

ELIZABETH THOMAS DOLD is a Principal at Groom Law Group, Chartered in Washington, DC. DAVID N. LEVINE is a Principal at Groom Law Group, Chartered in Washington, DC.

Employee Benefits Corner

Sample IRS Plan Amendment Language (via LRMs) Is Here

By Elizabeth Thomas Dold and David N. Levine

Despite the generous extension of plan amendment deadlines for recent law changes (generally through December 31, 2026 (as provided in Notice 2024-2"irc", plan sponsors have been eager to update their plan documents to reflect various recent law changes—particularly the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE 1.0) and SECURE 2.0 changes. The thought being that it is helpful when the plan document reflects current law and current operations, as the plan document controls. But there is hesitation when there is guidance still pending on the various legal changes, or there is no indication of what the Internal Revenue Service (IRS) will approve. Therefore, it is always welcomed when the IRS updates their “Listing of Required Modifications” (LRMs), which is sample language for pre-approved plan provider documents to follow when submitting their documents to the IRS.

We are pleased to report that the IRS recently issued updated LRMs for defined contribution (DC) plans—www.irs.gov/retirement-plans/listing-of-required-modifications-lrms—that address a number of plan changes under recent laws. Importantly, this language can be used by both pre-approved and individually designed plans. Due to the complexities of the Internal Revenue Code (Code), and wanting to be sure that the plan document is in compliance with the law, this document is a good starting point.

Set forth below is a summary of the key provisions that were updated to reflect recent law. The LRMs do not include all legal changes over the last few years (as some of the provisions still need IRS guidance), but this list will get us started. These changes are also outlined in Notice 2024-3—the 2023 Cumulative List (www.irs.gov/pub/irs-drop/n-24-03.pdf).

1. Required Minimum Distributions (RMDs) (Code Sec. 401(a)(9)) (required changes). The LRMs reflect (i) required beginning date changes from SECURE 1.0 and 2.0, (ii) waiver of 2020 RMDs (following Notice 2020-51), (iii) post-death RMD rules for DC plans, and (iv) changes to qualifying longevity annuity contracts.

DC LRM Sample Adoption Agreement Language (www.irs.gov/pub/irs-tege/dc-lrm0124-redlined.pdf): see items #49 (most of the RMD changes), #32, and #42 (qualified longevity annuity contract (QLAC)).

2. Small Cashouts (Code Secs. 401(a)(31)(B) and 411(a)(11)) (optional change). The LRMs include changes to increase the cashout to \$7,000 (up from \$5,000).

DC LRM Sample Adoption Agreement Language: *see* items #43 and #44.

\$5,000 (\$7,000 for distributions made after December 31, 2023).

3. Distributions During Working Retirement (Code Sec. 401(a)(36)) (optional change). The LRMs reflect the lowering of the minimum age at which a pension plan (including a money purchase pension plan) may make a distribution to an employee for an in-service distribution, from age 62 years to age 59½ years.

DC LRM Sample Adoption Agreement Language: *See* item #44A.

A participant's benefit under the plan may not be distributed before the participant attains age 59½ years (age 62 years for plan years beginning before January 1, 2020) or, if earlier, the participant separates from employment, attains normal retirement age under the plan, dies, or becomes disabled, or upon termination of the plan.

4. Lifetime Income Investment Distribution (Code Sec. 401(a)(38)) (optional). The LRMs provide language for DC plans to permit certain transfers and distributions of lifetime income investment options in cases in which the investment options are no longer authorized to be held as investment options under the plan.

DC LRM Sample Adoption Agreement Language: *see* items #69 (below) and #51 (direct rollover).

A lifetime income investment held by the plan may be distributed if the investment can no longer be held as an investment option under the plan. Distributions must be made within the 90-day period ending on the date when the lifetime income investment is no longer authorized to be held as an investment option under the plan, and [SELECT ONE OR BOTH OF THE FOLLOWING]:

1. _____ The distribution may be made in a direct trustee-to-trustee transfer to an eligible retirement plan.
2. _____ The distribution may be made in the form of an annuity contract purchased for a participant and distributed by the plan to a participant.

For purposes of this section, a lifetime income investment is an investment option designed to provide a participant with election rights (1) that

are not uniformly available with respect to other investment options under the plan, and (2) that are rights to a lifetime income feature available through a contract or other arrangement offered under the plan. A lifetime income feature is (1) a feature that guarantees a minimum level of income annually (or more frequently) for at least the remainder of the life of the participant or the joint lives of the participant and the participant's designated beneficiary, or (2) an annuity payable on behalf of the participant under which payments are made in substantially equal periodic payments (not less frequently than annually) over the life of the participant or the joint lives of the participant and a participant's designated beneficiary.

5. Qualified Birth or Adoption Distribution (Code Sec. 72(t)(2)(H)) (optional change). The LRMs reflect SECURE 1.0 and 2.0 language to permit an individual to receive a distribution from an applicable eligible retirement plan of up to \$5,000 without application of the 10% additional tax if the distribution meets the requirements to be a qualified birth or adoption distribution. *See* Notice 2020-68.

DC LRM Sample Adoption Agreement Language: *see* item #51A (recontribution rights);

CODA LRM (www.irs.gov/pub/irs-tegel/coda-lrm0124-redlined.pdf), Part XVI (*see* below).

The participant's Qualified Birth or Adoption. If elected by the Employer in the Adoption Agreement, a Participant's Elective Deferrals may be distributed on or after the date specified in the Adoption Agreement as a Qualified Birth or Adoption Distribution. A Qualified Birth or Adoption Distribution is any distribution of up to \$5,000 (or lesser amount as provided in the Adoption Agreement) from the plan to a participant if made during the one-year period beginning on the date the child of the participant is born or the legal adoption by the participant of an eligible adoptee is finalized. A distribution of up to \$5,000 for each child can be made with respect to multiple births and adoptions if the distribution is made within the one-year period following the date on which the children are born, or the adoptions are finalized. An eligible adoptee is defined as any individual who has not attained age 18 or is physically or mentally incapable of self-support. An individual is physically or mentally incapable of self-support if they are unable to engage in any substantial gainful activity as described in section of the plan.

6. Terminally Ill Distribution (Code Sec. 72(t)(2)) (optional change). The LRMs discuss the SECURE

2.0 change to provide relief from the 10% additional tax for distributions to certain terminally ill individuals. *See* Notice 2024-2.

DC LRM Sample Adoption Agreement Language: *see* item #51A (recontribution rights);

CODA LRMs Part XVI.

7. Emergency Personal Expense Distribution (Code Sec. 72(t)(2)(I)) (optional change). The LRMs provide guidance on the SECURE 2.0 change that permits an individual to receive a distribution from an applicable eligible retirement plan of up to \$1,000 without application of the 10% additional tax if the distribution meets the requirements to be an emergency personal expense distribution.

DC LRM Sample Adoption Agreement Language: *see* item #51A (recontribution rights).

8. Domestic Abuse Victim Distribution (Code Sec. 72(t)(2)(K)) (optional change). The LRMs provide language that permits an individual to receive a distribution from an applicable eligible retirement plan of up to \$10,000 (to be adjusted for inflation) without application of the 10% additional tax if the distribution is an eligible distribution to a domestic abuse victim.

CODA LRM Part XVI (key language below).

Cases of Domestic Abuse. If elected by the Employer in the Adoption Agreement, a Participant's Elective Deferrals may be distributed on or after the date specified in the Adoption Agreement as a Distribution in Case of Domestic Abuse. A Distribution in Case of Domestic Abuse is any distribution equal to the lesser of \$10,000 or 50% of the present value of the nonforfeitable accrued benefit of the employee (or a lesser amount as provided in the Adoption Agreement) from the plan to a participant if made during the one-year period beginning on any date that the participant is a victim of domestic abuse by a spouse or domestic partner. The term "domestic abuse" means physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim or to undermine the victim's ability to reason independently, including by means of abuse of the victim's child or another family member living in the household. Distributions in Case of Domestic Abuse shall not be treated as an Eligible Rollover Distribution as defined in section ____.

9. Use of Forfeitures (Code Sec. 401(a)(8)) (required change). The LRMs reflect language regarding the use of forfeitures following the proposed regulations issued in 2023.

DC LRM Sample Adoption Agreement Language: *see* item #39 (largely existing language).

10. Hardship Distributions (Code Sec. 401(k), final regulations) (optional/required). The LRMs reflect the final regulations and the Bipartisan Budget Act of 2018 (BBA) changes to hardship distributions, with the key mandatory change to eliminate the six-month prohibition on contributions after a hardship distribution, and changing the definition of qualified nonelective contributions (QNECs) and qualified matching contributions (QMACs). *See* Notice 2020-52.

CODA LRM Part XI (QMACs), Part XIV (QNECs), Part XVII (main provisions), Part XX (safe harbor plans).

11. Long-term, Part-time Employees (Code Secs. 401(k)(2)(D) and 401(k)(15), proposed regulations) (generally required). The LRMs reflect the special rules that apply to long-term, part-time employees following SECURE 1.0 and 2.0.

CODA LRM: Part II (*see* below), IX (match), X (vesting); *see* DC LRM #18, and #19.

"LTPT Employee" means any long-term part-time Employee who has completed at least 500 hours of service in each of two consecutive 12-month periods beginning after December 31, 2020, has attained age 21 years, and who is not yet a plan participant. For plan years beginning on or before December 31, 2024, the previous sentence shall be applied substituting "three consecutive 12-month periods" for "two consecutive 12-month periods." The term LTPT Employee shall not apply to employees described in Code Sec. 410(b)(3).

Notwithstanding any other provisions in the plan, LTPT Employees shall be eligible to make Elective Deferrals under the CODA feature of the plan. An LTPT Employee shall participate in the CODA feature on the earliest date specified in Section _____ [ENTER THE PLAN PROVISION FOR ENTRY INTO THE PLAN CORRESPONDING TO DC LRM #18].

12. Employer Roth Match or Nonelective Contributions (Code Sec. 402A) (optional change). The LRMs provide sample language for plan sponsors to allow a qualified plan to permit an employee to elect to designate nonforfeitable employer matching or nonelective contributions as Roth contributions. *See* Notice 2024-2.

DC LRM Sample Adoption Agreement Language: *see* item #25 (below), #31 (415 changes), and #34 (separate accounts).

The Employer's nonelective profit-sharing contribution will be: [] a. Made as a pre-tax discretionary contribution. [] b. Subject to participant election, made as a designated Roth nonelective contribution, in which case (i) the contribution amount and earnings thereon will be 100% fully and immediately vested, and (ii) it is includible in an individual's gross income for the taxable year in which the contribution is allocated to the individual's account.

The thought being that it is helpful when the plan document reflects current law and current operations, as the plan document controls. But there is hesitation when there is guidance still pending on the various legal changes, or there is no indication of what the Internal Revenue Service (IRS) will approve.

If no election is made, Election a applies.

Election b can be made only if (i) the employee is fully vested in employer profit-sharing contributions at the time the contribution is allocated to the employee's account, (ii) it is made by the employee no later than the time that the contribution is allocated to the employee's account and (iii) it is irrevocable with respect to those contributions.

An employee must have an effective opportunity to make or change the designation afforded by Elections a and b at least once during each plan year.

CODA LRM # IX.

The Employer's matching contribution will be: [] a. Made as a pre-tax contribution. [] b. Subject to participant election, made as a designated Roth contribution, in which case (i) the contribution amount and earnings thereon will be 100% fully and immediately vested, and (ii) it is includible in an individual's gross income for the taxable year in which the contribution is allocated to the individual's account. If no election is made, Election a. applies.

Election b. can be made only if (i) the employee is fully vested in matching contributions at the time the contribution is allocated to the employee's account, (ii) it is made by the employee no later than the time

that the matching contribution is allocated to the employee's account and (iii) it is irrevocable with respect to those contributions. An employee must have an effective opportunity to make or change the designation afforded by Elections a. and b. at least once during each plan year.

13. Top-Heavy Relief (Code Sec. 416(c)(2)(C)) (optional change). The LRMs permit employees not meeting the age or service requirements of Code Sec. 410(a)(1) (without regard to subparagraph (B) thereof) to be excluded from consideration in determining whether a plan meets the top-heavy minimum benefit requirements in Code Secs. 416(c)(2) (A) and (B).

DC LRM Sample Adoption Agreement Language: *see* items #62; CODA LRM Part XVIII.

(1) Except as otherwise provided in (3), (4), and (5), below, the employer contributions and forfeitures allocated on behalf of any participant who is not a key employee shall not be less than the lesser of 3% of such participant's compensation or in the case where the employer has no defined benefit plan which designates this plan to satisfy Code Sec. 401, the largest percentage of employer contributions and forfeitures, as a percentage of key employee's compensation, as limited by Code Sec. 401(a)(17), allocated on behalf of any key employee for that year. The minimum allocation is determined without regard to any Social Security contribution. This minimum allocation shall be made even though, under other plan provisions, the participant would not otherwise be entitled to receive an allocation or would have received a lesser allocation for the year because of (i) the participant's failure to complete 1,000 hours of service (or any equivalent provided in the plan), or (ii) the participant's failure to make mandatory employee contributions to the plan, or (iii) compensation less than a stated amount. ...

(5) The provision in (1) above shall not apply to any employee who fails to meet the minimum age and service requirements of Code Sec. 410(a)(1) for plan years beginning after December 31, 2023.

14. Disaster Relief (optional changes). The LRMs provide detailed language for various disaster relief provisions related to loans. The LRMs also include recontribution language for distributions that meet the requirements for a qualified disaster recovery distribution, which provides special disaster-related rules for the use of retirement funds.

DC LRM Sample Adoption Agreement Language: *see* items #77 and #51A (recontribution rights);

CODA LRMs Part XVI (*see below*).

A federally declared disaster, where the disaster is treated as a hardship under section ____, or where resulting legislation or guidance otherwise authorizes such a distribution.

15. CARES Loans and Distributions (optional change). The LRMs provide sample language to reflect special rules for coronavirus-related distributions and plan loans made to qualified individuals. *See* Notice 2020-50.

DC LRM Sample Adoption Agreement Language: *See* items #77 (below) and #51A (recontribution rights).

If elected by the Employer in the Adoption Agreement, a loan to a participant or beneficiary may be treated as a coronavirus-related loan. A coronavirus-related loan is a loan made from the plan on or after March 27, 2020 and before September 23, 2020, to a qualified individual, as defined in section 2202(a)(4)(A)(ii) of the Coronavirus Aid, Relief, and Economic Security Act, Pub L 116-136 (CARES Act) and Section 1B of Notice 2020-50, which does not exceed the lesser of (a) \$100,000 (reduced by the excess (if any) of the highest outstanding balance of loans during the one-year period ending on the day before the loan is made, over the outstanding balance of loans from the plan on the date the loan is made), or (2) the individual's vested benefit under the plan and other retirement plans maintained by the Employer and Related Employers.

If a loan is outstanding on or after March 27, 2020, and any repayment on the loan is due from March 27, 2020, to December 31, 2020, that due date may be delayed under the plan for up to one year. Any payments after the suspension period must be adjusted to reflect the delay and any interest accruing during the delay, and the period of delay

must be disregarded in determining the five-year period and the term of the loan under Code Secs. 72(p)(2)(B) and (C).

CODA LRMs Part XVI (*see key language below*).

Coronavirus-Related Distributions. If elected by the employer in the Adoption Agreement, a Participant's Elective Deferrals may be distributed as a coronavirus-related distribution. A coronavirus-related distribution is any distribution made from the plan on or after January 1, 2020 and before December 31, 2020, to a qualified individual, as defined in section 2202(a)(4)(A)(ii) of the Coronavirus Aid, Relief, and Economic Security Act, Pub L 116-136 (CARES Act) and Section 1B of Notice 2020-50, which does not exceed, in the aggregate, ____ the amount specified in the Adoption Agreement under the plan and other retirement plans maintained by the Employer and Related Employers.

Due to the complexities of the Internal Revenue Code (Code), and wanting to be sure that the plan document is in compliance with the law, this document is a good starting point.

Lastly, for provisions that do not yet have sample plan amendment language, the IRS did update its operational compliance list recently (www.irs.gov/retirement-plans/operational-compliance-list), so that is also worth a read in order to ensure that plan operations are in line with recent law changes.

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