

# 2018 Benefits Grab Bag - Tax Reform, Bipartisan Budget Act and Other Items

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## ***Retirement Plan Contribution Limits Not Altered by Tax Reform-So Far***

Even though the Tax Cuts and Jobs Act made some changes to how the Internal Revenue Service (the "Service") is to adjust retirement plan contribution limits late last year, the Service confirmed that the limits on retirement plan contributions in the [attached document](#) that were issued late last year will not be changed for 2018. The announcement only dealt with the retirement plan contribution limits.

## ***ERISA and Other Penalties Escalated***

ERISA and other laws impose penalties on employee benefit plan compliance violations. We have a chart showing all of the inflated numbers for each of the various violations.

## ***Opioid Abuse- Employment Laws, HIPAA Privacy and Other Considerations for Employers***

The news reports that the opioid crisis is widespread. It is not an issue that escapes the workplace. It has been reported that 70% of employers have felt the impact of prescription drug misuse in the workplace. It has also been reported that drug overdoses are now the leading cause of injury death in the U.S. outnumbering traffic accidents. Employers who may be facing employees with substance use and abuse issues need to be concerned with workplace laws related to safety (OSHA), HIPAA Privacy (if the information about the condition is received by the employer's medical plan), the Mental Health Parity and Addiction Equity Act and their medical plan's compliance with such law, FMLA, the Americans with Disabilities Act and state medical privacy laws that may all apply to a situation an employer faces. *Employers may want to review their employment policies and their employee assistance plan's procedures for dealing with individuals so afflicted to ensure there is a consistent approach that considers the variety of potentially applicable laws. Employers may want to reach out to their medical plan's medical provider network(s) to determine what steps the network is taking to manage this issue, such as monitoring prescribing habits or educating health care providers about alternatives to opioids. If you face a situation with an employee that may indicate a substance abuse issue, it is important to consider the many different laws that may apply.*

## ***401(k) Hardship and Retirement Plan Rollover Rules Modified By the Bipartisan Budget Act of 2018 with Rapid Effective Dates***

At the end of last week when the budget standoff was again temporarily resolved by the Bipartisan Budget Act of 2018 (the "BBA"), there were two changes included impacting retirement plans. First, the BBA instructed the Service to modify its 401(k) regulations related to hardship withdrawals no later than 1 year after the date of enactment or by Feb. 9, 2019. *The hardship withdrawal modifications that are to be made will apply to plan years after December 31, 2018 and will also require modifications to most 401(k) plan documents.* The first of the modifications removes the required 6 month suspension following a hardship withdrawal on employee elective deferral or salary reduction contributions. The second modification permits the hardship withdrawal to be taken not only from the elective deferral contributions by the employee, the qualified matching contributions and the qualified nonelective contributions, but also from the earnings on any of those contributions. The individuals are no longer required to exhaust available loans before taking a hardship withdrawal under the new provision. The types of funds that can be withdrawn are now listed in a new provision within Code section 401(k), but those new provisions make no mention of the longstanding accounting requirement in the current 401(k) regulations which contemplate an ongoing accounting and consideration of amounts previously taken as hardship withdrawals to determine the current amount available, hopefully this will be clarified when the regulations are revised as directed by the BBA.

The BBA also modified the traditional rollover rules for rollovers that are necessitated when the Service levied on a participant's retirement plan account and seized those assets for past due taxes, but then later decided the levy was not proper and returned the funds to the individual. This modification to the levy provision now permits the individual to

rollover the amount returned not within 60 days of receipt, the rule for traditional plan to plan rollovers, but any time up to the due date (without any extension) for the individual to file the tax return for the year in which such property or money seized was returned. It also permits the interest on the amount returned from the seizure to be eligible to be rolled over. So if an individual's retirement account was seized in 2017, and the Service determined it seizure was incorrect and returned the funds on April 2, 2018, the individual could submit the amount returned, including earnings thereon as a rollover any time prior to April 15, 2019. *This new rollover rule is effective for calendar quarters beginning on and after April 1, 2018. Retirement plan documents frequently incorporate the 60 day limitation on the rollovers and do not contemplate the funds coming from the Service rather than from another retirement plan or an IRA, so plan documents should be reviewed to determine what changes need to be made.*

*Plan sponsors should also contact their record keepers regarding when they will be prepared to administer the new rollover provision and the new hardship withdrawal provision.*

#### *The Best Offense Maybe A Good Defense*

In the world of sports, a great offense will not save you if there is no defense at work. Similarly, employee benefit plan administration and fiduciary compliance may catch you flat footed if you have not taken steps to be prepared with a good defense in daily operations. A regular compliance review of policies and procedures and whether they are being followed is important so that the plan is following the plan documents and its own procedures because documenting procedural prudence is a key defense. Similarly, over the years as personnel change, sometimes there are gaps in the institutional memory regarding what strategies were in place, where the records are kept and who is monitoring what requirements, limits, rules and the compliance of the decision making process with the governing plan documents, administrative policies and procedures.

Periodic monitoring also enables an employer to identify issues, rectify any omissions and to correct any violations potentially using the IRS self-correction program under the Employee Plans Compliance Resolution System, or correcting fiduciary issues before the correction costs grow with the market's earnings. Periodic reviewing that the appropriate procedures are documented as being followed will also aid you in stopping omissions that could have more serious consequences if allowed to continue without correction or that may present a risk in litigation.

#### *PBGC Missing Participant Program is Open for Defined Contribution Plans that Terminate in 2018 or Later*

The Pension Benefit Guaranty Corporation ("PBGC") has opened its missing participant program to permit defined contribution plans that terminate on or after January 1, 2018 to elect to transfer the benefit of a participant who is missing to the PBGC. This is only open to defined contribution retirement plans (e.g., 401(k) plans, profit sharing plans) that are terminating. It is not open to ongoing plans that cannot find participants or participants who should be receiving minimum required distributions after age 70 and ½ that is still the responsibility of the plan sponsor. *Plan sponsors may want to review their procedures regarding identifying and locating missing participants because while the expansion of the PBGC missing participant program is helpful for terminating plans, ongoing plans still must locate their own participants and make sure they comply with the minimum required distribution requirements.*

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