Dopkins & Company, LLP
CERTIFIED PUBLIC ACCOUNTANTS AND CONSULTANTS

EMPLOYEE BENEFIT PLANS

CRITICAL UPDATES ON INDUSTRY DEVELOPMENTS

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1 401(k) Plan Investment Options: Cryptocurrencies

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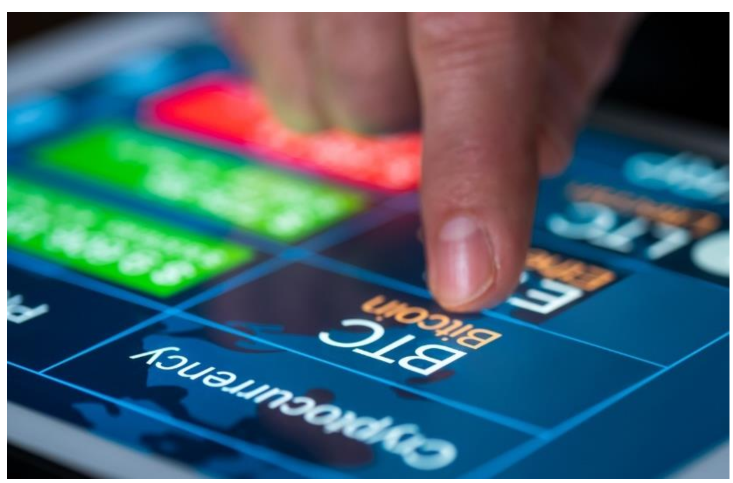
In March 2022, the U.S. Department of Labor issued Compliance Assistance Release No. 2022-01 – *401(k) Plan Investments in "Cryptocurrencies*" (Crypto Release). According to the Crypto Release, certain firms have been marketing cryptocurrencies to 401(k) plans as potential investment options for plan participants. The Department of Labor (DOL) cautions plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option to a 401(k) plan. The following is a summary of highlights from the Crypto Release.



Under ERISA, fiduciaries must act solely in the financial interests of plan participants and adhere to an exacting standard of professional care. Fiduciaries who breach those duties are personally liable for any losses to the plan resulting from that breach. A fiduciary's consideration of whether to include an option for participants to invest in cryptocurrencies is subject to these exacting responsibilities.

Fiduciaries have an obligation to ensure the prudence of the investment options and may not shift responsibility to identify and avoid imprudent investment options to plan participants. The DOL has expressed concerns about a fiduciary's decision to expose plan participants to investments in crypto currencies for the following reasons:

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- **Speculative and Volatile Investments:** Cryptocurrencies have been subject to extreme price volatility, which may be due to the many uncertainties associated with valuing these assets, speculative conduct, the amount of fictitious trading reported, widely published incidents of theft and fraud, and other factors.
- **The Challenge for Plan Participants to Make Informed Investment Decisions:** Cryptocurrencies are often promoted as innovative investments that offer investors unique potential for outsized profits. These investments can all too easily attract investments from inexpert plan participants with great expectations of high returns and little appreciation of the risks the investments pose to their retirement investments.
- **Custodial and Recordkeeping Concerns:** Cryptocurrencies are not held like traditional plan assets in trust or custodial accounts, readily valued and available to pay benefits and plan expenses. Instead, they generally exist as lines of computer code in a digital wallet. Methods of holding cryptocurrencies can be vulnerable to hackers and theft.
- **Valuation Concerns:** Experts have fundamental disagreements about important aspects of the cryptocurrency market, noting that none of the proposed models for valuing cryptocurrencies are as sound or academically defensible as traditional discounted cash flow analysis for equities or interest and credit models for debt.
- **Evolving Regulatory Environment:** Rules and regulations governing the cryptocurrency markets may be evolving, and some market participants may be operating outside of existing regulatory frameworks or not complying with them.

Based on these risks and the nuances of investing in cryptocurrency, the Employee Benefits Security Administration anticipates investigating plans that offer cryptocurrency investment options, and may take action to protect the interests of plan participants. Plan fiduciaries should fully consider cryptocurrency risks before adding a cryptocurrency option to a 401(k) plan's investment menu.

2 Retirement Plan Amendment Deadlines Extended

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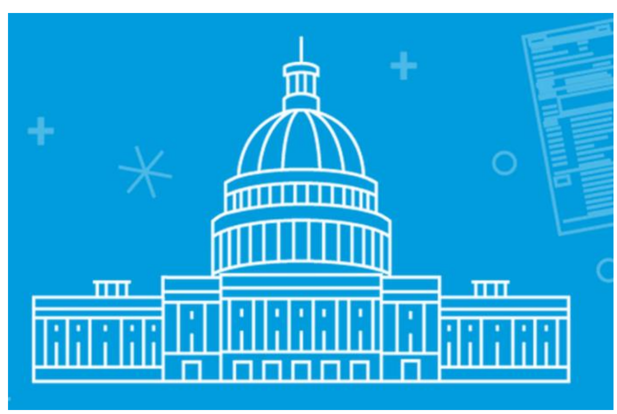
On Aug. 3, 2022, the IRS issued Notice 2022-33, which outlined changes to the due dates for plan amendments resulting from the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), the Coronavirus Aid, Relief, and Economic Security (CARES Act) and the Bipartisan American Miners Act of 2019 (Miners Act). Plan sponsors now have additional time to coordinate with their legal counsel and third-party administrators to incorporate the necessary amendments to plan documents required by these Acts.



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With the issuance of Notice 2022-33 on Aug. 3, 2022, the IRS heeded pleas for an extension of time to incorporate certain legislative amendments resulting from the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), the Coronavirus Aid, Relief, and Economic Security (CARES Act) and the Bipartisan American Miners Act of 2019 (Miners Act). Plan sponsors of non-governmental qualified retirement plans originally had until the last day of the plan year beginning on or after Jan. 1, 2022 in order to amend their plan documents to reflect the operational changes from these acts (IRAs, governmental plans, and 403(b) plans maintained by public schools had different due dates).

Specifically, the amendments were necessary to reflect the updated operations of the plan to comply with:

1. All provisions of the SECURE Act,
2. Section 104(a) of the Miners Act, which amended the minimum age for in-service withdrawals from a defined benefit pension plan from age 62 to age 59½, and
3. Section 2203(a) of the CARES Act, which provided a waiver of required minimum distributions for defined contribution plans and IRAs for the 2020 plan year.

Note: The extended amendment deadline does not apply to the loan and withdrawal provisions under the CARES Act. As of now, plans that applied the coronavirus-related provisions must still be amended by the last day of the first plan year beginning on or after Jan. 1, 2022 (2024 for governmental plans).

In general, plan sponsors of non-governmental qualified retirement plans (excluding 403(b) plans maintained by public schools) and IRAs now have until Dec. 31, 2025 to incorporate the necessary amendments. Other plans, such as governmental retirement plans, have later extended deadlines. This relief is valuable for plan sponsors who have been waiting on additional guidance from the IRS on several issues addressed in the SECURE Act.

This article was written by Lauren Sanchez, Christy Fillingame and originally appeared on 2022-08-03.

https://rsmus.com/insights/tax-alerts/2022/late-filing-penalties-may-apply-when-efile-mandate-not-met.html

3 Update on Pooled Employer Plans (PEPs)

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Pooled Employer Plans (PEPs) were created by the SECURE Act, enacted in 2019. This new plan setup is meant to address certain issues in the oversight and maintenance of Multiple Employer Plans (MEPs) and traditional single employer defined contribution plans. Unlike MEPs, PEPs permit unrelated companies with no business commonalities to partake in a single retirement plan. Instead of being sponsored by the employer, a PEP is sponsored by a third-party “pooled plan provider”, a new type of plan fiduciary created by the SECURE Act. PEPs also effectively eliminate the “one bad apple rule”, which meant that a MEP could previously be disqualified if one of the participating companies violated ERISA requirements. This is not the case with PEPs.

There are several benefits directly seen by participating employers and participants in PEPs. One major benefit is decreased risk for participating employers, as under a PEP, the employer shifts fiduciary duties to the pooled plan provider. As the named fiduciary of the plan, the pooled plan provider will take on administrative duties, file the participating employers’ Form 5500, and be responsible for plan compliance, including responding to DOL or IRS investigations. This shift of fiduciary duties helps to limit exposure to lawsuits, as a large amount of ERISA litigation is related to companies having insufficient plan oversight. PEPs will also generally have lower administrative costs, and may bundle multiple services (such as recordkeeping, custodian and advisor services) to offer economies of scale. The companies who participate in a PEP will retain certain responsibilities, including providing complete and correct plan information to the pooled plan provider, and remitting contributions timely. Finally, the SECURE Act offers certain tax incentives to employers to help offset the cost of starting up a PEP.

PEPs can be advantageous in eliminating some of the administrative burden put on plan sponsors and employers. However, they are not right for everyone. If you would like more information on PEPs, please contact your Dopkins representative.

4 Offering Retirement Plans to Long-Term Part-Time Employees

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On December 20, 2019 the SECURE Act was signed into law. One provision of the SECURE Act requires employers to offer long-term part-time employees eligibility to participate in their retirement plan. A long-term part-time employee is defined as an employee who has worked at least 500 hours per year for the previous three years. It is important to note, following the issuance of IRS Notice 2022-33, that the hours prior to 2022 are not considered. Based on these rules, the earliest entry for these employees would be January 1, 2025. However, plan sponsors should begin to consider this provision now if it will result in a change to their plan, as they are required to track hours and offer participation beginning in 2025.

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IRS 90-Day Pre-Examination Compliance Pilot for Retirement Plans

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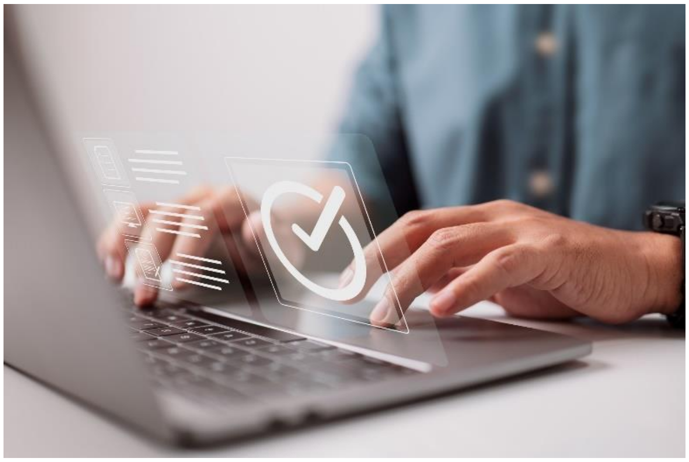
Beginning in **June 2022**, the IRS will be piloting a new pre-examination compliance program (June 3, 2022 Announcement) for retirement plans. As part of this pilot program, the IRS will be issuing notices to select companies sponsoring retirement plans, giving them a 90-day window to review plan documents and operations to ensure they are compliant before IRS review.

Purpose

The purpose of this pilot program is to encourage companies sponsoring retirement plans (i.e., plan sponsors) to take ownership of regularly reviewing their plan documents and operations to ensure they are compliant (with the help of their tax advisor, legal counsel and third-party plan administrator). The IRS intends for this to drive efficiencies in encouraging ongoing review and, if necessary, corrections. Such review will fall on plan sponsors and their advisors rather than on IRS agents to identify and recommend plan corrections, saving time spent on retirement plan examinations.



What happens if I am selected for this pilot?

1. **Notice issued.** The IRS will issue a notice stating its intent to review plan documentation after a 90-day window. The 90-day window provides a grace period to take any necessary steps to bring the plan into compliance.
2. **Conduct a self-review.** Don't wait! Take steps immediately within the 90-day period to review your 1) plan document to ensure it is up-to-date on plan amendments (as published in the IRS Required Amendments List) and 2) plan operations to ensure the plan is being operated in accordance with the terms of the plan document.
3. **Correct any errors.** Should errors be identified, you may be eligible to self-correct them within the 90-day window. The IRS already has a program in place that details common plan errors and correction methods. The program is the Employee Plans Compliance Resolution System (EPCRS) outlined in Rev. Proc. 2021-30. If any errors are not available for self-correction, then a closing agreement can be requested from the IRS. Your advisers can assist you in determining whether errors are eligible for self-correction and, if not, filing an application with the IRS to request a closing agreement.
4. **IRS review.** After the 90-day period closes, the IRS will review your assessment of plan operations and documentation of any corrections. The IRS will then either issue a closing letter or conduct an examination, which could be limited or full scope in nature.

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Where do I start?

If it has been a while since you have reviewed your plan document or plan operations, it is recommended to conduct a self-review, regardless of whether or not you receive a notice for this pilot pre-examination compliance program. First, you should ensure you understand the provisions of your plan document. Secondly, obtain records (e.g., payroll, participant elections, participant account data, compliance testing) to review. Walk through the plan process from start (when an employee enters the plan) to finish (when an account balance is distributed) and assess whether the plan provisions are being followed.

Information on the following common errors and some others can be found in this guide: Top 10 retirement plan internal control pitfalls-and how to avoid them.

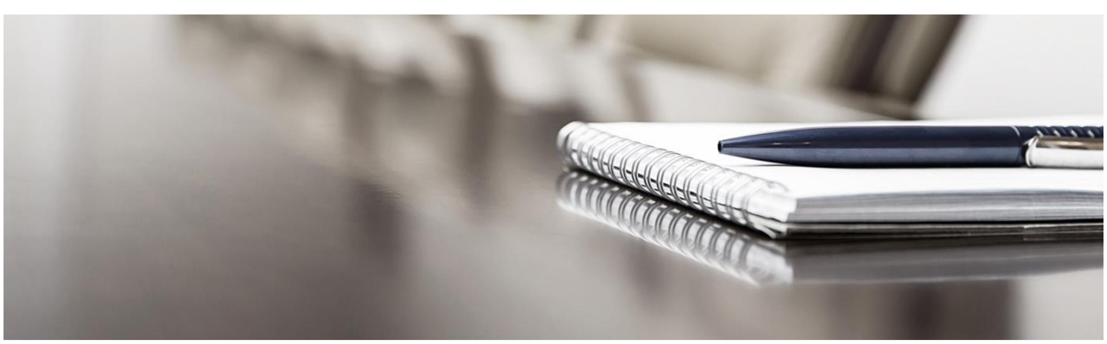
1. Failure to use the correct definition of plan compensation
2. Failure to timely deposit deferrals
3. Failure to timely apply forfeitures
4. Failure to include all eligible employees
5. Failure to properly administer automatic enrollment

A best practice is to review your plan document and operations on a regular and ongoing basis with your third-party administrator, legal counsel and tax adviser to help you assess compliance and identify any errors. This results in a greater likelihood to identify and thwart errors early, as well as avoiding the need to make corrections under pressure if you are selected for this or any other compliance review.

While it remains to be seen if the IRS will permanently adopt this compliance pilot, it demonstrates the IRS intent to have plan sponsors and their advisors take ownership of ongoing review and correction. Left uncorrected, plan document errors or operational errors can jeopardize a plan's qualified status and the tax advantages under the plan. Reach out to your advisors with questions or if you need assistance reviewing your plan operations.

This article was written by Christy Fillingame, Lauren Sanchez and originally appeared on 2022-06-23.

https://rsmus.com/insights/tax-alerts/2022/irs-90-day-pre-examination-compliance-pilot-for-retirement-plans.html



6 SECURE Act 2.0 – What You Need to Know

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In March 2022, the U.S. House of Representatives approved the Securing a Strong Retirement Act. This legislation, which is pending approval by the Senate for which a vote is expected by the end of the calendar year, has been dubbed “SECURE Act 2.0.” The bill expands upon 2019’s SECURE Act and aims to improve retirement savings opportunities for employees. If approved, the bill will introduce the following key provisions:

- **Mandate automatic enrollment/escalation** – While the number of 401(k) plans with these provisions continues to increase, the SECURE Act 2.0 would require employers that establish defined contribution plans after 2021 to require automatic enrollment for eligible employees at a 3% pre-tax deferral rate (unless directed otherwise by the participant). This rate would be required to increase annually by 1%, up to at least 10% but not more than 15% of an employee’s pay. Exceptions to this requirement would be provided for small or new businesses, as defined, church plans and governmental plans.
- **Enhance amount and form of catch-up contributions** – Under current law, catch-up contributions can be made, upon affirmative election, for employees who have attained age 50. These contributions are subject to ceiling set by the Internal Revenue Service, which is typically adjusted annually for inflation, and can be made on either a pre-tax or Roth basis (depending on what is permitted by the plan sponsor). The SECURE Act 2.0 would not only increase the annual catch-up amount for participants ages 62 through 64 – beginning in 2023 – but would also require all catch-up contributions to be designated as Roth contributions.
- **Permit Roth matching contributions** – Plan sponsors would have the option to permit employees to elect that some or all of their matching contributions to be treated as Roth contributions. As such, these contributions would not be excludable from employees’ gross income.
- **Delay mandatory distributions –** The original SECURE Act, signed in December 2019, increased the age at which participants are required to begin taking distributions from their 401(k) accounts from 70.5 to 72. The SECURE Act 2.0 would build on this, further increasing this age to 73 in 2022, 74 starting in 2029, and 75 starting in 2032.
- **Shorten measurement period for long-term part time employees** – As previously discussed, the original SECURE Act introduced eligibility for long-term part-term employees for 401(k) plan participation. The earliest entry date for these employees based on the bill is January 1, 2025. However, the SECURE Act 2.0 would decrease the measurement period from three years to two years, implying that the earliest entry date would be January 1, 2024.

Other changes introduced by the bill include:

- Allow plan sponsors to make matching contributions based on employees’ student loan payments
- Create a national database for Americans to find lost retirement accounts
- Expand options for self-correction for participant loan errors and employee deferral failures
- Allow 403(b) retirement plans to adopt certain features of 401(k) plans
- Eliminate barriers to offering lifetime income annuities as an investment option

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