Parker Brown Macaulay & Sheerin

Excellence In Employee Benefits Law

Employee Benefits Alert

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2020 Retirement Plan Contribution and Benefit Limit Increases

The 2020 inflation-adjusted limitations for retirement plans have now taken effect. The IRS announced the cost-of-living-adjustments on November 6, 2019, in Notice 2019-59. The highlights of the changes from 2019 include an increase in the elective deferral limit from $19,000 to $19,500, and increase in the catch-up contribution limit for employees age 50 and over from $6,000 to $6,500. The following chart summarizes the changes in various key limits from 2019 to 2020:

Retirement Plan Limit / Threshold	2020	2019	Increase
Elective Deferrals: employee pre-tax and Roth contributions (401(k), 403(b) and 457(b) plans)	$19,500	$19,000	$500
Age 50 Catch-up: Employee pre-tax and Roth contributions	$6,500	$6,000	$500
Compensation Limit	$285,000	$280,000	$5,000
415 Annual Contribution Dollar Limit on Total Contributions (excludes Age 50 Catch-up)	$57,000	$56,000	$1,000
Highly Compensated Employee Dollar Threshold	$130,000	$125,000	$5,000
415 Annual Benefit Limit under a Defined Benefit Plan	$230,000	$225,000	$5,000

Now is the time to update plan documents and summary plan descriptions in order to comply with the increases. It is also imperative that you ensure that your plans are being administered in accordance with the new 2020 limitations both by your internal professionals and also by third party service providers.

403(b) Plan Remedial Amendment Period

March 31, 2020, is the last day of the remedial amendment period during which an eligible employer may correct form defects retroactive to January 1, 2010 in its written 403(b) plan by timely adopting a "pre-approved plan" or, by timely amending or restating its individually designed plan. This means that by March 31, 2020, 403(b) plan sponsors must adopt either a pre-approved 403(b) plan or amend or restate its individually designed, in accordance with Rev. Proc. 2017-18 to address any plan document defects retroactive to January 1, 2010.

In 2013, the IRS issued Revenue Procedure 2013-22 in which it established a pre-approved plan program for 403(b) plans. Prior to this time there was no process for having the IRS review 403(b) plan documents and issue an opinion that it meets all of the IRC and IRS requirements. There is still no process for the IRS to approve an individually designed plan. However, the IRS has now issued favorable opinion letters for many 403(b) pre-approved plan providers. While obtaining an IRS advisory or opinion letter is not legally required, it will be important to ensure the plan document complies with the requirements of §403(b) in addition to being operationally compliant.

The decision to adopt an individually designed versus pre-approved plan is often challenging, because both approaches have advantages and disadvantages. However, the decision should be reflective of the plan's administrative complexity, the need for design flexibility and the level of regulatory support needed in maintaining a compliant plan document. The following highlights some key advantages and disadvantages of using a pre-approved plan.

Advantages	**Disadvantages**
• Pre-approved plan provides IRS assurance that plan document satisfies 403(b) requirements • Can retroactively correct any plan defects to January 1, 2010 without submitting a voluntary correction program (VCP) filing • Ease of plan document maintenance. Fidelity would be responsible to ensure document and adoption agreement are kept up-to-date with legal requirements. They would also communicate any necessary changes • *May* save on legal costs for drafting document and amendments • Typically, a summary plan description (SPD) is also provided as part of service	• May have more limited flexibility in certain plan features or administrative practices • The pre-approved plan consists of an adoption agreement (which reflects each plan feature) and comprehensive "Basic Plan Document" which is standardized for all sponsors who use the pre-approved plan. I think the adoption agreement and comprehensive "Basic Plan Document" is less "user-friendly" than an individually designed plan. • May have limited ability to customize the SPD

Hardship Distribution Changes

Effective as of January 1, 2020, 401(k) and 403(b) plans must comply with the final hardship distribution regulations. These changes are required due to the changes made under the Bipartisan Budget Act of 2018. The IRS published proposed hardship distribution regulations on November 14, 2018, which were then finalized on September 19, 2019. In order to comply with the new rules, plan sponsors must: (1) adopt a hardship distribution amendment; (2) update plan SPDs or distribute a summary of material modification reflecting the changes; (3) review and revise hardship distribution policies and procedures; and (4) ensure service providers are prepared to administer hardship distributions pursuant to the new rules.

The following is a brief summary of the primary hardship distribution changes:

- **Elimination of the 6-Month Suspension** - A participant may no longer be suspended from making elective deferral contributions, from all employer plans, for at least six (6) months following receipt of a hardship distribution.
- **Elimination of the Loan Requirement & Verification Process** – A participant is no longer required to take all available loans before receiving a hardship distribution. This is a voluntary change – that is, a plan sponsor can decide whether to continue to require the participant to take all available loans before taking a hardship withdrawal. However, a participant must represent to the plan sponsor in writing that he or she has insufficient cash or other liquid assets to satisfy the financial need.
- **Source of Hardship Distributions** - Participant hardship distribution sources now include all investment earnings on participant deferrals as well as qualified nonelective contributions (QNECs), qualified matching contributions (QMACs), and employer safe harbor contributions. **Important Caveat for 403(b) Plan Sponsors**: For Section 403(b) plans, the hardship distribution sources are not expanded to include earnings (due to Section 403(b)(11) of the Code), QNECs, QMACs in a custodial account.
- **Expansion of Safe Harbor Expenses** - Expenses deemed to be an immediate and heavy financial need include losses and expenses incurred as a result of a federally declared disaster where the participant's principal residence or place of employment is located within the designated disaster area.
- **Plan Administer Inquiries** - Plan administrators are not required to inquire into the financial condition of employees so long as "the plan administrator does not have actual knowledge that is contrary to the representation."

Limited Expansion of the Determination Letter Program

On May 1, 2019, the IRS issued Rev.Proc. 2019-20 providing for the further limited expansion of the determination letter program. Previously, Rev. Proc. 2016-37 was issued which allowed plan sponsors to submit a determination letter application for initial qualification and qualification upon plan termination. Many plan sponsors and practitioners objected to the limited scope of the

program, which resulted in the program's expansion. Pursuant to Rev. Proc. 2019-20, the IRS announced that the agency will accept determination letter applications for individually designed statutory hybrid plans, as defined in § 1.411(a)(13)-1(d)(5), during the 12-month period beginning September 1, 2019, and ending August 31, 2020, and individually designed merged plans on an ongoing basis. Although the program is narrow in scope, the ability to request a determination letter under the foregoing scenarios is an improvement and hopefully suggestive of the IRS's intention of broader future program expansion.

IRS Guidance on the Signed Plan Document Requirement

On December 9, 2019, the IRS's Office of Chief Counsel issued internal agency guidance which serves as a reminder to plan sponsors of the importance of maintaining signed plan documents that must be produced in the event of a regulatory examination or civil dispute. The importance of signing plan documents and amendments is sometime minimized and not prioritized by plan sponsors, which is detrimental to a plan's tax-favored status. The guidance, requested as general advice for reliance in IRS agents' plan examinations, concluded that a plan is considered adopted only if proof of adoption can be provided. In the absence of such proof, a plan can be disqualified with adverse tax implications.

In *Val Lanes Recreation Center v Commissioner*, TC Memo 2018-92, the Tax Court found that the IRS abused its discretion by revoking the qualified status of a retirement plan under Section 401(a) of the Code. The revocation was based on the plan sponsor's inability to produce a signed document that was legally compliant with the applicable regulatory requirements. The court found that even though a current signed plan document could not be produced, the plan sponsor offered a credible explanation as to the absence of executed copies. The plan sponsor did produce signed copies of a prior restatement, which was reviewed favorably by the court, because the plan sponsor had executed plan documents in the past. The executed plan document could not be produced because the plan sponsor's offices had flooded damaging its files, and the plan sponsor's accountant's records and computers had been seized by the Department of Labor in a separate matter. The court indicated that the credible explanation, along with proof, was sufficient to avoid the revocation of the plan's tax-qualified status.

The Chief Counsel indicated that the existence of a written plan document that is communicated to employees is a core requirement for determining a plan's tax-qualified status. See Treas. Reg. §1.401-1(a)(2). Accordingly, a signed copy of the plan document must be retained by the sponsoring employer or its agents. Further, Section 6001 of the Code requires that every person liable for tax is required, in part, to keep records. The regulations issued thereunder, which specifically govern, retention of records, additionally provides that books and records shall be kept at all times and be subject to inspection by IRS officers or employees and that such information must be retained as long as the contents are material under internal revenue law. See Treas.Reg.§1.6001-1(e).

The Chief Counsel noted that the facts of the *Val Lanes* case were highly unusual, and that the case does not stand for the proposition that a taxpayer may meet the burden of having an

executed plan document based on the production of an unsigned plan document and a having a pattern and practice of typically signing plan documents. Instead, the taxpayer bears the burden of proof that it executed the document which is ordinarily met by producing the signed document. The Chief Counsel concluded that upon failure to produce an executed plan, the employer has the burden to prove that it executed the plan document.

We highly recommend that employers self-audit to ensure that all plan documents have been signed and can be produced upon request.

2020 Best Employee Benefits Practices

The new year provides employers with the opportunity for a fresh start in implementing employee benefits practices that minimize regulatory risk and ensure that the employee offerings are utilized and viewed as valuable by employees. An organization's benefits offerings are often reflective of the organization's culture and total rewards philosophy needed to attract and retain qualified employees. Notwithstanding the foregoing, the following are a few best practices that we recommend all plans implement in order to maximize benefit utilization and streamline administration.

- **Execute Plan Documents.** Ensure that all plan documents are signed and can be easily located. We recommend that both the original copy be maintained in a safe secure place and that an electronic copy of the original document be saved in a secure place accessible by the appropriate human resources staff.

- **Employee Education.** Benefit plans have little value if employees don't participate in them. Take the time to educate employees regarding the benefit plans offered to enable them to make smart enrollment choices. We recommend that employee education also occur outside of open enrollment, and perhaps quarterly through a brown bag meeting. We also encourage employers to establish administrative practices that make it easy for employees to enroll and actively participate in benefits arrangements.

- **Evaluate Benefits Programs.** It's important to periodically evaluate the design of your employee benefit arrangements to ensure that the design helps achieve the organization's goals and those of your employees. If you aren't sure what is most important to your employees, ask them. A thorough benefits survey can help clarify your employees' values and correct misconceptions about participation in certain arrangements.

- **Reward Retention.** Constant turnover is expensive and time consuming for employers. Not only can the cost of continued turnover be negative for an organization's bottom line, the organization's institutional knowledge and a consistent point-of-contact for your customers is jeopardized when employees terminate employment. Further, constant turnover has a negative effect on workspace culture. Employee retention is therefore very important from a cultural and economic perspective, which requires that benefit programs be designed to encourage longevity and reward retention. We encourage organizations to provide favorably viewed benefit options for every stage of employees' life cycles, from

the time they are hired to the time they retire. It is important to recognize and reward employees' tenure with benefit features that grow in value over time.

- **Involve Benefits Counsel**. Due to the complex legal framework and morass of regulations, benefit counsel should be consulted when considering making benefit plan design changes. We are not only creative and practical, but due to the depth and breadth of our legal and consulting practice, we know what works. In addition, use us as a preemptive means of avoiding expensive, and potentially embarrassing, litigation and/or participant claims.

Distribution of Updated SPDs

Section 104(b) of ERISA requires that an updated SPD be provided to participants every 5 years or every 10 years if the plan has not changed. When is the last time your organization updated and distributed SPDs? Since the date of the last SPD, it is likely that the organization's plans have been amended several times. Additionally, the IRS and DOL have issued a great deal of guidance in recent years.

You may have provided participants with summaries of material modification (SMM) to explain the changes. However, the law still requires that the updated SPD be provided every 5 or 10 years as applicable. We are available to assist you with the process.

Remember, we are more than lawyers and are always here to help!

If there are any topics that you would like for us to cover in our Employee Benefits Alerts, please email Bonita Hatchett-Bodle at bhatchett@parkerbrown.com or call 617-399-0440

Parker, Brown, Macaulay & Sheerin, P.C. concentrates exclusively in employee benefits law. With more than seven decades of combined employee benefits experience, our lawyers find innovative, practical solutions to legal and business problems involving ERISA, employee benefits, executive compensation, and compliance with regulatory laws such as COBRA and HIPAA.

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