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Employee Benefits &  
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# Planning for 2019: Year-End Deadlines & Considerations for Employee Retirement, Health and Welfare Plans

## Changes to 2019 Plan Limits

Employers should incorporate the new 2019 dollar limits for various employer-sponsored retirement and welfare plans in their summary plan descriptions and other participant communications, and make any necessary changes to the payroll system to apply the new IRS limits for 2019.

The employee salary deferral limit for 401(k), 403(b), and 457(b) plans increased from \$18,500 to \$19,000. The age 50 catch-up contribution limit remains at \$6,000. A detailed list of the 2019 retirement plan limits can be found on the IRS website.

The contribution limits for HSAs increased from \$3,450 to \$3,500 (single) and from \$6,900 to \$7,000 (family). The age 55 catch-up contribution limit remains the same for 2019 at \$1,000.

The contribution limit for health care FSAs increased from \$2,650 to \$2,700.

## Retirement, Health and Welfare Plan Considerations

**Disability Claims Procedures.** The new procedures of the Department of Labor (DOL) applicable to claims for disability benefits took effect April 1, 2018, for any welfare, retirement or non-qualified “top hat” deferred compensation plan that offers a disability benefit or conditions a right or feature (e.g., vesting) on a disability determination by the plan administrator

or its delegate, which does not rely on an independent third-party determination (e.g., Social Security Administration or a disability insurer for the employer's long-term disability plan). Affected plans may need to be amended to reflect those changes no later than **December 31, 2018**.

### **Qualified Retirement Plan Considerations**

**Safe Harbor Notices for 401(k) and 403(b).** If a 401(k) or 403(b) plan provides for a safe harbor match or non-elective contributions, the plan must provide an annual safe harbor notice to participants at least 30 days (but no more than 90 days) before the beginning of each plan year. For calendar year plans, the deadline is **December 1, 2018**.

**Automatic Enrollment Notice.** If a plan has an automatic enrollment or re-enrollment feature, the plan must provide an automatic enrollment notice at least 30 days (but no more than 90 days) before the beginning of each plan year (i.e., **December 1, 2018** for calendar year plans).

**Qualified Default Investment Alternatives (QDIA) Notice.** If a participant-directed plan intends to rely on the QDIA safe harbor relief from fiduciary liability, the plan must provide an annual notice at least 30 days (but no more than 90 days) before the beginning of each plan year (i.e., **December 1, 2018** for calendar year plans). *Most of our clients rely on this relief and therefore must send this notice.*

**Eligible (and Qualified) Automatic Contribution Arrangements.** EACA and QACA provisions generally cannot be added to a plan mid-year. Therefore, if an employer intends to add an EACA or QACA to its plan for the 2019 plan year, a plan amendment must be adopted before the beginning of each plan year. Participant notices must also be provided at least 30 days (but no more than 90 days) prior to the start of the year (i.e., **December 1, 2018** for calendar year plans).

**Changes to Compensation Definitions.** The 2017 Tax Cuts & Jobs Act (TCJA) eliminates business deductions for certain expenses and fringe benefits, such as moving expenses for non-military personnel and bike commuting expenses, for plan years beginning on or after January 1, 2018. These changes may impact plan provisions defining what is considered "compensation" for purposes of calculating plan benefits and contributions. Plans that are designed to include taxable fringe benefits may need to be amended no later than the last day of the plan year (i.e., **December**

**31, 2018**, for calendar year plans) to exclude these newly taxable benefits if the plan sponsor did not change procedures to properly report this compensation under the plan.

**Required Minimum Distributions.** Employers should confirm with the plan's record keeper that post age 70½ minimum required distributions for former employees will be distributed no later than **December 31, 2018**. Employers are also encouraged to inquire with the record keeper whether there are any "lost" participants (e.g., no current mailing address on file). This has become an important fiduciary issue for the DOL, mostly in the context of defined benefit pension plans, but the rules generally apply to 401(k) plans as well.

**Adoption of Discretionary Plan Amendments.** If an employer implemented discretionary changes during the plan year, the plan generally must be amended to reflect those changes no later than the last day of the plan year (i.e., **December 31, 2018** for calendar year plans).

**Hardship Distributions.** For plan years beginning on or after January 1, 2019, plans that permit hardship distributions will have the option to remove certain limitations required by current law. Specifically, participants will not need to suspend their salary deferrals for six months following a hardship withdrawal (suspension in progress may be ended January 1, 2019); they will not be required to take plan loans before a hardship distribution is granted; and they will be able to take a hardship withdrawal from qualified non-elective contributions, qualified matching contributions, and earnings on post-1986 elective deferrals. Plan sponsors that want to implement one or more of these discretionary changes will need to amend their plan by the end of the plan year in which such changes take effect (i.e., **December 31, 2019**, for calendar year plans), and discuss them with the plan's record keeper before the changes take effect. Note that for plan years beginning on or after January 1, 2020, plans will be required to eliminate the six-month suspension on contributions following a hardship distribution.

**Forfeiture Accounts in Safe Harbor Plans.** Revised IRS regulations adopted in 2018 allow plan sponsors to use forfeitures to fund safe-harbor contributions, QNECs and QMACs. To the extent that existing plan language or administrative practice is in conflict with the plan sponsor's intent to use forfeitures to make safe-harbor contributions, QNECs and QMACs, the plan will need to be amended by the end of the plan year in which such update takes effect (i.e., **December 31, 2018**, for 2018 in the case of a calendar year plan).

**Hurricane and Disaster Relief.** Plan sponsors that have taken advantage of IRS relief from certain requirements applicable to loans and hardship withdrawals for victims of Hurricanes Harvey, Irma, and Maria may need to amend their plan documents to conform to plan operations no later than **December 31, 2018**, for calendar year plans.

**Revenue Share Account and Forfeiture Accounts.** Revenue sharing payments received by a plan and forfeitures incurred during the 2018 calendar year must generally be used or allocated to plan participants no later the close of the current plan year (i.e., **December 31, 2018**), and should not be carried over to the following plan year.

**Provide Annual Funding Notice to Defined Benefit Plan Participants.** An annual funding notice (AFTAP) of the plan's funding status must be provided to participants within 120 days after the end of the plan year for large plans and by the due date of the Form 5500 annual report for small plans (100 or fewer participants).

### **Common Issues to Consider**

*Plan mistakes involving inconsistencies between the payroll system and the plan's definition of "compensation" for purposes of both employee 401(k) elective deferrals and matching contributions.* Employers should review payroll codes to make sure they are consistent with the plan's definition of compensation.

*Failures to timely and correctly implement changes to an employee's deferral elections.* Employers may want to include a provision in both the plan document and summary plan description that requires a participant to notify the plan administrator and record keeper of any errors in the participant's deferral election within 30 days of receiving a payroll statement. Employers should also send a notice to participants (or remind them as part of the annual enrollment process) that they are responsible for reviewing payroll statements and promptly reporting any errors in their elections.

### **Nonqualified Retirement Plan Considerations**

**Elections for Deferrals.** Except in the case of certain performance compensation and certain new plan entrants, participants in a nonqualified deferred compensation plan that is subject to Section 409A of the Code generally must make deferral elections (including payment elections) prior to December 31, 2018, for any amounts that would otherwise be earned during the 2019 calendar year.

Plan sponsors are encouraged to provide eligible employees a reminder of any restrictions and advance filing requirements the plan may impose.

## **Health and Welfare Considerations**

**Full-Time Employee Determinations for Eligibility.** If a plan sponsor changed its methodology for determining the full-time status of an employee to the look-back measurement method of Internal Revenue Code Section 4980H, the eligibility provisions of the plan may need to be amended to conform to plan operations. Plan sponsors should also consider whether this change in methodology impacts the administration of COBRA.

**FMLA Tax Credit.** The TCJA added an employer tax credit for tax years 2018 and 2019 for employers who offer qualifying paid FMLA leave. Employers (including small employer not otherwise subject to FMLA) that wish to take advantage of the employer tax credit should review and revise their leave policy to comply with the tax credit requirements. The paid leave policy must be written and in place before the employer may take advantage of the tax credit for any leave offered under that policy. Employers may still take advantage of the tax credit for the 2018 tax year if the written policy is in place on or before **December 31, 2018** (for calendar year plans) and the employer retroactively conforms its leave practices to the requirements of the tax credit for the entire year. For tax year 2019, the written policy must be in place by **December 31, 2018** (for calendar year plans).

**Affordable Care Act (ACA) Individual Mandate Revisions.** The TCJA repealed the individual mandate effective for plan years beginning after December 31, 2018. Plan sponsors may need to review and revise any communications, summaries or notices that discuss the individual mandate.

**ACA Summary of Benefits and Coverage.** The ACA requires health plans and health insurance issuers to provide a Summary of Benefits and Coverage (SBC) upon a participant's enrollment to help them understand their coverage. Plan sponsors with an annual open enrollment period must use the DOL's SBC template, which is available on the DOL's website.

**ACA Reporting Deadlines.** Applicable large employers must report to the IRS and provide employee information designed to verify compliance with the employer and individual shared responsibility rules and eligibility for Marketplace subsidies. The following deadlines apply:

Forms 1094-B and C must be filed with the IRS by February 28, 2019 (or April 1, 2019, if filing electronically).

Forms 1095-B and C must be distributed to employees by January 31, 2019.

**Health Care Exchanges.** The ACA open enrollment period will be 45 days in 2018. For purposes of employer communications regarding health care exchange coverage, the open enrollment period for coverage beginning January 1, 2019, will run from November 1 to December 15, 2018.

**ACA Employer Mandate Assessments.** The IRS will continue sending letters to employers that are subject to ACA employer mandate assessments for prior tax years. If an employer wishes to challenge the assessment, they will need to prepare a response within 30 days of the IRS letter and provide any changes to Forms 1095-C or 1094-C.

### Contact Us

Please contact one of our attorneys in the Employee Benefits and Executive Compensation practice group if you have any questions or if you need assistance in preparing plan amendments or employee communication.