

2021 Retirement Plan Year-End Amendments and Operational Compliance

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As we approach the end of 2021, it's again time for sponsors of 401(a) and 403(b) plans to review their plan documents and plan operations to ensure compliance with increasingly complex qualification requirements. While there is no one-size-fits-all checklist, the following provides an overview of these requirements to help plan sponsors (1) determine the need to adopt plan amendments before year-end, (2) ensure operational compliance with changes in law, (3) evaluate the implications of potential future plan changes, and (4) take appropriate action/next steps.

Required Amendments for 2021 Year-End

Plan sponsors should ensure their plans are amended to reflect the following, which includes items on the [IRS 2019 Required Amendments List](#), by year-end:¹⁴

- ***Final IRS Regulations for Hardship Distributions from 401(k) and 403(b) Plans.*** In 2019, the IRS issued final regulations applicable to hardship distributions from 401(k) and 403(b) plans to reflect both legislative and regulatory changes. All plans – including pre-approved plans – must be amended to reflect the required changes and plan operations no later than December 31, 2021. Please see [IRS Finalizes Changes in Hardship Distribution Rules](#) for additional information.
- ***Final IRS Regulations for Collectively-Bargained Cash Balance/Hybrid Defined Benefit Plans.*** In 2015, the IRS issued the last in a series of regulations applicable to cash balance and other hybrid defined benefit plans. Sponsors of collectively-bargained plans have until December 31, 2021 to amend those plans to reflect certain changes, such as parameters regarding the use of a “market rate of return.” Please see [View from Groom: Final Cash Balance Regulations Provide More Time and Flexibility](#) for additional information.
- ***Plan Design Changes in 2021.*** Plan documents should be amended by plan year-end for any “discretionary” plan design changes implemented during 2021. These discretionary changes include plan design changes (other than required compliance changes), changes in plan

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administration to the extent reflected in the plan document, and changes to plan provisions pursuant to collective bargaining agreements. An earlier deadline applies to plan sponsors who choose to adopt a 401(k) safe harbor plan design for 2021, using a 3% nonelective contribution. The safe harbor plan provisions must be adopted, and disclosures provided to participants, at least 30 days before the end of the plan year (*i.e.*, by December 1, 2021 for calendar year plans). Amendments also may be required in 2021 for discretionary changes taking effect in 2022, as described below.

- ***New Mortality Tables for Defined Benefit Plans.*** The IRS updated the mortality tables under Section 417(e) for valuing lump sums and certain other distribution options (*e.g.*, Social Security leveling options), as well as for Section 415 calculations and funding requirements. Amendments for the updated 2019 mortality tables are required by December 31, 2021 (except for governmental and church plans, which are not required to use these actuarial tables). No amendment is required, however, for plans that incorporate the IRS mortality table by reference (*e.g.*, many plans refer to the applicable mortality table prescribed by Section 417(e)(3)).

Operational Compliance Review

The IRS maintains an “[Operational Compliance List](#)” (last updated June 3, 2021) that describes statutory and regulatory changes in requirements for 401(a) and 403(b) plans. Plan sponsors should review this list to ensure their plans are operationally compliant with the relevant provisions. Important additions to the Operational Compliance List for 2021 and 2022 include the following:

- ***SECURE Act Changes.*** Although plan amendments are not required until December 31, 2022 (December 31, 2024 for governmental plans), plans need to be in operational compliance with various SECURE Act changes, such as the mandatory changes to the Section 401(a)(9) required minimum distribution rules on earlier dates. Please see [Groom’s SECURE Act Resource Library](#) for additional information.
- ***Remote Notarization/Relief from Physical Presence for Participant and Spousal Consent.*** Plan sponsors may continue to take advantage of the temporary relief from the requirement for certain participant elections (including spousal consents) to be witnessed in the “physical presence” of a plan representative or notary public. The relief, initially provided in Notice 2021-3 through June 30, 2021, was extended in Notice 2021-40 through June 30, 2022. Please see [IRS Extends Remote Notarization Through June 2022 \(And Is Considering Permanent Relief\)](#) for more information, including the potential for this relief to become permanent.
- ***New Minimum Required Distribution Tables for Defined Contribution Plans.*** Beginning January 1, 2022, final regulations under Section 401(a)(9) require use of new tables to calculate required distributions from tax-qualified defined contribution plans and Section 403(b) plans. Please see [IRS Issues Final Regulations Updating Minimum Required Distribution Rules](#) for additional information.

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- **Non-COVID Disaster Relief.** The Consolidated Appropriations Act, 2021 included optional disaster-related distribution and loan rules (similar to relief under the CARES Act and for other natural disasters – such as in-service distributions up to \$100,000, 10% penalty tax relief, increased loan limits, loan repayment suspensions, and return of withdrawals for home purchases) for FEMA declared disasters (other than COVID) from January 1, 2020 through 60 days after enactment of the Act (g., through February 25, 2021). The relief applied to distributions made through the day before 180 days after enactment (e.g., June 24, 2021). Plan sponsors electing this relief need to ensure their plans are in operational compliance, but no plan amendment is required until the end of the 2022 plan year (2024 for governmental plans).

When reviewing the Operational Compliance List, plan sponsors may want to consider amending their plans for certain changes effective in prior years, even though amendments are not yet required. For example, most plan sponsors have until the end of the 2022 plan year to amend their plans to reflect CARES Act changes (governmental plans have until the end of 2024) but may prefer to amend their plans now. Even though plan documents generally need not be amended until a later date, it is critical for sponsors and plan service providers to be in alignment on when and how these changes are implemented.

Looking Ahead - Timing Considerations for Future Plan Changes

Many plan sponsors are already looking beyond 2021 and evaluating potential future changes to their retirement plans. As part of this process, plan sponsors should plan ahead, taking into account the following:

- **Future Retirement Plan Enhancements.** These enhancements may include student loan repayment assistance, automatic reenrollment features (designed to help employees maximize matching contributions), new “non-elective” employer contributions, and financial wellness and investment advice/managed account offerings in defined contribution plans. Plan sponsors should talk to counsel prior to making these changes to ensure they are implemented in an intentional and compliant manner, particularly changes that require advance notice to participants or changes to service-provider agreements and related fees.
- **Amendments for 2022 Plan Design Changes.** While plan sponsors generally have until the end of the plan year to adopt discretionary plan design amendments, there are numerous exceptions. For example, plan sponsors that wish to implement a safe harbor 401(k) plan design based on matching contributions must amend their plans before the beginning of the plan year and provide advance notice to participants. In addition, changes that reduce future benefits or are otherwise subject to anti-cutback rules generally must be adopted on a prospective basis, and may also require advance notice to participants. Moreover, a reduction of matching or non-elective/profit sharing contributions, depending on plan terms, or changes to plans that use a 401(k) safe harbor design, also may be subject to the prospective amendment rules.

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- **Plan Termination Amendments.** Plans that are terminating must be amended to reflect all discretionary and required amendments, including SECURE Act and CARES Act changes, by the plan termination date.

Next Steps for Plan Sponsors

In the coming weeks, plan sponsors should take the following next steps to ensure their plan documents and plan operations are compliant:

- **Review and Amend Plan Documents.** Review and amend plan documents to ensure they timely reflect all discretionary and required plan changes (including design changes that became effective during the year or, in some cases, will become effective next year).
- **Review and Amend SPDs.** Review and amend Summary Plan Descriptions – or issue a Summary of Material Modifications – for recent material changes.
- **Review Plan Operations.** Review plan operations to determine whether conforming plan amendments may be required and to ensure that changes in law are timely implemented.
- **Consider EPCRS for Any Plan Amendment or Operational Compliance Issues.** If the plan document and operational review indicates potential non-compliance, talk to counsel to evaluate possible corrective measures in accordance with the Employee Plans Compliance Resolution System ("EPCRS") (Rev. Proc. 2021-30). Please see [IRS Makes Helpful Changes to EPCRS and Modifies Anonymous Submission Process](#) for additional information.
- **Consider Eligibility for IRS Determination Letter.** Consider seeking an IRS determination letter for any new individually-designed 401(a) plan, or an updated determination letter for plan changes related to certain merger and acquisition activity or plan terminations. Please see [IRS Reopens Determination Letter Program for Two Significant Groups of Plans](#) for additional information.
- **Evaluate Potential Future Plan Changes.** Consider whether future plan changes may require a prospective amendment and stay in front of changes that may require advance notice to participants and changes to service-provider agreements and related fees.

In addition to the above, plan sponsors should confirm that legally-required participant notices (*e.g.*, 401(k) safe harbor notices, QDIA/automatic enrollment notices, fee disclosures) are compliant in form and are being provided by the applicable deadlines using the appropriate method of delivery.

If you have any questions, please do not hesitate to contact your regular Groom attorney or the authors listed below:

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