

### **Considerations for Plan Administrators**

Plan administrators should review the following actions to be taken before the end of 2022 and focus on what to expect for 2023. The following checklist addresses plan amendments, notices and other considerations for qualified retirement plans (pages 1 through 5), welfare plans (pages 5 through 7), and stock-based and non-qualified plans (pages 8 through 9). A chart showing benefit and contribution limits for 2023 is on page 11.

### **Amendments and Considerations for All Qualified Retirement Plans**

- **SECURE Act Changes Effective in 2020:** The Setting Every Community Up for Retirement Enhancement Act (the “SECURE Act”), which was signed into law in December 2019, made significant changes to retirement plans. Highlights of the SECURE Act retirement plan provisions that became effective in 2020 include:
  - raising the required minimum distribution age to 72;
  - changing the post-death distribution rules for defined contribution plans;
  - increasing the 10% cap for automatic enrollment for 401(k) safe harbor plans to 15%;
  - permitting portability of lifetime income options;
  - permitting penalty-free withdrawals from defined contribution plans and IRAs in the case of birth or adoption of a child;
  - eliminating the advance notice requirement for nonelective safe harbor plans; and
  - increasing penalties for failure to file Form 5500.
  
- **SECURE Act Change Effective in 2021:** Employees who complete three consecutive years of service in which they are credited with at least 500 hours of service must be permitted to make elective deferral contributions to the 401(k) plan (but may be excluded from employer matching and nonelective contributions). Employers must start to track part-time employees’ hours starting in 2021. The Employers are not, however, required to permit such employees to make deferrals until completing three consecutive years of part-time service, or **2024**, at the earliest.

- **CARES Act:** The Coronavirus, Aid, Relief and Economic Security Act (the "CARES Act"), which was signed into law in March 2020, offered assistance to certain defined contribution plan participants affected by the COVID-19 Pandemic by:
  - permitting "qualifying individuals," as defined by the CARES Act, to take "coronavirus-related distributions" of up to \$100,000 per year from his or her account without the 10% early withdrawal penalty, with the option for individuals to repay such distributions to a retirement plan within three years of receiving the distribution (which will end in 2023);
  - increasing the maximum amount of qualified plan loans, through September 23, 2020, to the lesser of \$100,000 and 100% of a qualified individual's vested account balance and extending (for one year) the due date for a qualified individual's loan repayments due through the end of 2020; and
  - providing a temporary waiver of the required minimum distribution (RMD) rules for distributions from tax-qualified retirement plans and IRAs that are required to be made during the 2020 calendar year.
- **SECURE Act and CARES Act Amendment Deadline:** The IRS extended the deadline by which plans must be amended for changes under the SECURE Act and CARES Act to the last day of the first plan year beginning on or after January 1, 2025, or such later date as the Secretary of the Treasury may provide. However, because these provisions have been in effect since as early as 2020, plan sponsors should consider amending their plans now, so that plan documents reflect current administration.
- **SECURE Act 2.0:** Pundits are saying that "SECURE Act 2.0," which refers to several bills moving through Congress this year, will pass by **the end of the year**. There is momentum to pass legislation with the goal of covering more workers in employer-sponsored retirement plans and improving retirement savings. While it's hard to know which pieces of the various proposals will survive, provisions under consideration include: requiring an automatic enrollment feature in most newly established 401(k) and 403(b) plans, increasing the involuntary cash-out limit from \$5,000 to \$7,000, treating student loan repayments as elective deferrals for purposes of matching contributions, and increasing the catch-up contribution limit to \$10,000.
- **Discretionary Plan Amendments:** Plan amendments reflecting discretionary changes that became effective in the current plan year (other than the SECURE Act and CARES Act changes discussed above) must be **adopted by the last day of the plan year**, e.g., December 31, 2022, for a calendar year plan. An increase in benefits, adding a new participating employer, and the addition of a new type of contribution are examples of discretionary changes that would need to be documented in plan amendments adopted by the end of the year. For defined

benefit plans, advance participant notice may be required if an amendment significantly reduces the rate of future benefit accruals, such as a pension plan freeze.

- Determination Letter Procedures**: The IRS expanded its determination letter program to allow submissions for merged plans. Previously, the program permitted determination letter requests only for initial plan qualification and plan termination. Plan sponsors now can request an IRS determination of the qualified status of a merged plan. The application must generally be submitted before the end of the plan year following the year of the plan merger. For instance, if a merger occurred in 2021, the determination letter request must be submitted ***no later than December 31, 2022***, for a calendar year plan.
- Fee Disclosure – Action Required Annually**: Certain retirement plan service providers must provide an ERISA section 408(b)(2) fee disclosure to plan fiduciaries. The disclosure allows plan fiduciaries to determine if fees paid from plan assets are reasonable, as required by ERISA. Plan fiduciaries must provide annual fee disclosures to participants. Information on fees deducted from participants' accounts also must be provided in quarterly statements.
- Fiduciary Procedures**: Best practice is for retirement plan fiduciaries responsible for selecting and monitoring plan investments to meet on a regular basis (preferably, quarterly) to review the performance of the plan's investments and the reasonableness of investment-related fees that are paid directly from plan assets. Minutes of such meetings recording the fiduciaries' decisions should be maintained. Such fiduciaries should report annually to the corporate board or its delegate.

### **Considerations for Defined Contribution Plans**

- Safe Harbor Plans**: Generally, safe harbor 401(k) amendments must be adopted before the beginning of the plan year. An employer that wishes to add or amend an existing safe harbor matching or nonelective contribution in a calendar-year 401(k) plan for the 2023 plan year should adopt an amendment ***by December 31, 2022***. Under the SECURE Act, however, an employer may adopt the 3% nonelective contribution safe harbor at any time before the 30<sup>th</sup> day before the close of the plan year.
- Forfeitures and Revenue-Share Accounts**: The IRS generally requires that forfeitures and revenue share accounts must be used or allocated to participants annually. Employers should review whether forfeitures held in their defined contribution plans should be allocated to participants, used to pay expenses, or to reduce employer contributions within the plan year that the forfeitures occurred. For a calendar year plan, forfeitures should be allocated or used ***by December 31, 2022***.

### Consideration for Defined Benefit Plans

- PBGC Premium Increase:** The Pension Benefit Guaranty Corporation per-participant flat rate premium for *plan years beginning in 2023* is \$96 for single-employer plans.

### Notices for Defined Contribution Plans

- QDIA Notice – Annual Notice and Action required 30 Days Before Initial Investment:** The DOL Qualified Default Investment Alternative (QDIA) safe harbor regulations shield plan administrators from fiduciary liability with respect to default investments. Plans using QDIAs must provide a notice to participants and beneficiaries that satisfies the regulations. An initial notice must be provided to newly eligible plan participants before such participant's the first investment in the QDIA. Plan administrators must also provide an annual notice at least 30 days in advance of each subsequent plan year. For calendar year plans, the annual notice must be provided *by December 1, 2022*.
- 401(k) Plan Notices – Action Required 30 Days Before Plan Year:** Sponsors of 401(k) plans are required to notify participants at least 30 days before the beginning of the 2023 plan year if the following features will apply to the 401(k) plan for the 2023 plan year. The applicable notices must be issued to participants *by December 1, 2022*, for a calendar year plan.
  - **401(k) Safe Harbor Notice:** Plan sponsors that intend to make safe harbor matching contributions for 2023 must provide a safe harbor notice to participants. The SECURE Act eliminated the notice requirement effective for the 2023 plan year for plans that satisfy the safe harbor by making a nonelective contributions.
  - **QACA Notice:** A Qualified Automatic Contribution Arrangement (QACA) is an automatic contribution 401(k) plan that is deemed to pass nondiscrimination testing. The QACA safe harbor requires annual increases to the automatic enrollment amount and safe harbor employer contributions. Plan administrators must issue a QACA notice to participants.
  - **EACA Notice:** An Eligible Automatic Contribution Arrangement (EACA) is another automatic enrollment plan that specifically permits a participant to withdraw automatic contributions made within 90 days after the first automatic contribution. Plan administrators must issue an EACA notice to participants.
- Diversification Notice - Action Required 30 Days Before Direction:** Defined contribution plans that permit participants to elect to invest in publicly traded employer securities (*e.g.*, a company stock fund) must provide participants with a notice of diversification rights. Plan administrators must distribute the notice at



least 30 days before the first date on which a participant may direct the investment of the proceeds of employer securities.

- Lifetime Income Illustration:** Sponsors of defined contribution plans now have to provide illustrations in the plans' benefit statements to show the estimated lifetime income stream that a participant's account could generate. Plans were first required to provide the illustrations in 2022 and are required to provide the illustrations at least annually thereafter.

### **Notices for Defined Benefit Plans**

- Benefit Statements – Action Required in 2023:** Defined benefit plans are generally required to furnish participants with a pension benefit statement at least once every three years. An alternative notice method would be to instead send an **annual notice** telling the participant of the availability of the pension benefit statement and how to obtain it.
- Annual Funding Notice – Action Required in 2023:** *Within 120 days after the end of the plan year (April 30 for calendar year plans)*, defined benefit plans must provide the Pension Benefit Guaranty Corporation, participants, beneficiaries, unions, and contributing employers with detailed information about: (1) the funded status of the plan; (2) the plan's investments; (3) the group covered by the plan; and (4) a description of the rules for terminating the plan. Plans with fewer than 100 participants must provide the notice by the due date for filing the plan's annual return (Form 5500). Additional notice requirements apply if the plan is subject to benefit restrictions for being underfunded.

### **Considerations for Health and Welfare Benefit Plans**

- Cafeteria Plan Amendments:** The Consolidated Appropriations Act, 2021 (CAA) permitted plan sponsors to implement cafeteria plan changes in 2020 and 2021, with delayed amendment deadlines. For CAA changes implemented in 2021, the amendment deadline for a plan with a calendar year is **December 31, 2022**. The deadline for non-calendar year plans is December 31, 2023. The changes permitted by the CAA include the following:
  - Unlimited carry-over of unused flexible spending arrangement funds from 2021 to 2022;
  - Extended 12-month grace period for flexible spending arrangement claims for plan years ending in 2021; and
  - Access to flexible spending arrangement funds for employees who no longer participate through the end of the plan year in which participation ended.

- COVID-19 Personal Protective Equipment (PPE):** IRS Announcement 2021-7 permits health flexible spending arrangements and health reimbursement arrangements to reimburse expenses for PPE for the primary purpose of preventing the spread of COVID-19, effective as early as January 1, 2020. A plans may be retroactively amended no later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective. All retroactive amendments, however, must be adopted no later than **December 31, 2022**.
- Fee Disclosure:** Under the CAA's amendment to ERISA section 408(b)(2), "covered service providers" to group health plans must disclose to the plan's fiduciary the direct and indirect compensation that the covered service provider expects to receive from providing services to the plan. Covered service providers include persons who provide "brokerage services" or "consulting" to ERISA-covered group health plans and reasonably expects to receive \$1,000 or more in direct or indirect compensation in connection with providing those services. Before entering into, extending, or renewing a service agreement with a covered service provider, plan fiduciaries should ask to see the ERISA section 408(b)(2) disclosure.
- Student Loan Repayment Plans:** The CAA included a provision allowing employers to make tax-free payments on their employees' student loans of up to \$5,250 per year through January 1, 2026. This is a five-year extension of a provision originally enacted in the CARES Act. The student loan repayment plan must be operated pursuant to a written plan document.
- Updated Notice for No Surprises Act:** Group health plans and insurers were required to provide the initial notice regarding patient rights under the No Surprises Act by January 1, 2022. The annual notice must be made publicly available, posted on the plan's website, and included in explanations of benefits. The government provided a model notice to meet the disclosure requirements that can be used to ensure good-faith compliance with the disclosure requirement. The model notice can be found here: <https://www.cms.gov/files/document/model-disclosure-notice-patient-protections-against-surprise-billing-providers-facilities-health.pdf>. The previous version of the model notice may only be used through the end of 2022.
- Prescription Drug Data Collection (RxDC) and Health Care Cost Reporting:** Pharmacy Benefit and Drug Costs Reporting (or Rx DC Reporting) is a new reporting requirement implemented under the CAA and is **due by December 27, 2022**. Group health plans and health insurance issuers offering group, individual, and self-funded health insurance coverage, as well as student health plans, must report information about prescription drugs and healthcare spending to the Department of Health and Human Services, the Department of Labor, and the Department of the Treasury. Reporting instructions are found here: <https://regtap.cms.gov/uploads/library/RxDC-Section-204-Reporting-Instructions-06-30-2022.pdf>

- Reporting Health Plan Coverage to the IRS and Employees:** Code section 6056 requires Applicable Large Employers to report information about employer-sponsored health coverage to the IRS and to employees. An Applicable Large Employer is an employer that employs at least 50 full-time employees, including full-time equivalent employees. In addition, sponsors of self-insured health plans that provide minimum essential coverage must file an annual return with the IRS and provide statements to employees. Returns are due to the IRS **by February 28, 2023** (or March 31, 2023, if filing electronically). Statements to employees are generally due January 31, 2023.
- Medicare Part D Notices:** Employers offering group health plans providing prescription drug coverage to individuals who are eligible for Medicare must provide a notice of creditable or non-creditable coverage to such individuals before **October 15** of each year. Such employers are also required to disclose to the Centers for Medicare and Medicaid Services (CMS) whether their prescription drug coverage is creditable within **60 days after the beginning of the plan year**. Disclosure to CMS is made through the CMS creditable coverage disclosure webpage.
- Patient-Centered Outcomes Research Institute (PCORI) Fee Extended:** The PCORI fee applicable to health insurers and to self-insured health plan sponsors is determined as follows and is sent with IRS Form 720.

| <u>Plan Year Ending</u> | <u>Due Date</u> | <u>Fee Amount</u>       |
|-------------------------|-----------------|-------------------------|
| Jan. to Sept 2022       | July 31, 2023   | \$2.79 per covered life |
| Oct. to Dec. 2022       | July 31, 2023   | \$2.93 per covered life |

- Group Health Plan Cost-Sharing Limits:** The 2023 out-of-pocket maximums for non-grandfathered group health plans are \$9,100 for self-only coverage and \$18,200 for family coverage. The out-of-pocket limits for health savings account-compatible high deductible health plans are \$7,500 for self-only coverage and \$15,000 for family coverage.
- Summary of Benefits and Coverage:** Insurers and group health plans must provide a Summary of Benefits and Coverage (SBC) for each coverage option offered by the insurer or plan. Participants who enroll mid-year must be provided an SBC within 90 days of enrollment. Calendar year plans have already complied, or are in the process of complying, with this requirement. The SBC should be provided at the beginning of open enrollment each year if renewal is not automatic or at least 30 days before the beginning of each plan year if renewal is automatic. Plans also must provide 60 days' notice of changes to the content of an SBC.

- Annual Notices for Group Health Plans:** In addition to the notices described above, employers must continue to provide participants with the following annual group health plan notices:

- Children's Health Insurance Program Reauthorization Act Notice
- Women's Health and Cancer Rights Act Notice
- Newborns' and Mothers' Health Protection Act Notice
- HIPAA Special Enrollment Notice

### **Stock-Based, Executive and Director Compensation**

- ISO Exercises and ESPP Share Transfer Reporting:** Employers whose employees exercised an incentive stock option (ISO) in 2022 or made an initial transfer in 2022 of shares acquired under an employee stock purchase plan within the meaning of Code section 423 (ESPP), are subject to information reporting. Employers will report information to employees and to the IRS relating to ISO exercises and initial transfers of ESPP shares on IRS Forms 3921 and 3922. The ***IRS filing deadline is February 28, 2023*** (paper filing), or ***March 31, 2023*** (electronic filing). Employers must ***provide this year's employee statements by January 31, 2023***. Note that these filings apply to all companies offering ISOs or an ESPP, not just publicly traded employers.
- FICA Taxation of Nonqualified Deferred Compensation Plans:** Nonqualified deferred compensation plans are subject to special rules on the timing of FICA taxation. In general, amounts deferred are taken into account in the year those amounts are first vested, rather than at the time of payment. This rule often results in a smaller portion of the deferred benefit being subject to Social Security and (depending on plan design) Medicare taxes than would be the case if taxes were withheld and paid upon distribution. A number of factors affect the amount of compensation taken into account for a given year, and the proper year of taxation must be carefully assessed in the case of defined benefit-type nonqualified plans. Employers have until ***December 31, 2022***, to withhold and pay FICA taxes on compensation deferrals that are subject to this rule in 2022.
- Nonqualified Plan Deferral Elections for 2023 Compensation:** Elections to defer compensation earned in 2023 must be completed by ***December 31, 2022***, absent very limited exceptions. If a company plans to rely on any exception to the December 31, 2022, deadline, legal counsel should be consulted before year end.
- For Compensation That Vests in 2023 or Later Years, Review and Correct any Code section 409A Violations:** Employers should review all nonqualified deferred compensation plans or agreements, under which compensation vests in 2023 or later years, to ensure that there are no Code section 409A violations. If employers identify the violation prior to the end of 2022, then documentary violations with respect to unvested amounts generally can be corrected by



**December 31, 2022**, without penalties. Code section 409A corrections should be reviewed by legal counsel.

- Identify 2023 Specified Employees Under Code section 409A:** Unless a different identification period has been elected, public company employers must identify individuals who were specified employees in the 12-month period ending on **December 31, 2022**. Specified employee status for these individuals applies for the 12-month period beginning April 1, 2023. If an employer intends to change their specified employee determination and effective dates, legal counsel should be consulted.
- Changes to Definition of “Covered Employee” under Code section 162(m):** Code section 162(m) limits the deductibility of compensation in excess of \$1 million paid to certain officers of a publicly traded employer. Significant changes to expand this limitation were made to Code section 162(m) in 2017. The American Rescue Plan Act of 2021 (ARPA) added five additional employees to the group for whom a compensation deduction is limited, reaching any employee (not limited to officers) who is among the five highest-compensated employees for the taxable year, other than individuals already covered under the 2017 legislative changes. ARPA’s changes are effective for taxable years beginning after **December 31, 2026**. We will continue to monitor developments relating to this effective date.
- Evaluate Remaining Share Reserve for Equity Incentive Plans:** A publicly traded employer should determine whether the remaining share reserve under its equity incentive plan is sufficient for grants planned through 2023 and, ideally, 2024. If not, an employer should begin preparing now for share increase and other amendments that may be necessary or desirable. Share increases and certain other changes are required to be approved by shareholders under New York Stock Exchange and Nasdaq Stock Market listing requirements and under tax rules relating to ISOs, where ISOs are offered under a plan. An employer should consider both the timing of its annual meeting and its regular grant schedule as part of this planning.
- Changes to Code Section 83(b) Election Signature Requirements:** The IRS issued temporary guidance allowing for the use of electronic or digital signatures on certain tax forms, including elections under Code section 83(b) with respect to transfer or issuance of restricted property (typically, restricted stock and partnership interests, including profits interests) on April 15, 2021. This allowance was extended on November 18, 2021, but is set to expire on October 31, 2023. Absent further extensions, handwritten signatures will be required for Section 83(b) elections **beginning November 1, 2023**. Code section 83(b) elections are very time-sensitive; thus, consultation with counsel *prior* to the transfer or issuance date is prudent.
- SEC Guidance on Clawback Policies:** On October 26, 2022, the Securities and Exchange Commission adopted final rules that direct national securities exchanges

to establish listing standards that will require listed companies to adopt and comply with policies that provide for the recovery of erroneously awarded incentive-based executive compensation in the event that the company is required to prepare an accounting restatement due to the material noncompliance of the company with any financial reporting requirement under the federal securities laws. For affected employers, these rules broaden the scope of clawback events and may impact documentation relating to incentive-based plans and awards, including equity awards. Companies should review their existing clawback policies and consult with legal counsel regarding the effect of these final rules on existing and planned compensation arrangements.

- New Excise Tax on Stock Repurchases and Effect of Benefit Plan Issuances and Contributions:** Effective for stock repurchases *after December 31, 2022*, Code section 4501 imposes a 1% excise tax on the fair market value of stock repurchased in a taxable year by a “covered corporation” (generally, a publicly traded domestic corporation or publicly traded partnership). However, Code section 4501(e)(2) provides an exception for stock repurchases where the stock repurchased is (or an amount of stock equal to the value of the repurchased stock is) “contributed to an employer-sponsored retirement plan, employee stock ownership plan, or other similar plan.” In addition, under Code section 4501(c)(3), the amount subject to the excise tax is reduced by the fair market value of stock issued during the taxable year, including “stock issued or provided to employees” of the company or certain affiliates. While the foregoing aspects of the new rule are helpful, clarifying guidance is needed. We will continue to monitor regulatory and other developments regarding the excise tax and related employee benefit plan matters.

| <b>Contribution and Benefit Limits for 2023</b>  |                   |                   |
|--|-------------------|-------------------|
| <b>Description</b>   | <b>2022 Limit</b> | <b>2023 Limit</b> |
| Compensation Cap   | \$305,000         | \$330,000         |
| Elective Deferral Limit for 401(k) plans, SEPs, 403(b) plans, and 457(b) plans               | \$20,500          | \$22,500          |
| Catch-Up Contributions for Individuals Age 50 and Older                                      | \$6,500           | \$7,500           |
| Defined Benefit Maximum Annual Accrual   | \$245,000         | \$265,000         |
| Defined Contribution Maximum Annual Addition   | \$61,000          | \$66,000          |
| Highly Compensated Employee Compensation Limit   | \$135,000         | \$150,000         |
| Key Employee Compensation Limit (Top Heavy Plans)  | \$200,000         | \$215,000         |
| ESOP Threshold for determining maximum account balance subject to 5-year distribution period |                   |                   |
| Regular Limit  | \$1,230,000       | \$1,330,000       |
| Lump Sum Distributions (Income Averaging)  | \$245,000         | \$265,000         |
| SEP Compensation Threshold for Participation   | \$650             | \$750             |
| SIMPLE IRA Maximum Pre-Tax Contribution  | \$14,000          | \$15,500          |
| Catch-Up Contributions for SIMPLE IRAs or SIMPLE 401(k) plans                                | \$3,000           | \$3,500           |
| Social Security Taxable Wage Base  | \$147,000         | \$160,200         |
| Health Flexible Spending Account Limit (Cafeteria Plans)                                     | \$2,850           | \$3,050           |
| Carryover Amount   | \$570             | \$610             |
| Health Savings Account Maximum Contributions   |                   |                   |
| Family Coverage  | \$7,300           | \$7,750           |
| Single Coverage  | \$3,650           | \$3,850           |

If you have any questions regarding this checklist, please contact any member of the Employee Benefits & Executive Compensation Section at Williams Mullen.

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