akerman

Practice Update

# Retirement Plan and Other HR Compliance Reminders

September 11, 2019
By Mary K. Samsa

Governmental agencies have been issuing a variety of guidance in the past 24 months that have changed certain reporting and disclosure requirements applicable to employee benefit plans, as well as providing for certain new compliance deadlines. This article highlights some of these key compliance reminders that are either already applicable or that have an impending deadline approaching. For your convenience, the below sections are hyperlinked to facilitate navigation of this update.

- Code Section 403(b) Plans
- Employee Plans Compliance Resolution System (EPCRS)
- Reportable Events and the Pension Benefit Guaranty Corporation (PBGC)
- Loss of Unused Transportation Fringe Benefit Dollars Upon Termination of Employment
- Electronic Top-Hat Filings
- Use of Truncated Social Security Numbers on Form W-2s please

**Code Section 403(b) Plans**
Individually designed retirement plans under Section 403(b) of the Internal Revenue Code of 1986, as amended (the Code) are required to be amended and restated no later than March 31, 2020, in

## Related People

Beth Alcalde
Carolyn M. Kershner
Peter E. Salomon
Mary K. Samsa

## Related Work

Employee Benefits and Executive Compensation
Tax

## Related Offices

Chicago

accordance with IRS Revenue Procedure 2017-18. As background, Code Section 403(b) plans were relatively ignored by both the Internal Revenue Service (IRS) and the Department of Labor (DOL) until January 1, 2010 when the IRS implemented the written plan document requirement and other governing regulations and the DOL implemented new annual reporting and disclosure requirements (i.e. primarily Form 5500). Since that time, both agencies have been relatively quiet while tax-exempt organizations adjusted their compliance procedures to meet the new requirements.

If a tax-exempt organization chooses not to amend and restate its Code Section 403(b) Plan, then Rev. Proc. 2017-18 anticipates that the tax-exempt organization would instead convert its plan onto an IRS Code Section 403(b) pre-approved document (which based on their IRS pre-approval, are deemed to be fully compliant). Vendors with these pre-approved documents can be found here.

The March 31, 2020, deadline coincides with the equivalent of a Code Section 403(b) Plan's first remedial amendment period. Going forward, it is anticipated that the amendment and restatement requirement will generally occur every five years. Since this may be the first time plan sponsors have truly refocused their attention on their Code Section 403(b) Plan (since the original December 31, 2009 deadline pertaining to written plan documents), the remaining period until March 31, 2020, provides an excellent opportunity for tax-exempt organizations offering Code Section 403(b) Plans to make appropriate changes to these plans that can improve functionality, administration and operational compliance.

For purposes of any restatements, best practices would indicate that plans sponsors should:

1. Ensure all interim (legally required) amendments have been incorporated into their Code Section 403(b) Plan. Unfortunately, the IRS does not

provide a comprehensive listing of all interim Code Section 403(b) Plan amendments since January 1, 2010. However, using the new IRS Operational Compliance List portion of the IRS website, found here, and with the help of a qualified attorney, a plan sponsor can ensure that its Code Section 403(b) is fully updated for law by March 31, 2020.

2. Evaluate specific language of plan provisions and compare them against the actual operation of those provisions in practice. If discrepancies exist, determine whether to prospectively conform plan language to the administrative practice or conform plan administrative practice to the underlying plan language. Depending on the inconsistency, certain operational failures may be required to be reported to the IRS upon their correction.
3. Ensure the Code Section 403(b) Plan is being annually tested with respect to discrimination compliance testing. This is a focus of recent IRS audits. If deficiencies or difficulties in passing are identified, the remaining period until March 31, 2020, may pose an opportune time to restructure the plan's design or contribution features.

Code Section 403(b) plan sponsors are encouraged to reach out to their employee benefits counsel for assessment of each plan's overall documentary and operational compliance prior to year end.

*Link to Top*

**Employee Plans Compliance Resolution System (EPCRS)**

Voluntary Compliance Program (VCP) submissions under EPCRS must now be made electronically as of April 1, 2019. (See Section 11.01(2) of Rev. Proc. 2019-19 attached here). For plan sponsors needing to make any tax-qualified retirement plan corrections that are not capable of self-correction, they should review the electronic filing requirements prior to preparing any VCP filing to avoid unnecessary work.

*Link to Top*

**Reportable Events and the Pension Benefit Guaranty Corporation (PBGC)**

The PBGC has recently updated its Form 10 (Post-Event Notice of Reportable Event) instructions. PBGC Form 10 is utilized to report to the PBGC certain events which could potentially be construed as placing the financial security of a defined benefit pension plan in jeopardy (e.g., failure to make minimum funding contributions, application for minimum funding waiver, etc.). For plan sponsors offering defined benefit pension plans subject to PBGC oversight, it is worth mentioning that the updated Form 10 instructions (released in early 2019) now require plan sponsors to include with each Form 10 filing comprehensive controlled group information pertaining to the controlled group's structure, audited or unaudited financial information for all members of the controlled group, and a variety of actuarial information with respect to any and all pension plans maintained within the controlled group (e.g. actuarial valuations, summary of actuarial assumptions, effective interest rates, etc.). This new requirement appears to be designed to monitor the financial health of the controlled group in which any defined benefit pension plan is maintained in the event that the members of that controlled group need to be held joint and severely liable under Code Section 412(b)(2) or ERISA Sections 302(b)(2). This additional information disclosure is likely to be time consuming to assemble. As such, for plan sponsors potentially subject to Form 10 reporting, some advance planning should be done for purposes of determining the optimal way to accumulate and the retain this information.

*Link to Top*

**Loss of Unused Transportation Fringe Benefit Dollars Upon Termination of Employment**

Through Information Letter 2019-0002, the IRS has formally clarified that unused transportation fringe

benefit dollars are forfeited (i.e., cannot be refunded to a former employee) following a termination of employment. The IRS provided that when an employee makes an election to receive a qualified transportation fringe instead of cash compensation, the tax law treats the benefit as provided directly by the employer rather than being purchased by the employee with the amount of the compensation reduction. Further, Regulation Section 1.132-9(b), Q/A-5 provides that an employer may provide qualified transportation fringe benefits only to individuals who are current employees of the employer when the qualified transportation fringe is provided. As such, the Information Letter emphasizes that employers cannot continue providing qualified transportation fringe benefits to individuals who are no longer employees. The natural result of this is that to avoid potential forfeiture situations, employees participating in these programs and who are contemplating a termination of employment must affirmatively cancel their compensation reduction election ahead of time. The Information Letter further states that there is no distinction between employees released from employment by the employer and employeeswho voluntarily choose to resign. Employers who either allowed former employees to use up their prior salary reductions following termination or refunded unused amounts must revise their procedures to correctly forfeit these amounts going forward.

*Link to Top*

**Electronic Top-Hat Filings**

On September 30, 2014, the DOL issued proposed rules under ERISA Regulation Section 2520.104-23 to require electronic submission of top-hat plan statements (i.e., top-hat plans are compensatory arrangements offered to a select group of management or highly compensated employees that do not require the full protection of rights under ERISA). At the same time, the DOL also made available a new web-based filing system for these

electronic filings. Use of this web-based filing system was voluntary until the adoption of a final rule. The proposed regulation has now been finalized as of June 17, 2019 and all top-hat plan statements must now be submitted electronically. The final regulation has not changed the current content requirements of the top-hat statement.

Going forward, the Employee Benefit Security Administration's web-based filing system will be the exclusive method for filing top-hat statements. Filings submitted by mail or personal delivery will no longer be accepted. The new web-based system is designed to assist administrators by ensuring that all of the information required by the regulations is included in the notice or statement before the filing can be completed through the website. Upon submission of a completed filing, the new web-based filing system sends an electronic confirmation of receipt to the administrator. The final regulation became effective August 16, 2019.

*Link to Top*

**Use of Truncated Social Security Numbers on Form W-2s**

On September 20, 2017, the IRS issued proposed amendments to the regulations under Code Sections 6051 and 6052 pertaining to the use of truncated employees' social security numbers (SSNs) on copies of Forms W-2 (Wage and Tax Statement) that are furnished to employees. Under the proposed regulations, truncated SSNs will be permitted to appear in the form of IRS Truncated Taxpayer Identification Numbers (TTINs) on certain information filings. The rules on TTINs, found here, allow an employer to display only the last four digits of a taxpayer identifying number and use either asterisks (*) or Xs to replace the first five digits of the identifying number. The use of truncated SSN reporting was evaluated to aid employers' efforts in protecting employees from identity theft. The proposed amendments have now been finalized as of July 3, 2019.

Forms to which the permissible use of truncation can be used include Forms W-2c, Forms 1099, Form 1095-C, and the territorial Forms W-2. The final regulations do not apply to any other forms. Specifically, notwithstanding the final rules, a TTIN may not be used on a statement or document if a statute, regulation, other guidance published in the Internal Revenue Bulletin, form, or instructions, specifically requires use of an SSN, IRS individual taxpayer identification number (ITIN), IRS adoption taxpayer identification number (ATIN), or IRS employer identification number (EIN) and does not specifically permit truncation. If a specific form continues to require an SSN and does not permit truncation, the SSN may not be truncated to appear in the form of an IRS TTIN. The IRS intends to incorporate the revised regulations into forms and instructions pertaining to Forms W-2. The final regulations are effective immediately.

If you would like to discuss any of the above areas and their application in more depth, please reach out to your Akerman contact for more information.