necessary coverage and nondiscrimination tests
 - limiting contributions
 - complying with top-heavy rules
 - making plan distributions

Introduction to Plan Administration (cont'd)

- General Duties (cont'd.):
 - taking into account controlled group issues and leased employees
 - administering a plan's loan program
 - filing the annual report (Form series 5500)
 - updating the plan document
 - complying with fiduciary responsibilities, such as bonding and disclosure to participants

Introduction to Plan Administration (cont'd)

- Frequently, a plan administrator will delegate some, most or all of its functions to a third-party service provider, such as a record-keeper.
- If it does so, the administrator and service provider need to clearly understand and state which party is responsible for which disclosure, reporting and other obligations. Misunderstandings can result in missed or late disclosures and filing.
 - For example, it is important that the plan administrator know whether it, the record-keeper, or another party is responsible for distributing various participant notices (such as a blackout notice, or a 401(k) safe harbor notice).

JANUARY

- January 7 – January 24 – (DB and DC plans) Deliver “notice to interested parties” (within 10-24 days before filing date) for applications to the IRS for favorable determination of on-cycle qualified plans (end of on-cycle filing period is January 31)
- January 31 – Provide employees with Form W-2 (Copies B and C) reporting the prior year’s information, which will show active plan participant status and other information (e.g., whether 401(k) contributions were made, whether make-up contributions were made)
- January 31 – (DB, DC, and 403(b) plans) Report prior year’s distributions, including direct rollovers, from tax-qualified plans and 403(b) plans on Form 1099-R (Copies B and C) to participants and beneficiaries
- January 31 – (DB, DC, and 403(b) plans) - Report income tax withheld from prior year distributions to the IRS on Form 945

JANUARY (cont'd)

- Items to Consider for the Coming Year:
 - (DB, DC, and 403(b) plans) If the plan is new, does it have an SPD?
 - ERISA requires that an SPD must be provided to participants in a new plan on or before the latest of:
 - 120 days after the plan's effective date;
 - 120 days after the plan's adoption date; or
 - 90 days after an employee becomes a participant.
 - An SPD must be provided to a beneficiary by 90 days after the beneficiary begins receiving plan benefits.

JANUARY (cont'd)

- If the plan is existing, must the SPD be updated?
 - ERISA requires the SPD to be updated every 5 years if the plan has been amended (every 10 years if the plan has not been amended). The updated SPD must be provided to participants and beneficiaries receiving benefits no later than 210 days after the end of the plan year for which it was updated.
 - DOL Reg. 2520.102-3 provides detailed content requirements, such as descriptions of eligibility for participation and benefits, qualified joint and survivor annuities, determination of years of service, vesting, and general plan information.
 - The outcome of certain legal cases provides guidance as to what should be present in an SPD.

JANUARY (cont'd)

- Are plan documents, amendments, collective bargaining agreements and trust documents available for viewing at the plan administrator's office, and available to copy? ERISA requires that they be made available within 30 days of a participant's request (the DOL may also request copies), and imposes a penalty of up to \$110 per day for failure to timely provide them.
- General Participant Disclosure Documents – are they up-to-date?
 - (DC plan) Notice Regarding the Rights Relating to the divestment of employer securities
 - (DC and 403(b) plans) Safe harbor, qualified default investment alternative ("QDIA"), and/or automatic enrollment notices
 - (DB, DC, and 403(b) plans) Notice of the denial of a benefit claim, and denial upon appeal
 - (DB) Suspension of benefits notice
 - (DB, DC, and 403(b) plans) QDRO notices and procedures
 - (DB, DC, and 403(b) plans) Qualified preretirement survivor notice and qualified joint and survivor notice
 - (DB, DC, 403(b) plans) – Notice of the right to elect not to have federal income tax withheld from distributions other than "eligible rollover distributions"

JANUARY

- General Participant Disclosure Documents – are they up-to-date?
 - (DC, 403(b)) General description of the material features, explanation of relative values of optional forms and notice to consent of distribution exceeding \$5,000
 - (DB, DC, 403(b) plan) Notice of the right to defer distribution and the consequences of the failure to defer
 - (DB, DC, 403(b) plan) Special tax notice regarding plan payments (402(f) notice)
 - (DB, DC, 403(b) plans) – Automatic rollover notice (if plan automatically rolls over amounts exceeding \$1,000 absent a participant determination otherwise)
 - (403(b)) At least once in each plan year participants must be made aware of the opportunity to make or change a cash or deferred election
 - (DC, 403(b)) DOL Reg. 404a-5 disclosure of plan-related and investment-related information – this disclosure must be provided on or before the first date the participant or beneficiary can direct his/her investments, and annually thereafter; administrative and individual expenses actually charged to a participant must be disclosed quarterly (“participant-level fee disclosure”).

FEBRUARY

- Quarterly – (DC and 403(b) plans) Provide periodic benefit statement (ERISA Section 105 Notice) to each participant and beneficiary who may direct the investment of his or her accounts
 - Periodic benefit statement must be provided once each calendar year to participants and beneficiaries who may *not* direct investment
 - Periodic benefit statement must be provided once every 3 years to vested employee-participants in a DB plan, or the plan administrator may instead provide an annual notice indicating how statement may be obtained
- Last day of February – (DB, DC, and 403(b) plans) - Provide Form W-2 (Copy A) reporting the prior year's plan information to the Social Security Administration
- Last day of February - (DB, DC, and 403(b) plans) - Report prior year distributions, including direct rollovers, from tax-qualified and 403(b) plans, to the IRS using Form 1096 to transmit Copy A of Form 1099-R

MARCH

- March 15 – (DB, DC, and 403(b) plans) Report prior year pension payments (and withholding) to non-resident aliens on Form 1042-S (Copy B)
- March 15 – (DB, DC, and 403(b) plans) - Report prior year pensions paid to nonresident aliens to the IRS using Form 1042-T to transmit Copy A of Form 1042-S

APRIL

- Employers must determine whether any participants must begin receiving required minimum distributions (“RMDs”) – RMDs must be paid by April 1:
 - (DB and DC plans) Participant who reached age 70-1/2 in the prior year and are 5% owners, whether or not currently employed
 - (DB, DC, and 403(b) plans) Participants who reached age are 70-1/2 in the prior year and are not 5% owners whether or not currently employed, if the plan so provides
 - Exceptions apply to participants who signed an election before January 1, 1984 to remain under the pre-Tax Equity and Fiscal Responsibility Act (“TEFRA”) rules, and to participants who are not 5% owners who reached age 70-1/2 before January 1, 1988
- (DB plan)
 - Provide annual funding notice (101(f) notice) to participants, beneficiaries, alternate payees, participating unions, and the PBGC) within (in general) 120 days after the close of the plan year to which it relates

MAY

- ERISA Section 4043.25 requires that the PBGC be notified within 30 days of a failure to make a required quarterly contribution.
- Required quarterly contributions are due 15 days after the end of the quarter.
- Thus, if a required April 15 contribution was not made, the PBGC must be notified by May 15.

JUNE

- Consider possible plan design, administrative, and legally-required changes.
 - Determine whether a written plan amendment is required:
 - A written amendment will be needed for any change impacting the provisions of the written document.
 - A written amendment will likely not be needed for record-keeping and certain administrative changes .
 - Consider carefully *all* changes relating to the plan to determine if a written amendment is needed – if a plan change requires a written amendment and the amendment is not adopted *timely*, the plan is deemed not to be operating according to its terms (which could, technically, result in disqualification).

JUNE (cont'd)

- Retroactive Amendments
 - Where a written amendment is needed, many may be adopted on a retroactive basis (after the amendment's effective date), subject to the restrictions of IRC 411(d)(6).
 - “Discretionary” amendments (changes that are not legally-required, such as design changes) must generally be adopted by the last day of the plan year in which they are effective.
 - “Interim” amendments (changes to comply with statutory or regulatory changes) must be adopted by the later of (1) the due date (including extensions) for filing the employer's tax return for the year in which the change becomes effective or (2) the end of the plan year in which the change becomes effective.

JUNE (cont'd)

- Exceptions:
 - Government and tax-exempt employers
 - Earlier deadline required by statutory provision or guidance for a discretionary amendment (e.g., an amendment to add a cash or deferred arrangement to a profit sharing plan cannot be adopted retroactively)
 - Earlier or later deadline provided by statutory provision or guidance for an interim amendment (e.g., Section 1107 of PPA '06 provided that any complying discretionary or interim amendment would be timely adopted by the last day of the first plan year beginning on or after 1/1/09)
 - The amendment rules relating to 403(b) plans are different and under development at the IRS

JUNE (cont'd)

- Other Issues to Keep in Mind:
 - 401(k) safe harbor plans – in general, amendments may not be adopted mid-year; the effective date must be the first day of the plan year and the amendment must be adopted before the effective date; the IRS may liberalize this restriction in the future.
 - If an employer is operating at an economic loss, or if the plan's safe harbor notice indicated that safe harbor contributions might be suspended or reduced mid-year, the employer may reduce or suspend safe harbor contributions mid-year, if the employer provides a safe harbor supplemental notice at least 30 days before the amendment effective date.
 - An amendment removing a protected benefit must generally be adopted before the effective date or an impermissible benefit cutback will occur.

JUNE (cont'd)

- (DB, DC, and 403(b) plans) - If an amendment modifies a vesting schedule to reduce the vesting percentage, the percentage of the benefit already vested may not be reduced, and the employer must allow participants with at least 3 years of service to elect to remain under the pre-amendment schedule; the election period begins no later than the date the amendment is adopted and ends no earlier than the latest of:
 - 60 days after the amendment adoption date;
 - 60 days after the amendment effective date; or
 - 60 days after the participant is provided with a written notice of the amendment.
- Remember to consider changes under collective bargaining agreements to see if they should be included in any written amendments.
- (DB and money purchase DC plans) – If the amendment will significantly reduce benefit accrual, an ERISA 204(h) notice must be sent to participants, employee organizations, and alternate payees at least 45 days (generally) before the amendment effective date.

JULY

- (DB, DC and 403(b) plans) - A “summary of material modifications” (“SMM”) that describes plan amendments made in the prior (calendar) plan year are generally due by July 29.
 - This timing reflects the statutory requirement that a SMM be provided no later than 210 days after the end of the plan year in which the amendment was adopted.
- (DB, DC and 403(b) plans) - July 31 – File Form 5500 with the Department of Labor (unless an extension applies).

AUGUST

- (DB plans) - August 15 – File Form 10 with the PBGC if necessary to report late quarterly contribution.

SEPTEMBER

- (DC and 403(b) plans) - A summary annual report must be distributed by September 30 if the plan sponsor did not have an extension to file its Form 5500.
 - The summary annual report requirement no longer applies to DB plans.

OCTOBER

- (DB, DC and 403(b) plans) - File Form 5500 and related materials with the Department of Labor (if an extension applies).
- (DB and DC plans) - If the plan failed coverage or nondiscrimination testing in the prior plan year, a corrective amendment may be adopted under Treasury Regulation Section 1.401(a)(4)-11(g) by October 15.
- (DB plans) - File PBGC premium by October 15.

NOVEMBER

- (DB plans) - November 15 – File a Form 10 with the PBGC if necessary to report a late quarterly contribution.

DECEMBER

- (Safe harbor 401(k) plans) - December 1 is the deadline for distributing a safe harbor notice to participants in a safe harbor 401(k) plan (and the notice cannot be distributed any earlier than October 1).
- (Participant-directed DC plans) - December 1 is also the deadline for distributing a “qualified default investment alternative” (“QDIA”) notice.
- (401(k) plans) - If a plan has an automatic enrollment feature, but is not a “QACA” safe harbor plan, December 1 is the deadline for distributing a notice describing the automatic enrollment provisions of the plan.
- (DB and DC plans) - Any discretionary amendments must be adopted by December 31, or earlier if their adoption could trigger a Code Section 411(d)(6) reduction.
- (401(k) plans) - Return excess and aggregate excess contributions by December 31 for a failed ADP/ACP test (respectively) from the prior plan year.

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QUESTIONS?

Register for upcoming webinars in this series:

September 22 | Retirement Plan Correction Issues

October 14 | Fiduciary Issues for Defined Contribution Plans

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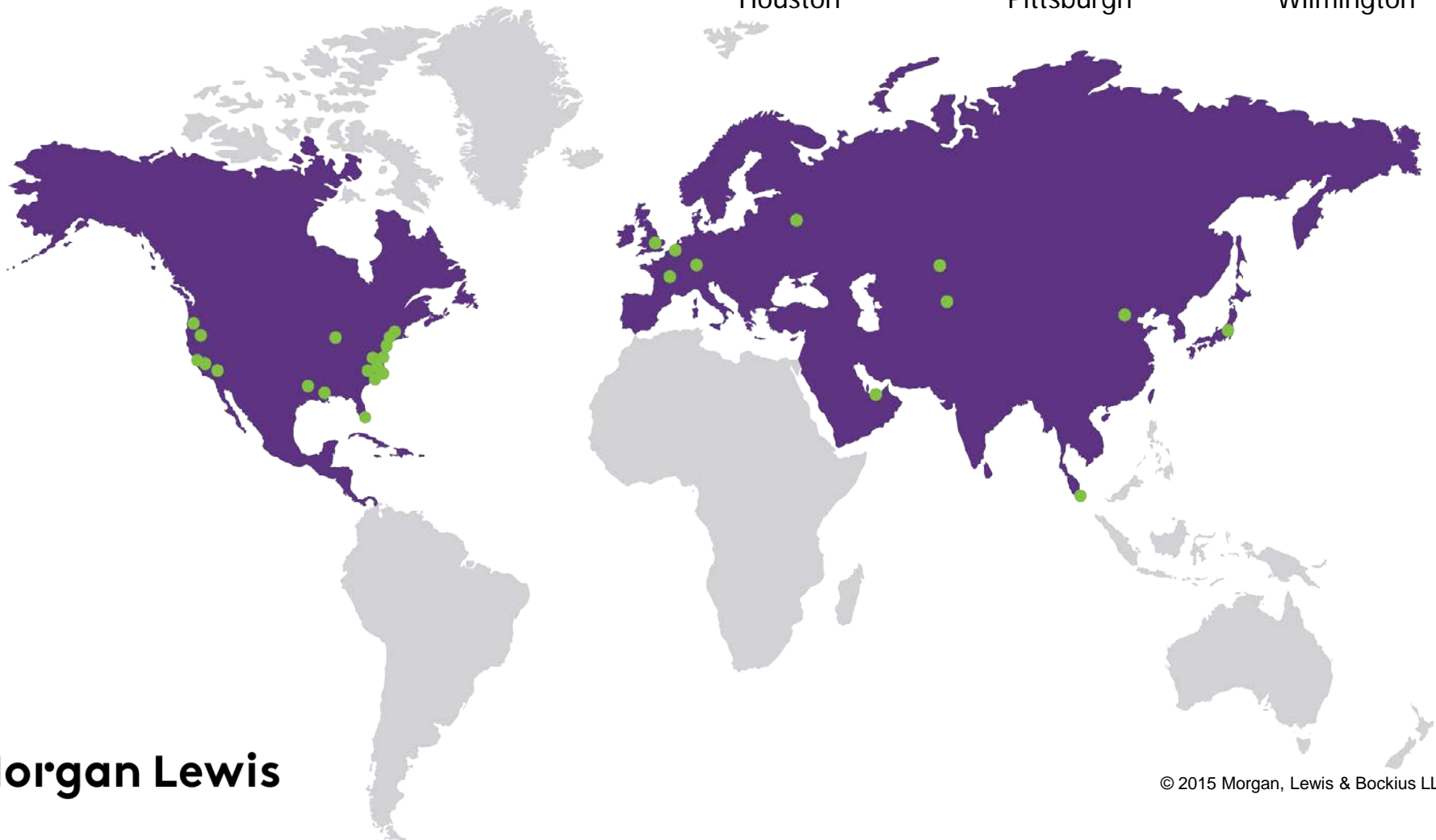
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