Addressing Missed 401(k) Plan Deadlines During COVID-19

Summary

The COVID-19 pandemic has put many extra burdens on 401(k) plan sponsors. In addition to navigating all of the uncertainty related to the economy and workplace safety, plan sponsors have had to keep an eye on regular retirement plan procedures and deadlines. Often, workplaces were shut-down for extended periods (and may still be off-limits), so the employees responsible for handling those matters might not have been able to access records or other materials necessary to ensure timely compliance. In some cases, employers may have even laid off or terminated those employees due to a sudden downturn in business.

So, it is entirely possible that 401(k) plan sponsors may have missed some compliance deadlines—especially during the chaotic first few months of the pandemic which started in mid-March for most of the United States. In recognition of this, the federal government has offered some relief for plan sponsors trying to address deadlines that were potentially missed.

Deadline Extension

Internal Revenue Service (IRS). On April 6, 2020, the IRS issued Notice 2020-23, postponing the due date of many tax payments and filings, and extending many deadlines that would otherwise apply with regard to 401(k) plan administration, so that any such due date or deadline that would ordinarily fall on or after April 1, 2020 through July 14, 2020, was automatically extended to July 15, 2020.

Department of Labor (DOL). On April 29, 2020, the DOL issued Disaster Relief Notice 2020-01 (which IRS concurs with) saying that that the DOL will not take enforcement action against plan sponsors who have missed various ERISA deadlines. The notice gives retroactive relief (back to March 1). The notice stresses that the delay must be solely attributable to the pandemic, so employers and service providers should document the cause of the delay and that the missed action was taken as soon as possible.

Here we list key 401(k) plan compliance deadlines from the first six months of 2020 and discuss what plan sponsors can do to address items that may have been overlooked.

Key 401(k) Plan March-August 2020 Compliance Deadlines for Calendar Year Plans

This list shows the original deadlines from March 2020 through August 2020 for some of the key compliance requirements for calendar year 401(k) plans and describes any deadline extensions or suspensions because of the pandemic.

- **March 15:** Deadline to process corrective distributions for plans failing actual deferral percentage (ADP) or actual contribution percentage (ACP) tests (avoiding 10% excise tax). No deadline extension or other relief provided.

- **April 1**: First required minimum distribution (RMD) to terminated participants (or more than 5% owners) who reached age 70.5 in 2019, as well as older participants who retired in 2019. All RMDs for 2020 have been suspended. So, if a participant took a 2019 RMD before April 1 or a 2020 RMD, the participant is allowed to repay it to the plan (or the participant can roll it over tax-free) by August 31, 2020. Participants need to hurry if they want to avoid taxation in 2020, since it seems that participants cannot avoid taxation in 2020 if RMDs are rolled over after August 31, 2020. It is not yet clear how this affects Form 1099-R reporting. It seems that if the RMDs were returned to the original plan, then the distribution would be cancelled, and Form 1099-R would not be needed. But if the participant rolled the RMD into an IRA or another plan, the original plan would have no knowledge of that and would generally be required to issue a Form 1099-R for the RMD.

• **April 15:** Excess contribution refunds for participants who contributed more than the 402(g) limits for 2019. Deadline extended until July 15, 2020 by IRS Notice 2020-23.

• **May 15:** Q1 2020 benefit statements; Q1 participant fee disclosure for plans that allow self-directed investments. Deadline extended until 60 days after the end of the COVID-19 National Emergency, by DOL Disaster Notice 2020-01, but only if the plan acts in good faith and furnishes the material as soon as administratively practicable.

• **June 28**: Deadline for retirement plans with publicly traded employer securities to file their Form 11-K annual report with the U.S. Securities and Exchange Commission (SEC) —i.e., by 180 days after the end of the retirement plan year. Deadline extended to Aug. 12, 2020 for calendar year plans, but only if the issuer files an 8-K and delay is COVID-related.

• **July 28:** Summary of material modifications (SMM) is due to participants—i.e., 210 days after the end of the plan year in which the change was adopted—unless it was included in a timely updated summary plan description (SPD). Deadline extended until 60 days after the end of the COVID-19 National Emergency, by DOL Disaster Notice 2020-01, but only if the plan acts in good faith and furnishes the material as soon as administratively practicable.

• **July 31**: File Form 5500 or file Form 5558 to get an automatic extension to October 15; for plans that do not have self-directed investments, deadline to distribute 2019 annual benefits statement. No deadline extension or other relief provided (so far). (Instead of filing a Form 5558, plan sponsors could also extend the due date to file Form 5500 based on the extended due date of their federal income tax returns.)

• **Aug. 14:** Q2 2020 benefit statement and participant fee disclosure for plans that allow self-directed investments. Deadline extended until 60 days after the end of the COVID-19 National Emergency, by DOL Disaster Notice 2020-01, but only if the plan acts in good faith and furnishes the material as soon as administratively practicable.

Relief fo Late Deposits of Employee Deferrals

In addition to potentially overlooking these deadlines, plan sponsors may have been unable to timely deposit participants' paycheck contributions into their 401(k) plan accounts. Generally, the DOL considers late deposits to be a prohibited transaction, but the agency has granted some leniency amid the pandemic.

DOL Disaster Relief Notice 2020-01 says that the DOL will not take enforcement action against plan sponsors who have missed their regular "timely deposit" remittance schedules from March 1 until the 60th day following the announced end of the national emergency resulting from COVID-19 (or such other date that DOL may designate in future guidance). The notice gives retroactive relief (back to March 1). The notice stresses that the delay must be solely attributable to the pandemic, so employers and service providers should document the cause of the delay and show that the contributions were deposited into the plan as soon as possible. Plan sponsors should note that, despite the DOL's non-enforcement position, they cannot use employee salary deferrals as operating cash for their business. The need for operating cash, even when the need is created by a COVID-19 shut down, is not a delay that would be protected.

Other DOL Relief

In more good news, DOL Disaster Relief Notice 2020-01 says that 401(k) plans will not be in violation of ERISA for a failure to timely furnish a notice, disclosure, or document that must be furnished between March 1, 2020 and 60 days after the announced end of the COVID-19 National Emergency, if the plan acts in good faith and furnishes the material as soon as administratively practicable. Also, 401(k) plans can use electronic communications with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access to electronic means of communication, including email, text messages, and continuous access websites, the DOL notice said. This greatly expands existing electronic plan administration rules.

The notice also provided relief for:

• Timely substantiating participant plan loans and distributions - which seems to apply to hardship distributions and special coronavirus distributions, but does not apply to spousal consents (IRS has granted separate relief for obtaining those during the pandemic)

• Giving blackout period notices

• Processing benefit claims and appeals

Finally, the notice stated that ERISA Section 518, as amended by the CARES Act, provides that, for any employee benefit plan sponsor, administrator, participant, beneficiary, or other person affected by a Presidentially declared disaster (or a public health emergency declared by the Secretary of Health and Human Services), the DOL may prescribe a period of up to one year that may be disregarded in determining the date by which any action is required or permitted to be completed. Section 518 further provides that no plan shall be treated as failing to be operated in accordance with the terms of the plan solely as a result of complying with such postponement of a deadline. So, the relief described herein will generally be for a period of no more than one year (i.e., through February 28, 2021), unless further relief is provided.

Insight: Don't Panic. Identify, Document and Address

Plan sponsors may just now be realizing that they missed a deadline or made some other oversight. If this is the case, don't panic. There are relatively straightforward ways to address these errors, and for some failures, the federal government has broadened the window for fixing oversights amid the pandemic.

The most important thing is to address the problem as soon as it is discovered by following the proper guidelines to remedy issues. This includes documenting the circumstances around why the deadline was missed and showing how the pandemic contributed to the mistake.

The IRS and DOL each have correction programs that may help plan sponsors avoid severe penalties or plan disqualification as a result of missed compliance deadlines. The IRS' 401(k) Fix It Guide (and 403(b) Fix It Guide) can help identify and offer solutions for common mistakes. In addition, plan sponsors often can remedy plan disqualification failures by using the IRS' Employee Plans Compliance Resolution System (EPCRS), correct certain fiduciary breaches under the Department of Labor (DOL)'s Voluntary Fiduciary Correction Program (VFCP) and obtain forgiveness for late Form 5500 filings through DOL's Delinquent Filer Voluntary Compliance (DFVC) Program.

Plan sponsors should keep in mind that missed or late compliance items that are not addressed before the start of an independent qualified public accountant audit (if ERISA requires one for that plan year) will likely delay the process and drive up the audit costs.

The pandemic has made this is a very confusing time to manage a retirement plan. Plan sponsors should consult with service providers to make sure they are taking the proper steps to remedy issues and meet future deadlines. Your representative is available to answer your questions and help develop a plan to put you on the right path for any oversights.

These deadlines are similar but not necessarily the same for 403B plans.