

THE ASPPA Journal

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Compliance—A Year in Review—January to December

by Lisa Scalia, CPC, QPA, QKA

In 1969, there was a movie called *If It's Tuesday, This Must Be Belgium*. The movie told the story of a group of US travelers in Europe touring seven countries in 18 days. When I first started working with retirement plans, I likened my first year of administering plans to be just like that movie! If it's January, it must be 1099-Rs; if it's February, it must be nondiscrimination testing; if it's March, it must be ADP refunds; etc. While the movie may have been a comedy, compliance with IRS and DOL regulations is no laughing matter.

So, I started developing compliance calendars for clients to help manage the process. The use of a compliance calendar can be an excellent tracking and planning tool with regard to plan operations and documenting due diligence.

Compliance events fall into two different categories:

- Those with specific completion dates; and
- Those that need to be addressed on a quarterly or annual basis but not necessarily on a specific date.

This article is organized into these two types of compliance events. While not meant to be all inclusive, the objective is to give highlights of the major events and a basis for a planning tool with clients. From the plan sponsor perspective, the calendar can serve to track key events and keep the plan in compliance. [Note: The dates in this compliance calendar are based on a January 1 – December 31 defined contribution plan year and employer fiscal year. In general, if a due date for performing an act for tax purposes falls on a Saturday, Sunday or holiday, it is delayed to the next business day. In the case of ADP/ACP refunds, the 15th day is not extended; rather it is the business day prior. There is no specific reference in the Code to this, but the industry consensus is that distributions made after the 15th would be subject to the excise tax.]



Key Calendar Year Events

January 1

Consider effect of annual increases (if any) in Internal Revenue Code Section 402(g) pre-tax deferral and 414(v) catch up contribution limits. Review IRS cost-of-living adjustments to dollar limitations applied under Sections 415(c), 401(a)(17), 414(q) and 416(i) of the Code.

January 31

The Form 1099-R (and Form 1099-DIV for ESOPs with pass through dividends) must be sent to each participant who took a distribution or had a “deemed” distribution during the previous calendar year.

March 15

If a plan fails the ADP and/or ACP tests, the refunds of excess contributions and excess aggregate contributions must be returned no later than 2 ½ months after plan year end so as not to cause the employer to be required to pay an excise tax of 10% on the returned contributions. For a plan that qualifies as an Eligible Automatic Contribution Arrangement (EACA), this deadline is extended to six months after plan year end.

March 15

Employer contributions for corporations (and LLCs filing as corporations) made on an annual basis must be deposited no later than the plan sponsor's tax-filing deadline for the fiscal year in which the plan year ends including extension. Partnerships, sole proprietorships and LLCs filing as partnerships have until April 15 and not-for-profit organizations have until May 15 for their return. Filing for extension generally provides for an additional six months (five months for partnerships).

April 1

Required minimum distributions must start no later than the April 1 following the later of the year the participant either attains age 70 ½ or terminates employment unless the participant is a 5% owner. For example, for the first year distributions for the 2010 calendar year, the distribution is due no later than April 1, 2011. As distributions are required to be made at least annually until the account is fully paid out, another distribution will be required by December 31, 2011 for the 2011 calendar year. Required minimum distributions were suspended for 2009, but that relief did not extend to 2010.

April 15

The deadline for correcting 402(g) excess deferrals is April 15 of the plan year following the plan year of the excess deferral. Failure to correct results in double taxation to the participant—taxation first of the deferrals in the calendar year the elective deferral is made and once again in the year of distribution. In the event that the excess relates to the same employer, qualification issues can arise. This deadline is one of the few that is unrelated to the plan year of the qualified plan.

July 29

The Summary of Material Modifications (SMM) must be sent to participants for any plan amendments made in the prior plan year. While the actual DOL deadline is 210 days after the plan year to which the plan amendment relates, it is not practical in many cases to wait until the deadline to notify participants of a plan change.

July 31

The Form 5500 (Annual Return/Report of Employee Benefit Plan to IRS) must be filed with the DOL's Employee Benefits Security Administration (EBSA) no later than seven months following the end of the plan year, unless the plan files for an extension. The extension period is 2 ½ months. In order to qualify for the extension, Form 558 must be filed no later than the initial due date of the Form 5500.

July 31

If the plan sponsor is subject to penalty excise tax on certain transactions for the prior year [e.g., late deposit of 401(k) deferrals, other prohibited transactions, etc.], IRS Form 5330 "Return of Excise Taxes Related to Employee Benefit Plans" must be filed by the first business day following the last day of the seventh month after the close of the plan year. [Note: The excise tax for excess contributions and/or excess aggregate contributions due to a failed ADP/ACP test is due 15 months after the plan year end to which they relate.]

September 15

Corporations and LLCs filing as corporations that have filed for an extension of their federal tax return filing deadline must make plan related employer contributions.

September 15

If the plan sponsor wishes to rely on its corporate income tax return extension, Form 5500 and all required Schedules must be filed with the DOL's EBSA.

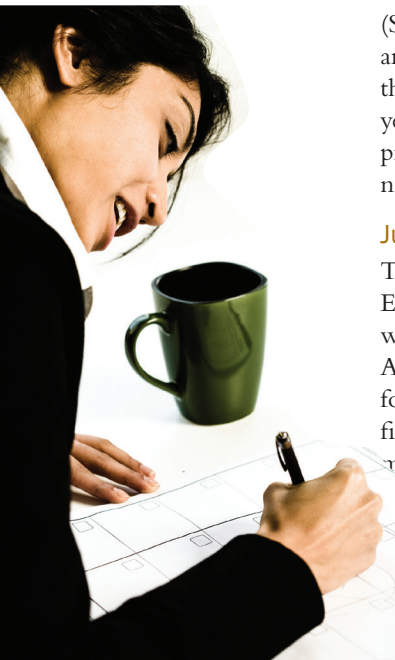
September 30

The Summary Annual Report (SAR) for plans that are not on extension is required to be provided to plan participants not later than two months after the filing of the Form 5500. For calendar year plans filing by July 31, the SAR is due September 30.

October 3

Plans using safe harbor testing rules [both traditional and QACA (Qualified Automatic Contribution Arrangement)], plans that utilize a Qualified Default Investment Alternative (QDIA) and plans that use any form of automatic enrollment are required to send out annual notices. All notices have the same timing requirements and may be combined for mailing purposes. Notices must be sent to all participants no earlier than 90 days prior to the start of the plan year and not later than 30 days prior to the start of the plan year.

For new participants, the initial QDIA notice must be sent at least 30 days prior to the date of plan eligibility or the first investment in the QDIA. In the event that the plan provides for the 90-day penalty-free withdrawal, then the notice may be as late as the date of eligibility. Notices for traditional safe harbor plans will be considered timely for new participants if provided by the date of eligibility. QACA plans must provide the notice for new participants to ensure that the participant has a reasonable amount of time after receipt of the notice to make an affirmative election.



October 15

Final date for calendar year plans to submit Form 5500, if on extension.

October 15

For plans that encounter difficulty satisfying coverage, the deadline to retroactively amend a plan to correct the failure is 9 ½ months after plan year end.

Employers are wise to address any coverage testing issues prior to embarking on any of the requisite compliance tests. For employers in a controlled group who have more than one plan covering different employees, the establishment of the “plan” for testing purposes will facilitate all other tests.

December 2

The latest date to send out annual notices for safe harbor, QDIA or auto enrollment.

December 15

Summary Annual Report is due two months after the filing deadline for the Form 5500 or December 15 if plan was on extension.

December 31

With minor exceptions, this day represents the absolute last day to complete compliance tests and process any corrections. Excess ADP/ACP amounts must be returned to HCEs no later than the last day of the plan year following the plan year to which they relate. While there is no specific date in the regulations for correcting Section 415 annual additions or plan limit violations, it would be prudent to correct these as soon as possible (but do not delay past December 31). All corrections are distributed or forfeited (if applicable) with earnings.

In addition to the above testing deadlines, annual required minimum distributions must be made by December 31 for those participants in pay status. December 31 is also the determination date for the upcoming plan year for which top heavy determination under Code Section 416 is made.

Discretionary amendments must be executed no later than the last day of the plan year in which they are adopted.

Events to Plan for during the Plan Year

The administration of qualified plans includes the performance of certain tasks that are not tied to specific calendar dates and warrant inclusion in an annual compliance calendar. All of these tasks carry fiduciary responsibility and must be handled timely and in accordance with the plan document and administrative policies where applicable.

Items such as the threshold for auto cashouts of balances upon termination, the grace period for loan defaults and the timing of when nonvested balances may be forfeited, and how

those forfeitures will be utilized, will be defined in the plan document.

However, no discussion on deadlines would be complete without addressing the timely deposit of elective deferrals. The failure to timely deposit elective deferrals and/or employee contributions is a prohibited transaction and may trigger a DOL audit.

401(k) Deposits

401(k) deposits must be deposited into the plan as soon as administratively possible once withheld by the plan sponsor. On January 14, 2010, the DOL published a timing standard for small plans (< 100 participants) that is seven business days. Although there is no DOL timing standard at this time for large plans, the turnaround time should not be greater than seven business days. Note: A plan sponsor should submit 401(k) contributions in a consistent manner (example—within four business days each payroll period). In addition, if the plan sponsor is already submitting 401(k) contributions within seven business days, it should continue to follow that practice. As this area is an increasing focus of the IRS for plan audits, consistency is the key factor.

Loan Defaults

In order for a loan to be exempt from the prohibited transaction rules, as well as to avoid taxation at the time the loan is made, the loan must meet certain conditions. For example, the loan must be paid off within a five-year timeframe (unless for a home loan), and loan repayments must be made no less than quarterly. It is the plan administrator's responsibility to ensure that loan repayments are made timely and the promissory note enforced.

Most plan documents provide for a grace period that ends the quarter after the quarter of the missed payment. If a payment is missed in the first quarter and no further payments are made by the end of the second quarter of the plan year, the loan will be defaulted. It is wise to set up a process to automatically default loans that have passed the grace period to avoid any qualification issues and/or ERISA violations.

Auto Cashouts

Many plans provide for the auto cashout of balances under a certain threshold. For plans that utilize the auto cashout rules, distributions of accounts under the plan document's stated threshold must be timely cashed out and terminated participants must be notified. At the very least, an annual sweep of participants should be done. This process can also be very effective in keeping small balances out of the plan and preventing issues in the future when participants

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need to be paid out and may have moved causing difficulty in locating them. When participants with small balances terminate and fail to take a distribution, the employer is forced to continue to send statements and provide annual notices.

Forfeitures of Nonvested Balances

On an annual basis, plans with a vesting schedule will accumulate forfeitures. Plans need to be in compliance with the timing of when forfeitures become available to the plan. Many plans provide that nonvested balances may be forfeited the later of when the participant takes an actual distribution or after five one-year breaks in service. The plan must also provide for how the forfeitures will be used—to pay reasonable administrative expenses, reduce contributions or be reallocated to participants' accounts.

Like other contributions, forfeitures should be used on an annual basis. At the end of each plan year, sponsors should review forfeiture account balances and allocate according to the terms of the plan document. Forfeitures should not be held unused from year to year or held unallocated in a suspense account unless there is a permissible reason for such action.

Summary Plan Description (SPD)

An SPD must be provided to an employee no later than 90 days after he/she becomes a participant in a plan. When a plan is significantly modified, participants and beneficiaries must be provided with a revised SPD (or alternatively, a SMM) within 210 days following the close of the plan year in which the changes were made. In any case, participants must receive a revised SPD at least every five years integrating all modifications to the plan within the five-year period. If no amendments are made to the plan during the five-year period, the SPD distribution can be delayed for up to ten years.

Sarbanes-Oxley Notice

Written notice is required for blackout periods that last three consecutive business days or more. The notice must be provided at least 30 days and no more than 60 days before the beginning of the blackout period. This timeframe is especially relevant when making fund changes or changing vendors with regard to the operation of the qualified plan.

Participant Statements

For a defined contribution plan with participant-directed investments, benefit statements must be provided at least on a quarterly basis. In addition, the quarterly statement must be delivered within 45 days after the end of the applicable period.

Plan Document IRS Filing

Under the IRS Determination Letter Filing Program, individually-designed plan documents must be filed every five years (based on the plan sponsor's EIN) and volume submitter plan documents every six years.

It should be noted that amendments to the HEART Act are due to be adopted by plans no later than December 31, 2010 for calendar year plans, and the Required Minimum Distribution amendments need to be adopted no later than the last day of 2011.

Summary

In addition to the above referenced testing and reporting requirements, plan sponsors may want to perform an annual "plan checkup" (*i.e.*, an audit of its operational practices and fiduciary responsibilities). A plan checkup should address plan expenses, plan design considerations, participant fees and plan investments. The checkup should also confirm the plan's compliance with the terms of its document, Investment Policy Statement and the requirements of 404(c), if applicable. Such an annual review seems appropriate in light of the heightened scrutiny surrounding plan fiduciaries.

Finally, test results should be reviewed with the objective of determining if plan design changes are needed to improve testing results or eliminate testing via safe harbor. The timing may be right to add new provisions such as auto enrollment or auto increase to boost participant savings rates.

In conclusion, compliance can be a 365 day a year job! 📌



Lisa Scalia, CPC, QPA, QKA, has more than 20 years experience in employee benefits, most recently as an ERISA consultant, second vice president with New York Life Retirement Plan Services. She counsels plan sponsors on plan design, compliance issues and fiduciary liability. She volunteers with ASPPA for the Education and Examination Committee by peer-reviewing examinations. In addition to her ASPPA credentials, she holds the Series 6 and 63 securities registrations with FINRA. (lisa_scalia@nylim.com)

