

Practice Update

Employee Benefits Update: 2013 Year End Plan Tasks

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As we approach the end of the year, employers and plan sponsors of qualified retirement plans and health and welfare plans should take time to meet various upcoming deadlines. Failure to comply with the deadlines may result in a range of employer penalties and excise taxes. This Practice Update highlights some of the most common year-end tasks and certain approaching deadlines that may apply to employers and plan sponsors. Except where noted, these deadlines apply to employee benefit plans operating with calendar year plan years.

Health and Welfare Benefit Plans

The following is a summary of some of the upcoming deadlines related to certain health and welfare plans:

- **Same Sex Spouse Amendment** – If any existing plan documents define “spouse” with reference to the Defense of Marriage Act (DOMA), plan amendments will be required in light of the Supreme Court’s decision declaring portions of DOMA unconstitutional. The IRS and DOL have issued guidance in the fall of 2013 on many important tax consequences of this decision, including with respect to cafeteria plans and flexible spending account programs. Regardless

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of the state where an employer is located, a thorough review of plan documents, tax withholding practices, and administrative procedures is warranted as soon as possible.

- **Cafeteria Plan Exchange-Related Amendment** – There is a special 2013 transitional rule that would permit non-calendar year cafeteria plans to be amended to permit changes in status for current plan participants who want to leave the employer's plan to join a health care exchange under the Affordable Care Act (ACA). Plan sponsors wishing to take advantage of this rule must amend their plans by *December 31, 2014*.
- **Health Flexible Spending Account \$500 Carryover Amendment** – Under IRS Notice 2013-71, health flexible spending account plans can, for the first time, be amended to add a \$500 carryover for participants with balances remaining at the end of the plan year. This exception to the traditional “use-it-or-lose-it” rule can be effective for the 2013 year, so long as any grace periods are removed from the plan by *December 31, 2013*, and so long as the amendment providing for the carryover feature is adopted by *December 31, 2014*. Note that as a practical matter, notwithstanding the limited transition rule for carryover amendments, most plan sponsors will wish to address both features at the same time.
- **Health Care Reform Amendment** – A number of ACA mandates take effect on January 1, 2014. For example, guidance discusses the required provision of “essential health benefits”, and also imposes new limits on in-network cost-sharing in 2014. Additionally, any covered plans that currently allow for waiting periods exceeding 90 days must be amended to shorten that period, prior to *December 31, 2013*.
- **HIPAA-Related Amendment and Updated Notice** – Final regulations issued under the Health Insurance Portability and Accountability Act (HIPAA) requires updated plan language,

administrative procedures, and notices to plan participants about how the plan protects certain covered individually-identifiable health information by *November 23, 2013*. Employers that have not yet updated their plans or distributed new notices should undertake these tasks expeditiously.

- **COBRA-Related Amendment and Updated Notice**
 - The Consolidated Omnibus Budget Reconciliation Act (COBRA)-related provisions within group health plan documents, as well as the COBRA election notices themselves, should be updated to reflect the DOL's newly approved language. That updated language now references the availability of alternate health care coverage through Exchanges offered under the ACA. There is not a year-end deadline for this task, but best practice is to adopt appropriate plan amendments as soon as possible.
- **Wellness-Related Amendment** – Any wellness programs that condition the receipt of a reward on any health goal attainment must comply with new HIPAA nondiscrimination requirements. Any non-compliant programs within employer-sponsored group health plan must be re-drafted and administratively revised by *December 31, 2013*.
- **GINA-Related Amendment** – Amendments to the Genetic Information Nondiscrimination Act (GINA) that became effective in March 2013 prohibit health plans from using genetic information to make eligibility decisions or to establish premiums. There is not a year-end deadline for this task, but plan sponsors are wise to ensure continued health plan compliance with GINA at this time.
- **Mental Health Parity-Related Amendment** – Final rules for the Mental Health Parity and Addiction Equity Act (MHPAEA) were released in November 2013. The requirements for parity between medical/surgical benefits and mental

health/substance use disorder benefits apply to plan years beginning on or after *July 1, 2014*.

- **Discretionary Amendments** – Plan sponsors that made operational changes to their welfare plans during the year must generally amend their plan documents to reflect such changes no later than *December 31, 2013*.
- **W-2 Reporting Requirement** – Certain employers must list the aggregate cost of employer-sponsored group health coverage on every covered employee's Form W-2 for 2013. Form W-2's must be distributed no later than *January 31, 2014*.
- **SPDs, SMMs and Notice of Rescission** – SPDs must be revised or SMMs must be created to inform participants of substantive changes to a welfare plan. The SMM or SPD must be distributed no later than *210 days after the plan year in which the amendment is adopted*, or if there is a material reduction in covered services or benefits under the welfare plan, it must be distributed no later than 60 days after the date of adoption of the modification or change. In addition, before coverage under a plan may be rescinded, at least 30 days advance written notice must be provided to each participant who would be affected. Also, *60 days advance written notice is newly required under health care reform if a change* to a health plan would affect information in the Summary of Benefits and Coverage (SBC).
- **Summary of Benefits and Coverage Distribution** – New SBCs must be distributed during open enrollment for the 2014 plan year. The DOL changed the content of its template for the 2014 plan year by adding two additional sections.

Qualified Retirement Benefit Plans

The following is a summary of some of the upcoming deadlines related to certain qualified retirement plans:

- **Same Sex Spouse Amendment** – If the existing plan document defines “spouse” with reference to the Defense of Marriage Act (DOMA), a plan amendment will be required as soon as possible, in light of the Supreme Court’s decision declaring portions of DOMA unconstitutional.
- **Hurricane Sandy Relief** – Under IRS Announcement 2012-44, as long as the plan already provides for loans and/or hardship distributions, there may not be the need to additional amendments. But plan provisions and participant communications should be closely reviewed at this time.
- **401(k) Safe Harbor Notice** – All participants in a safe harbor 401(k) plan must receive an annual notice that describes the safe harbor contribution and certain other information by *December 2, 2013*.
- **401(k) Automatic Enrollment Notice** – If a plan provides for automatic enrollment, the plan administrator must provide eligible employees with an annual notice, no later than December 2, 2013, that describes the circumstances in which they may be automatically enrolled in the plan.
- **Qualified Default Investment Alternative (“QDIA”) Notices for Participant Directed Plans** – Plan sponsors of defined contribution plans with participant-directed investments must provide the annual QDIA notices to participants or beneficiaries no later than *December 2, 2013*.
- **Section 404a Fee Disclosures** – Beginning in 2012, 401(k) plans with participant-directed investments had to provide an investment and fee disclosure notice every twelve months. Due to the timing of initial DOL guidance on this requirement, if an employer wanted to time the distribution of this notice with the annual safe harbor, automatic enrollment, and/or QDIA notices, it would have been necessary to distribute the investment and fee disclosure notice twice in 2013. The DOL issued transition guidance to alleviate this concern, meaning that if

an employer already provided the 404a notice in Summer 2013, it does not have to be provided again until Fall 2014 with the other annual notices. On the other hand, if the employer did NOT provide the 404a notice in Summer 2013, generally it can be provided by December 2, 2013 with the other annual notices (so long as December 2, 2013 is not more than 18 months after the date of distribution of the 404a notice in 2012).

- **Employer Stock Diversification Notices for Participant Directed Plans** – Plan sponsors of defined contribution plans with participant-directed investments in employer stock must provide diversification notices no later than *December 2, 2013* to participants who will first be eligible to divest employer securities on January 1, 2014.
- **Voluntary Compliance for Section 403(b) Plans** – A 50% compliance fee reduction is available only through *December 31, 2013* for certain corrections for the failure of a 403(b) plan sponsor to have timely adopted a written 403(b) plan document in the past.
- **Amendment for Plans Covering Puerto Rican Employees** – There are new qualification requirements contained within the 2011 Puerto Rican Internal Revenue Code. The deadline for U.S. plan sponsors with Puerto Rican participants to adopt the required plan amendments is *April 1, 2014*.
- **Discretionary Amendments** – Plan sponsors that made operational changes to their retirement plans during the year must generally amend their plan documents to reflect such changes no later than *December 31, 2013*.
- **Determination Letter Requests** - Plan sponsors with employer identification numbers (“EINs”) ending in “3” or “8”, as well as certain governmental plans not electing a later cycle, must amend and restate their individually-designed qualified retirement plans and file them

with the IRS for a determination letter no later than *January 31, 2014*.

- **SPDs and SMMs** – Summary plan descriptions (“SPDs”) must be revised or summaries of material modifications (“SMMs”) must be created to inform participants of substantive changes to a retirement plan. The SMM or SPD must be distributed no later than *210 days* after the plan year in which the amendment is adopted.
- **Cost of Living Adjustments** – The IRS recently released the 2014 retirement plan cost of living adjustment (COLA) limits. The \$17,500 cap on elective deferrals to 401(k) plans and the catch-up limit of \$5,500 is not changing for 2014. But if an employer calculates any matching contributions, internal personnel may need to adjust by *December 31, 2013* in order to ensure using appropriate compensation limits.
- **Automatic Escalation of Employee Deferrals** – If a 401(k) or 403(b) plan provides that deferral election percentages will automatically increase at the beginning of the new plan year, employers should confirm that their payroll systems are prepared by *December 31, 2013* to properly implement the automatic escalations.

Please contact any member of Akerman’s Employee Benefits & Executive Compensation Practice Group with any questions about these topics.

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