

AUGUST 8, 2018

**A COUPLE OF 401(K) PLAN ODDS AND ENDS
THAT MAY NEED YOUR ATTENTION SOON**

The past couple of years have been relatively quiet on the 401(k) plan front. This is particularly true with respect to IRS required plan document changes. This has been a welcome break. There was a time when it seemed like plan amendments were required nearly every year. However, we would like to bring to your attention two new important matters that could require action on your part.

Special Tax Notice

As you may recall, there is a notice you must provide to individuals who receive distributions from your plan. It explains the tax consequences of the distribution, as well as the various rollover options available. The notice is required by section 402(f) of the Internal Revenue Code and is often referred to as the "402(f) Notice" or "Special Tax Notice." If your plan permits participant loans, that notice needs to be updated as soon as possible due to recent congressional legislation. If your plan does not permit plan loans, you can stop reading this section of the Alert and move on to the next one.

Here is what is going on –

- The Tax Cut and Jobs Act of 2017 enacted last December made very few changes that impact retirement plans. But there was one change that directly impacted plans that allow participant loans.
- The Act extended the period that an individual has to roll over a loan that was offset against his/her account balance if the offset was triggered by termination of employment or termination of the plan. (This scenario usually arises when a participant has a balance remaining on his/her loan that is not paid off at the time he/she terminates employment.)
- Under prior law, the time to roll over a loan offset was no different than any other rollover – 60 days from the date of the distribution. An individual who wanted to roll over all or a portion of loan offset would have to come up with the funds to contribute to the other plan or IRA.

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- Under the new law, individuals with a loan offset now have until the due date of their tax return, including extensions, to roll over the amount that was offset into another plan or IRA. As with the prior law, an individual who wants to roll over all or a portion of loan offset would need to come up with the funds to contribute to the other plan or IRA.

Because the 402(f) Special Tax Notice needs to explain all of this, plans that permit loans must update the notice to reflect the new rules. If our firm prepares your plan documents, we will be in contact with you in the near future regarding updating your notice.

Hardship Distribution Rule Changes

If your plan does not permit hardship distributions, you are lucky and can stop reading here. If your plan *does* allow hardship distributions, though, this section of the Alert applies to you.

Here is what you need to know –

- The Bipartisan Budget Act of 2018 (Budget Act) made several significant changes to the hardship distribution rules. Those changes become operationally effective for plan years beginning on or after January 1, 2019 (although formal plan amendments do not need to be executed until the end of the 2019 plan year).
- The changes impact three separate rules that apply to hardship distributions:
 - **Rule Change #1.** There are several “safe harbor” rules which, if satisfied, result in a hardship distribution being deemed permissible. One of those rules requires that participants must demonstrate an immediate and heavy financial need in order to be eligible for a hardship distribution. Under current law, in demonstrating financial need, the participant must first receive all distributions and loans that he/she is eligible for from any plan maintained by the employer. Under the Budget Act, however, a participant is no longer required to take an available loan from the plan in order to receive a hardship distribution.
 - **Rule Change #2.** Under current law, a plan must prohibit a participant who receives a hardship distribution from making 401(k) elective deferrals (and/or after-tax employee contributions) for at least a six-month period after the hardship distribution. The Budget Act changed the law to no longer require this six-month suspension of elective deferrals and/or after-tax employee contributions.
 - **Rule Change #3.** Under current law, a hardship distribution is limited to a participant’s aggregate elective deferrals and may not include earnings on those deferrals. The Budget Act now allows hardship distributions to include earnings on elective deferrals. (It also now permits hardship distributions of qualified nonelective employer contributions and qualified matching contributions plus earnings).

- You are not required to make these changes; however, it is our sense that many plan sponsors will probably want to do so in order to simplify plan administration. The current rules have been easy to trip up on. The failure to follow them is something the IRS often catches when auditing plans. For example, failing to suspend elective deferrals for six months following a hardship distribution and/or failing to restart elective deferrals once the six month suspension period is over are two very common sources of costly “operational failures.” Allowing a participant’s elective deferral election to remain in effect after a hardship distribution has been received will allow you to avoid both of these potential failures.
- You should start thinking about whether you may want to amend your plan, effective January 1, 2019, to take advantage of these three rule changes. **If our firm prepares your plan documents, we will be in contact with you in the near future regarding this.**

If you have any questions regarding these changes that may impact your 401(k) plan, please feel free to contact Eric Namee, Steven Smith or Brad Schlozman at (316) 267-2000.