

LEGAL UPDATE

Retirement Plans: 2022 Opportunities

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Employers and plan sponsors of retirement plans need to be aware of some responsibilities and opportunities that are available as we head into 2022.

Adopting a New Plan—Employers can take advantage of extended deadlines under the SECURE Act to adopt a new plan or to adopt a safe harbor design.

a. *Adopting a new plan*—In the past, plan sponsors had to adopt a new plan by the last day of the year for which the plan was effective. Under the SECURE Act, the deadline is now the due date, including extensions, of the plan sponsor's income tax return for that year. Thus, a calendar year taxpayer that adopts a plan by the extended tax return due date for 2021 will be treated as having adopted the plan as of the last day of 2021, which gives the adopting

employer the opportunity to make deductible contributions and retroactively provide benefits and reduce its tax liability.

b. *Adopting a safe harbor design*—The SECURE Act also allows plan sponsors to amend their 401(k) plans to add a safe harbor nonelective contribution feature (but not a safe harbor matching contribution feature) after the last day of a plan year as long as they do so by the due date of the plan sponsor's income tax return for that year. The employer's safe harbor contribution would have to be 4 percent of compensation instead of 3 percent of compensation. Thus, for example, an existing calendar year 401(k) plan can be amended by the extended tax return due date for 2021 to retroactively adopt a safe harbor design, and automatically satisfy 401(k) nondiscrimination testing, for 2021, which is a useful option if the plan fails

such testing and would have to make refunds to highly compensated employees.

Amend and restate defined contribution plan documents—Defined contribution plans, such as profit sharing plans, 401(k) plans, and money purchase pension plans, that rely on documents preapproved by the IRS need to amend and restate their documents by July 31, 2022. The new documents include statutory and regulatory changes since the last version of these documents, which was six years ago.

Update summary plan description (SPD)—ERISA requires that a plan's SPD be updated and redistributed from time to time, generally every five years if changes are made to the plan or the law. SPDs for defined contributions plans that are being amended and restated now generally are updated

at the same time, but SPDs for individually-designed plans, meaning those plans that do not fit neatly within a preapproved document, also should be reviewed and updated.

Cybersecurity—Some service providers are including updated service agreements with their amended and restated documents. These agreements should be carefully reviewed to ensure they address cybersecurity issues. The Department of Labor considers cybersecurity to be of utmost importance; vigilance and documentation of practices and procedures are key.

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