

The Employee Benefits Landscape in 2012: PART I

February 7, 2012 by [Kristy Britsch](#)

As we start a new year, plan sponsors and plan administrators should be aware of important upcoming changes affecting employee benefits in 2012. This Part I discusses changes impacting qualified plans, including recently released **final 408(b)(2) regulations** regarding fee disclosure requirements. Part II will discuss changes impacting health and welfare plans.

REMEMBER: The following amendments were due by December 31, 2011. If you are not sure as to whether these amendments have been adopted, please contact one of our benefits attorneys.

A. Required Minimum Distribution Suspension Amendment

The Worker, Retiree, and Employer Recovery Act ("WRERA"), enacted in 2008, and among its other provisions, waived required minimum distributions ("RMDs") from defined contribution plans (i.e., 401(k) plans, ESOPs, profit sharing plans, etc.) for the 2009 calendar year. Employers/plan sponsors must have adopted this amendment by the last day of the 2011 plan year (i.e., December 31, 2011 for calendar year plans)

B. Code Section 436 Funding Based Restrictions on Defined Benefit Plans

Section 436 of the Internal Revenue Code (the "Code") (added to the Code by the Pension Protection Act of 2006) imposes restrictions on benefit distributions and accruals for underfunded single-employer defined benefit plans. The restrictions that apply are determined by the plan's Adjusted Funding Target Attainment Percentage ("AFTAP"). If a plan's AFTAP is less than 80%, the plan cannot be amended to increase benefits. If a plan's AFTAP is less than 80%, but at least 60%, the portion of benefit that may be paid in a single lump sum or other prohibited payment is limited. If the AFTAP is less than 60%, the plan may not pay any lump sum distribution or other accelerated payments. Employers/plan sponsors must have adopted this amendment by the last day of the 2011 plan year (i.e., December 31, 2011 for calendar year plans).

QUALIFIED PLAN COMPLIANCE ITEMS IN 2012

Plan Restatements for Cycle B Plans (IRS Determination Letter Program)

For employers with an employer identification number ("EIN") ending in a two (2) or a seven (7) and who sponsor individually designed plans, the period to restate a qualified plan and submit the plan with the IRS for a favorable determination letter began on February 1, 2012 and ends on January 31, 2013.

Cost of Living Adjustments

Plan sponsors should review the cost of living adjustments ("COLA") to determine what, if any, changes must be considered.

	2010	2011	2012
Annual compensation for plan purposes (for plan years beginning in calendar year) 401(a)(17)	\$245,000	\$245,000	\$250,000
Defined benefit plan, basic limit (for limitation years ending in calendar year) 415(b)	\$195,000	\$195,000	\$200,000
Defined contribution plan, basic limit (for limitation years ending in calendar year) 415(c)	\$49,000	\$49,000	\$50,000
401(k) / 403(b) plan, elective deferrals (for taxable years beginning in calendar year) 402(g)	\$16,500	\$16,500	\$17,000
457 plan, elective deferrals (for taxable years beginning in calendar year)	\$16,500	\$16,500	\$17,000
401(k) / 403(b) /457, catch-up deferrals (for taxable years beginning in calendar year) (Age 50+) 414(v)	\$5,500	\$5,500	\$5,500
SIMPLE plan, elective deferrals (for calendar years) 408(p)	\$11,500	\$11,500	\$11,500
SIMPLE plan, catch-up deferrals (for taxable years beginning in calendar year) (Age 50+) 408(p)	\$2,500	\$2,500	\$2,500
IRA contribution limit 408(a)	\$5,000	\$5,000	\$5,000
IRA catch-up contribution (Age 50+)	\$1,000	\$1,000	\$1,000
Highly Compensated Employee 414(q)	\$110,000	\$110,000	\$115,000
SEP Coverage 408(p) (Compensation limit)	\$550	\$550	\$550
FICA Covered Compensation	\$106,800	\$106,800	\$110,100
Key Employee	\$160,000	\$160,000	\$165,000
ESOP 5- Year	\$985,000	\$985,000	\$1,015,000
Distribution period 409(o)(1)(c)(ii)			

Fee Disclosures Requirements: Plan Level Disclosures and Participant Level Disclosures

Plan administrators will be subjected to two new disclosure rules this year. One rule affects disclosures made at the plan level and the second rule affects disclosures made at the participant level. Under the final ERISA Section 408(b)(2) regulations, issued by the Department of Labor on February 2, 2012, the **plan level disclosures** take effect on **July 1, 2012** (extended from its April 1, 2012 effective date). The **participant level disclosures** take effect **August 30, 2012** (i.e., 60 days after the July 1 effective date of the plan level disclosure requirement)(extended from its May 31, 2012 effective date).

A. Plan Level Disclosures

Effective July 1, 2012, "covered service providers" must disclose to an ERISA plan fiduciary any compensation that they or their affiliates receive for services related to an ERISA covered plan. This rule applies to both defined benefit plans and defined contribution

plans. If a covered service provider fails to provide the required disclosures, the plan's service contract or arrangement with that covered service provider will not be considered "reasonable" under ERISA and thus, will be a prohibited transaction subject to penalties and which could expose plan fiduciaries to liability.

To provide background, ERISA Section 408(b)(2) requires plan fiduciaries to ensure that contracts or arrangements with their service providers, and the compensation paid under such arrangement, is "reasonable" in order for the arrangement to be exempt from ERISA's prohibited transaction rules. To ensure that compensation paid by a plan is "reasonable," the new fee disclosure regulations impose a new disclosure obligation on service providers.

ERISA Section 406(a)(1)(C) prohibits the "furnishing of goods, services or facilities between a plan and a party in interest." Because a "party in interest" includes any party that provides services to a plan, service arrangements generally are prohibited unless they qualify for an exemption. ERISA Section 408(b)(2) provides such an exemption by permitting a party in interest to provide "services" to a plan if:

1. the contract or arrangement is reasonable; and
2. the services are necessary for the establishment or operation of the plan; and
3. no more than reasonable compensation is paid for the services.

A covered service provider includes any service provider that enters into a contract or arrangement with an ERISA covered plan and expects to receive at least \$1,000 in direct or indirect compensation. The types of covered service providers subject to these new rules include the following:

1. Fiduciaries and investment advisors.
2. Recordkeeping or brokerage services that allow participants to self-direct the investment of his or her accounts.
3. Certain other service providers who receive *indirect* compensation. Indirect compensation means compensation received from a source other than the plan, the plan sponsor, the covered service provider, or an affiliate or subcontractor. This category includes accounting, auditing, actuarial, appraisal, custodial, banking, insurance, investment advisory, legal, valuation, or third-party administration services.

Covered service providers must provide plans with a description of the services provided to the plan, a description of direct and indirect compensation that the covered service provider expects to receive (includes commissions, finders fees and Rule 12b-1 fees) from the plan, a statement of the covered service provider's status (such as registered investment advisor or fiduciary), and a description of the fees that will be charged against the investments under the plan.

One significant change made by the final 408(b)(2) regulations is that the definition of covered plan now excludes **frozen** 403(b) annuity contracts and custodial accounts that were issued to employees prior to January 1, 2009 (i.e., 403(b) plans where no additional employer contributions have been made and the contract is fully vested and enforceable by the employee). For more information on the final 408(b)(2) regulations, please contact one of our benefits attorneys.

B. Participant Level Disclosures

As stated above, the extended effective date of the plan level disclosures affects compliance with the participant level disclosures. Calendar year plans will now be required to make their **initial annual disclosure** to participants no later than **August 30, 2012** and provide their **initial quarterly statements** no later than **November 14, 2012**.

Under the participant level disclosure requirements, plan administrators of retirement plans with participant directed accounts (such as 401(k) plans) will be required to disclose to participants (including employees who are eligible to participate) the fees and expenses associated with the funds in that retirement plan. This increased disclosure obligation includes “plan related disclosures” and “investment related disclosures.”

Investment Related Disclosures

Plan administrators must provide participants and beneficiaries with performance and investment fee information for each investment option available under the plan, on or before the date that a participant could first direct his or her investments, and annually thereafter. The investment related information that must be disclosed includes the following:

1. Identifying information for each investment option under the plan, including the name of each investment option and the type or category of the investment option (i.e., large or small cap, money market fund, etc.).
2. Performance data and benchmark information for each investment option available under the plan.
3. Fee and expense information for each investment option.
4. Website address and a glossary of investment related terms so that participants can access additional information about each investment option available under the plan.
5. 1-year, 5-year and 10-year investment performance returns and applicable benchmark returns for each investment option that does not have a fixed rate of return. For investment options with a fixed return, the annual rate of return and the term of the investment must be disclosed. The disclosure must also include a statement that an investment's past performance is not necessarily indicative of future performance and that the rate may be adjusted.

Investment related information must be provided to participants and beneficiaries in a chart (or similar scheme) that allows participants or beneficiaries to compare information about each of the investment options offered under the plan. The chart must include the date, the name, address and telephone number of the plan sponsor (or its designee), and an explanation that additional investment related information about the plan's investment options can be accessed via the web, and a description of how participants and beneficiaries can obtain (free of charge) paper copies of the information contained on the website.

In addition to the information that must be automatically provided to participants, plans must also provide the following information to participants upon request:

1. Prospectuses for any SEC registered investment options.
2. Financial statements and reports, such as shareholder reports.
3. Share value of each investment option and valuation date.
4. A list of assets that constitute the investment alternatives under the plan.

Plan Related Disclosures

Plan administrators must provide to each participant and beneficiary, on or before the date in which a participant can first direct his or her investments and annually thereafter, certain plan information, which may be categorized into three areas: (1) general plan information, (2) administrative expense information, and (3) individual expense information. If there is a change to this information, the updated information must be provided at least 30 days, but no more than 90 days, in advance of the effective date of the change.

1. **General Plan Information:** General plan information must be provided to participants and beneficiaries explaining the structure and mechanics of the plan, such as an explanation of the circumstances under which a participant or beneficiary may give investment instructions; an explanation of any limitations on such instructions, including transfer restrictions to or from a designated investment option; a list of investment options available under the plan; the identification of any investment managers, and a description of any “brokerage windows” or brokerage accounts that enable participants and beneficiaries to select investment options beyond those offered by the plan.
2. **Administrative Expense Information:** Plan administrators must provide participants and beneficiaries with an explanation of fees and expenses for general plan administrative services (e.g., legal, accounting or recordkeeping costs that may be charged against participants’ accounts on a plan-wide basis) and an explanation of the basis on which such charges will be allocated (e.g., pro rata) to each individual account under the plan. Administrative expenses must be reported to participants in a quarterly statement.
3. **Individual Expense Information:** Plan administrators must provide to participants and beneficiaries an explanation of any fees and expenses that may be charged to an individual’s account based on an individual basis (not plan-wide basis). This includes costs associated with fees and expenses for processing plan loans or qualified domestic relations orders (“QDROs”), fees associated with investment advice that may be rendered, or transfer fees. Similar to the administrative expenses, individual expenses must be disclosed to participants in a quarterly statement.

In light of the new fee disclosure requirements, at both the plan level and participant level, we urge plan sponsors to begin thinking about the compensation paid to covered service providers as part of its fiduciary review. We also urge plan sponsors and to begin thinking about participant communication strategies with respect to the new participant disclosures. If you have any questions about your “fiduciary review” or about this alert, please contact one our benefits attorneys.