



## Benefits and Compensation Alert

January 2019

### New Year's Resolutions for Benefit Professionals

Highlights:

- **Save for a Rainy Day:** Evaluate and consider amending 401(k) hardship provisions
- **Clear Out the Cobwebs:** Check DB plan actuarial assumptions for reasonableness
- **Ask for a Raise:** Avoid deduction limitations under Code Section 162(m)
- **Get in Shape:** Ensure wellness plans are not impacted by new EEOC guidance
- **Get a Checkup:** Check your Health Plan for common pitfalls
- **Clean Your Closets:** Review your qualified retirement plans for compliance concerns
- **Get Organized:** Act on, don't just file away, your plan's service provider's 402(b)(2) disclosures
- **Eat Better:** Your employer is more likely to reimburse a meal IF it can deduct it

It's 2019. Do your company's benefits and compensation practices "spark joy" for you and your employees? Here are some suggested resolutions to ensure that things stay tidy and compliant.

**Save for a rainy day:** Evaluate and consider amending 401(k) hardship provisions

Congress has made it easier to offer hardship withdrawals from your 401(k) or 403(b) plan. Plan sponsors are now working through numerous timing and transition issues:

- Whether to expand the list of permissible hardship events to include federally-declared disasters
  - If so, whether to recognize disasters that occurred in 2018, and how to substantiate "loss of income"
- Whether to allow hardship withdrawals for expenses incurred for a primary beneficiary (medical, educational, burial)

- If so, whether to modify the beneficiary designation process to prevent abuse
- Whether to allow an employee self-certification in 2019 or wait until 2020 (i.e., that the employee has insufficient cash to satisfy a financial need)
- Whether to truncate the suspension period for hardship withdrawals taken in late 2018, or let existing suspensions run out, and how to apply to other affected plans (ESPP, nonqualified plans)
- Whether to allow participants to withdraw earnings on pre-tax and Roth deferrals (not available to 403(b) plans)
- For safe harbor plans under 401(k) (12) or (k)(13), whether to allow participants to withdraw safe harbor source funds for hardship

Each of these changes will require a plan amendment, as well as participant communications and updated election forms. Prototype plans will need to confirm the approach taken by the prototype plan sponsor to ensure operational compliance.

**Clear Out the Cobwebs:** Check DB plan actuarial assumptions for reasonableness

Several recent lawsuits have challenged the actuarial assumptions utilized by employer pension plans. Under Code Section 401(a)(25), a qualified pension plan must specify its method for calculating actuarial equivalence, and these assumptions must be reasonable. Plaintiffs have questioned whether it is reasonable to rely on older mortality tables when converting a single life annuity to an optional benefit form. A full analysis requires an examination of both the mortality table and the applicable interest rate, and their interaction. We are working with a number of plan committees and their actuaries on this topic.

**Ask for a raise:** Avoid deduction limitations under Code Section 162(m)

Save the company a tax deduction and earn yourself a raise. Publicly traded companies continue to explore possible ways to reduce application of the Code Section 162(m) deduction limitation for executive officers. **A number of options should be on the table.** In addition, the Tax Cut and Jobs Act's grandfathering rule will continue to be relevant in future years, particularly for deferred compensation. As **we have advised**, do not assume that the Treasury guidance prevents you from relying on Tax Cut and Jobs Act's grandfathering of existing arrangements.

**Get in Shape:** Ensure wellness plans are not impacted by new EEOC guidance

Nicotine tests and body circumference measurements are standard fare for company-sponsored wellness plans. But employers should review their plans in light of an EEOC rule rescission effective January 1, 2019. The EEOC rules issued in 2016 had specifically allowed incentives of up to 30% of the cost of self-only health plan coverage for wellness plans involving exams, disability-related inquiries, or requests for genetic information (including spousal health information). See *Employee Benefits in Focus: Wellness Plans* (May 2016). However, now, because of a legal challenge from AARP, the EEOC has removed its safe harbor 30% incentive limit. This will open even smaller incentives to challenge by participants and/or the EEOC. Employers should consider whether their wellness plan designs may be susceptible to challenge as being "coercive" or causing participation to

be “involuntary” under the ADA or GINA; if so, modifications may be desirable to reduce the potential risk.

**Get a Checkup:** Check your Health Plan for common pitfalls

Has your medical plan seen a doctor lately? Significant risks lurk for plans that haven’t had robust preventive care. Consider a ‘wellness check’ to root out the following:

- Flawed claims and appeals process
- Inadequate privacy and data protection provisions and contractual arrangements
- One-sided vendor agreements
- ACA penalty exposure
- Fraud by participants, providers or service providers
- Mental health parity noncompliance
- HSA errors

**Clean Your Closets:** Review your qualified retirement plans for compliance concerns

If the idea of an IRS or DOL audit gives you the heebie-jeebies, it’s time to take a closer look at your qualified plans. We can help you reduce your audit risk by evaluating operational compliance and/or documentary compliance through our proprietary process. A typical ‘compliance review’ involves three phases: (i) review of plan documentation, SPD, and administrative manual; (ii) interview with key personnel; and (iii) data sampling. We would then work with your team to fix any mistakes and move on.

**Get Organized:** Act on, don't just file away, your plan's service provider's 402(b)(2) disclosures

Fee disclosures from your retirement plan service providers aren't just required legalese. They contain information to help your plan committees ensure that fees paid by your plans and participants remain reasonable. Consider it a good fiduciary habit to periodically review these disclosures, ensure their completeness, and follow up with your service providers as necessary to obtain the required information—and review this information when evaluating the provider’s services and fees.

**Eat Better:** Your employer is more likely to reimburse a meal IF it can deduct it

Every meal is better if your employer can pay for (and deduct) it. The Tax Cut and Jobs Act added and expanded deduction disallowances under Code Section 274, including for certain transportation and parking expenses, meal and eating facility expenses, and entertainment expenses. With a year of the new rules under our belts, taxpayers should review their 2018 and ongoing approach for reasonable compliance with the changes and interim IRS guidance. Among the new guidance, the IRS has temporarily provided that business meals can continue to be 50% deductible - as long as the expense is otherwise ordinary and necessary, the expense is not lavish or extravagant, the taxpayer or an employee is present, the food and beverages are provided to a current or potential customer or client, and the food is purchased separate from any entertainment expenses.

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