



Chapter 1

Retirement Plan Overview and Update

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TAX QUALIFIED RETIREMENT PLANS

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Introduction.

- Qualified retirement plans serve **two major functions** — they provide **employee benefits** and they act as **tax shelters**.

- 
- Retirement Plan Assets at 12/31/2016.

IRAs:	\$ 7.9 Trillion
Defined Contribution Plans:	\$ 7.0 Trillion
Defined Benefit (Private Sector):	\$ 2.9 Trillion
Defined Benefit (Gov't):	\$ 5.5 Trillion
Annuities:	\$ <u>2.0 Trillion</u>
Total:	\$ 25.3 Trillion

Retirement plan assets account for 36% of all U.S. household assets. In 1974, retirement plan assets accounted for 12% of U.S. household assets (Investment Company Institute, March, 2013).



RETIREMENT

- Importance of Employer Sponsored Plans.
 - 10% of individuals eligible to contribute to an IRA contribute to an IRA.
 - 70% of individuals eligible to contribute to a 401(k) plan contribute to a 401(k) plan.
 - 90% of individuals in a 401(k) Automatic Contribution Arrangement (ACA) contribute to a 401(k) plan.

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RETIREMENT

Tax advantages of qualified plans:

1. Employer contributions are deductible in the year made. Contributions are deductible if made prior to the due date for the corporate tax return, including extensions. IRC §404(a).
2. Participants are taxed only when they receive payments from the trust. IRC §402(a).
3. The retirement trust is tax-exempt and the trust funds accumulate income tax free. IRC §501(a).
4. Income tax brackets are generally lower at the time benefits are received following the participant's retirement or death. Additionally, Social Security taxes are paid neither on employer contributions to tax-qualified retirement plans nor on distributions to participants from such plans.
5. Qualified plans provide a means of forced savings and protection of assets from creditors claims.

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Example:

<u>Compensation</u>		<u>Retirement Plan Contribution</u>
\$ 10,000		\$ 10,000
<u>- 4,000</u>	Taxes	<u>- 0</u>
\$ 6,000		\$ 10,000
<u>- 3,000</u>	Spend	<u>- 0</u>
\$ 3,000	Save	\$ 10,000
<u>x .1</u>	Invest	<u>x .1</u>
\$ 300		\$ 1,000
<u>- 60</u>	Taxes	<u>- 0</u>
\$ 240		\$ 1,000
<u>+ 3,000</u>		<u>+ 10,000</u>
\$ 3,240		\$ 11,000

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RETIREMENT PLAN DOLLAR AND PERCENTAGE LIMITS

	2016	2017	2018
Annual compensation for plan purposes (for plan years beginning in calendar year) 401(a)(17)	\$265,000	\$270,000	\$275,000
Defined benefit plan, basic limit (for limitation years ending in calendar year) 415(b)	\$210,000	\$215,000	\$220,000
Defined contribution plan, basic limit (for limitation years ending in calendar year) 415(c)	\$53,000	\$54,000	\$55,000
401(k) / 403(b) plan, elective deferrals (for taxable years beginning in calendar year) 402(g)	\$18,000	\$18,000	\$18,500
457 plan, elective deferrals (for taxable years beginning in calendar year)	\$18,000	\$18,000	\$18,500
401(k) / 403(b) / 457, catch-up deferrals (for taxable years beginning in calendar year) (Age 50+) 414(v)	\$6,000	\$6,000	\$6,000

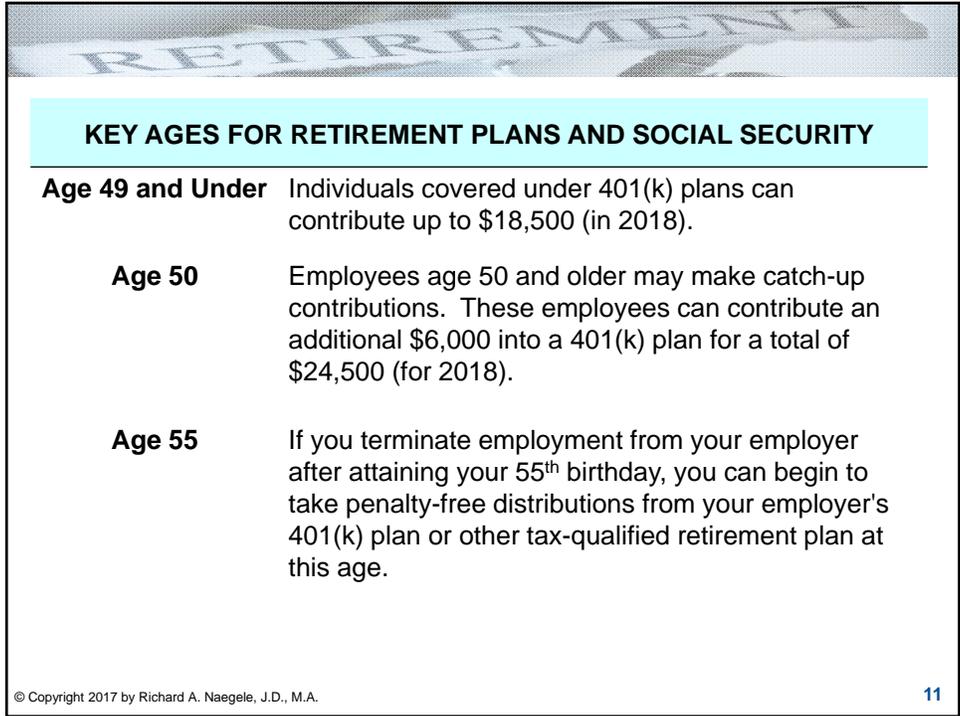
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RETIREMENT PLAN DOLLAR AND PERCENTAGE LIMITS (cont'd)			
	2016	2017	2018
SIMPLE plan, elective deferrals (for calendar years) 408(p)	\$12,500	\$12,500	\$12,500
SIMPLE plan, catch-up deferrals (for taxable years beginning in calendar year) (Age 50+) 408(p)	\$3,000	\$3,000	\$3,000
Defined contribution plan §415 percentage of compensation contribution limit 415(c)	100% of compensation	100% of compensation	100% of compensation
Profit sharing plan §404 percentage of compensation deduction limit	25% of compensation	25% of compensation	25% of compensation
Elective deferrals	Do not count against §404 deduction limits	Do not count against §404 deduction limits	Do not count against §404 deduction limits
SEP contribution / deduction limit 408(k)	25% of compensation	25% of compensation	25% of compensation

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RETIREMENT PLAN DOLLAR AND PERCENTAGE LIMITS (cont'd)			
	2016	2017	2018
IRA contribution limit 408(a)	\$5,500	\$5,500	\$5,500
IRA catch-up contribution (Age 50+)	\$1,000	\$1,000	\$1,000
Highly Compensated Employee 414(q)	\$120,000	\$120,000	\$120,000
Key Employee Officer 416(i)(1)(A)	\$170,000	\$170,000	\$175,000
SEP Coverage 408(p)	\$600	\$600	\$600
FICA Covered Compensation	\$118,500	\$127,200	\$128,700
PBGC Maximum Monthly Insured Benefit (Age 65)	\$5,011	\$5,369	\$5,420

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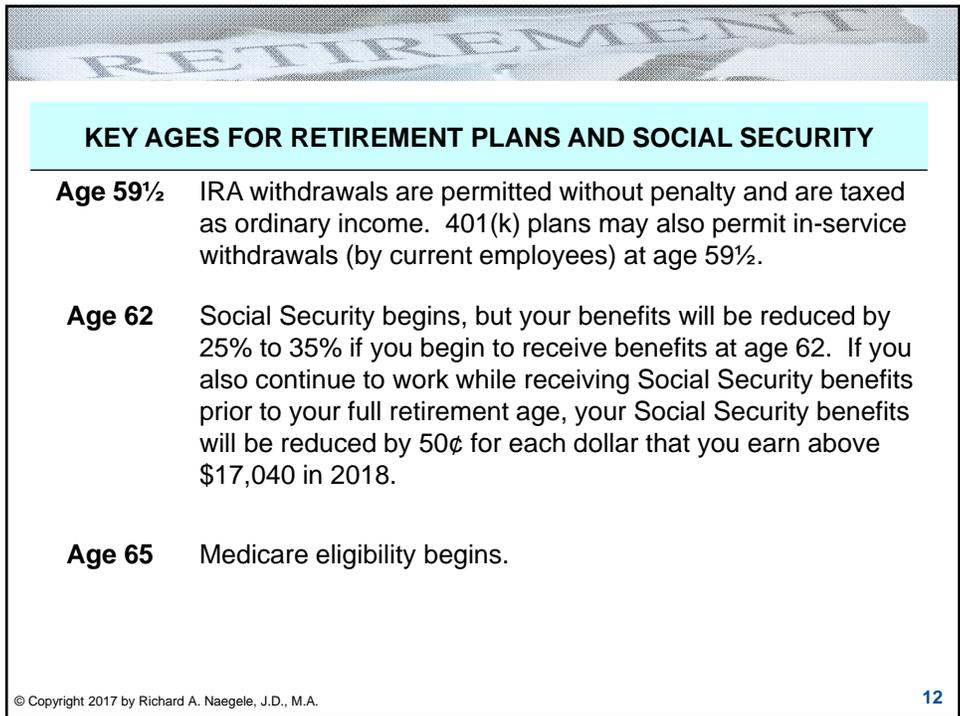
KEY AGES FOR RETIREMENT PLANS AND SOCIAL SECURITY

Age 49 and Under Individuals covered under 401(k) plans can contribute up to \$18,500 (in 2018).

Age 50 Employees age 50 and older may make catch-up contributions. These employees can contribute an additional \$6,000 into a 401(k) plan for a total of \$24,500 (for 2018).

Age 55 If you terminate employment from your employer after attaining your 55th birthday, you can begin to take penalty-free distributions from your employer's 401(k) plan or other tax-qualified retirement plan at this age.

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KEY AGES FOR RETIREMENT PLANS AND SOCIAL SECURITY

Age 59½ IRA withdrawals are permitted without penalty and are taxed as ordinary income. 401(k) plans may also permit in-service withdrawals (by current employees) at age 59½.

Age 62 Social Security begins, but your benefits will be reduced by 25% to 35% if you begin to receive benefits at age 62. If you also continue to work while receiving Social Security benefits prior to your full retirement age, your Social Security benefits will be reduced by 50¢ for each dollar that you earn above \$17,040 in 2018.

Age 65 Medicare eligibility begins.

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KEY AGES FOR RETIREMENT PLANS AND SOCIAL SECURITY

Age 66 This is the year that individuals born between 1943 and 1954 are eligible to receive full Social Security retirement benefits. For those born between 1955 and 1959, the full retirement age gradually increases from age 66 and 2 months to 66 and 10 months. The month that you reach your full retirement age, your Social Security benefits are no longer reduced if you continue to earn income from working. The maximum benefit at age 66 is \$2,788 per month for 2018.

Age 67 For those born in 1960 and later, the age at which you can receive full Social Security retirement benefits is age 67.

*Two-thirds of Social Security recipients commence benefits prior to full retirement age.

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KEY AGES FOR RETIREMENT PLANS AND SOCIAL SECURITY

Age 70 Your Social Security benefits will increase by 8% for each year that you delay receiving your benefits up until age 70. After age 70 there is no additional incentive to delay collecting your Social Security benefits.

Example:	<u>Age</u>	<u>Benefit %</u>	<u>Benefit</u>
	62	75%	\$1,500
	66	100%	\$2,000
	70	132%	\$2,640

*Benefit at age 70 is 176% of benefit at age 62.

Age 70½ At age 70½, individuals must begin to receive required minimum distributions from Individual Retirement Accounts and, in most cases, employer retirement plans.

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Comparison of Tax-Qualified Retirement Plan and Non-Qualified Deferred Compensation Plan (NQDC).

➤ Qualified Plan – 401(k) Plan

- Assets contributed to a separate trust.
 - ❖ Not an asset of the Employer.
 - ❖ Not attachable by creditors of Employer.
 - ❖ Not attachable by creditors of Participant.
 - ❖ Exceptions to protection from creditors of Participant.
 - QDRO: retirement benefits are a marital asset subject to division in divorce or attachment for child support.
 - Retirement plan assets may be subject to federal tax liens.
 - Certain federal criminal fines and penalties.
 - ❖ Tax-Exempt Trust.

- 
- Benefits may be rolled over to an IRA upon distribution from the qualified plan.
 - ❖ This provides further protection from creditors and further tax-deferred growth.
 - Employer receives current deduction for year of contributions.
 - Employee receives income only upon distribution of benefits from Plan but can roll over to IRA to further defer receipt of income.



- Employer contributions are not subject to Social Security or Medicare at time of contribution or at time of distribution.
 - ❖ Employee elective deferrals are subject to Social Security (6.2%) up to the taxable wage base \$118,500 (for 2016) and Medicare (1.45%) with no compensation limit.
- Qualified Plans must comply with strict coverage and nondiscrimination requirements.

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- **Non-Qualified Deferred Compensation Plan (NQDC).**
 - Employer receives deduction in same year that amounts are included in income of Employee.
 - There is no tax-exempt trust for retirement plan assets. If funded, plan assets are a general asset of the Employer and investment income is taxable to Employer.
 - Plan Assets (if informally funded) are assets of Employer and subject to attachment by creditors of Employer.

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- Rabbi Trust
 - ❖ Assets for NQDC are irrevocably segregated by the Employer into a separate trust. The trust assets are not available to the Employer for its general use.
 - ❖ Employee is an unsecured general creditor with respect to NQDC benefits even if such benefits are in a Rabbi Trust.
- Vested benefits are included in income for Social Security and Medicare purposes when earned.
- Very loose coverage rules. However, IRC §409A applies.
- NQDC is an unfunded, unsecured promise to pay benefits at a future date.

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CHANGES TO IRS EMPLOYEE PLANS DETERMINATION LETTER PROGRAM

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Rev. Proc. 2017-41 makes significant changes to IRS "Pre-Approved" Plans Program.



Rev. Proc. 2017-41 eliminates the distinction between master and prototype plans and volume submitter plans.



The IRS Opinion Letter Program will pre-approve the tax-qualified status of two types of plans:

- Standardized Plans
- Non-Standardized Plans



➤ **Standardized Plan:**

- The employer must adopt plan on a word-for-word basis.
- Employer can only select from pre-approved options for plan terms and provisions.



➤ **Non-Standardized Plan:**

- Adopting employer may make minor changes to the plan's pre-approved language.
- A non-standardized plan with minor modifications may be filed with the IRS on a Form 5307 to request an individual determination letter.

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Rev. Proc. 2016-37.

➤ Effective January 1, 2017:

- Sponsors of individually designed plans are only permitted to submit determination letter applications for:
 - ❖ Initial Plan Qualifications (a plan for which a determination letter has not previously been issued); or
 - ❖ Qualification Upon Plan Termination (plans terminating through the distribution of all plan assets or the transfer of plan assets and liabilities to PBGC); or
 - ❖ "Other Circumstances".

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"Other Circumstances". Rev. Proc. 2016-37.

The IRS may consider providing determination letters for individually designed plans in the event of:

- Significant changes in law
- New approaches in plan design; and
- The inability of certain types of plans to convert to pre-approved plans.

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Operational Compliance List. Rev. Proc. 2016-37.

The IRS will publish an Operational Compliance List each year.

The list will contain qualification requirement changes effective during a calendar year.

To remain compliant, a plan must comply with the items on the Operational Compliance List and each relevant qualification requirement.

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Required Amendments List (RAL). Rev. Proc. 2016-37.

The IRS will annually publish a Required Amendments List (RAL).

The RAL will establish the date that the remedial amendment period (RAP) expires for changes contained on that list.

Interim Amendments will still apply to pre-approved plans.

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The Remedial Amendment Period (RAP) will be based on the RAL.

The RAP for a change on the RAL will generally be the end of the second calendar year following the year in which the RAL is issued.

A change will not appear on the RAL until the IRS has issued guidance including possible model amendments.

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Rev. Proc. 2016-37.

- Effective January 1, 2017:
 - Staggered 5-year determination letter remedial amendment cycles for individually designed plans are eliminated.
 - Expiration dates on determination letters no longer apply. Determination letter is still valid after expiration date.



Rev. Proc. 2015-36.

- IRS Pre-Approved Plan Programs expanded to include:
 - Employee Stock Ownership Plans (ESOPs)
 - Cash Balance Pension Plans

RETIREMENT

QUALIFIED PLAN DOCUMENT UPDATES/REMEDIAL AMENDMENT CYCLE. REV. PROC. 2007-44; REV. PROC. 2015-36; REV. PROC. 2016-37; REV. PROC. 2017-41

RETIREMENT

Six-Year Cycle for Pre-Approved Plans.

- Six-Year Cycle for Pre-Approved Defined Contribution (DC) Plans.

Year	Step
5/1/2014-4/30/2016	Employers restate DC plans by adopting pre-approved plans. (PPA)
5/1/2008-4/30/2010	Employers restate DC plans by adopting pre-approved plans. (EGTRRA)

- The last day of the EGTRRA Remedial Amendment Cycle (RAC) for employers to adopt pre-approved defined contribution plans was April 30, 2010.
- The PPA RAC began 5/1/2014 and **ended 4/30/2016**.
- The next RAC for Defined Contribution Plans should begin in 2020 and end in 2022.

Six-year cycle for Pre-Approved Defined Benefit (DB) Plans.

- The two year remedial amendment cycle for employers to restate DB Plans by adopting pre-approved DB Plans commenced May 1, 2010 and ended on April 30, 2012.
- The next two year RAC for employers to restate DB Plans by adopting pre-approved DB Plans should begin in 2017 or 2018 and end in 2019 or 2020.

Interim Amendments.

- Summary of Interim Amendments and due dates.

Amendment	Due Date
EGTRRA Good Faith	End of 1st plan year beginning on or after January 1, 2003.
Required Minimum Distributions. IRC §401(a)(9)	End of 1st plan year beginning on or after January 1, 2003.
Mandatory Rollover/Involuntary Cash-Out	End of the Plan year that contains March 28, 2005.
IRC §401(k) final regulations	Last day of the 1st plan year beginning on or after January 1, 2006.
IRC §415 final regulations	Last day of the limitation year beginning on or after July 1, 2007.
Pension Protection Act (PPA) of 2006	Last day of the plan year beginning on or after January 1, 2009.
HEART Act IRC §§401(a)(37); 414(u)(9)	Last day of the first plan year beginning on or after January 1, 2010.
WRERA Waiver of 2009 RMDs	Last day of the first plan beginning on or after January 1, 2011.
IRC §436 Defined Benefit Plans	Last day of the first plan year beginning on or after January 1, 2013.



- Plan Sponsor/Employer should have copies of executed Adoption Agreement/Plan Documents and all Interim Amendments.
- Pre-Approved Plan Interim Amendments may be adopted by the entity sponsoring the Plan (e.g., Insurance Company, Brokerage Firm, Bank, Law-Firm).

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Non-Timely Amenders.

Tax-qualified retirement plans that missed the deadline to be amended and restated will need to be updated and filed with the IRS under the Voluntary Correction Program (VCP). VCP is part of the IRS Employee Plans Compliance Resolution System (EPCRS). The EPCRS is currently found in Rev. Proc. 2013-12.

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FEE DISCLOSURE AND PARTICIPANT REPORTING REQUIREMENTS

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Service Provider Fee Disclosure.

- **ERISA §408(b)(2).**
- 29 CFR §2550.408b 2; DOL FAB 2012-02 (effective July 1, 2012).

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➤ Overview.

- Persons providing services to an ERISA-covered plan are "parties in interest" of the plan, and ERISA section 406(a) prohibits parties in interest from providing services to a plan. ERISA section 408(b)(2) provides an exemption for "reasonable arrangements" under which parties in interest may provide services to a plan. The prior regulations under section 408(b)(2) required: (i) the services must be appropriate and helpful to the plan, (ii) the arrangement must be terminable by the plan without penalty on reasonably short notice, and (iii) the compensation received by the service providers must be reasonable.

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- **Covered Plans.** The final regulations define a covered plan as an employee pension plan. **Excluded** from the definitions are:
 - ❖ Welfare plans;
 - ❖ IRAs;
 - ❖ SEP-IRAs; and
 - ❖ SIMPLE-IRAs.

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➤ **The Regulations Apply to "Covered Service Providers" (CSP).**

- These new regulations only apply to covered service providers. Covered service providers are service providers (a) that enter into a contract or arrangement with a plan and reasonably expect to receive \$1,000 or more in compensation, direct or indirect, in connection with their services and (b) that provide the following services:
 - ❖ Fiduciary services or services provided to the plan as a registered investment advisor;
 - ❖ Recordkeeping or brokerage services to a participant-directed individual account plan where the investments options are made available under the arrangement furnished by the record keeper or broker; or
 - ❖ Accounting, appraisal, banking, consulting, custodial, insurance, investment advisory (for participants), legal, recordkeeping, securities or other investment brokerage, third party administration, or valuation services for which indirect compensation is received.

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NOT CSP if:

- ❖ Paid by Employer (not by Plan); or
- ❖ Paid directly (not indirectly) by Plan and have no connection with Plan investments.

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➤ **Disclosure Requirements.**

Covered service providers must disclose the following information in writing:

- **Services:** Description of the services to be provided to the plan.
- **Status:** Fiduciary to the plan or as a registered investment advisor.
- **Compensation:** All direct and indirect compensation to be received by the covered service provider, its affiliates or subcontractors.
- **Recordkeeping Services:** Information concerning those services and costs must be disclosed without regard to whether the services are furnished as part of a bundle or package.
- **Manner of Receipt:** Describe the manner in which compensation (including compensation for recordkeeping services) will be received, such as whether the plan will be billed or the compensation will be deducted directly from the plan's investments.
- **Investment Disclosure — Recordkeeping and Brokerage Services:** Information also must be disclosed about plan investments and investment options.

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Participant Disclosure Requirements for Participant-Directed Individual Account Plans.

➤ **ERISA §404a-5 Notice.**

➤ 29 CFR §2550.404a-5; DOL FAB 2012-02 (effective **August 30, 2012**).

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- Plans **not** subject to the participant disclosure requirements.
 - IRAs;
 - SEP-IRAs;
 - SIMPLE-IRAs;
 - Plans not subject to ERISA:
 - ❖ Owner-only plans;
 - ❖ Governmental plans;
 - ❖ Church plans.

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- **Plan Related Information — Annual Statement.**
 - General Plan Information.
 - ❖ A current list of the designated investment options under the plan.
 - ❖ The identity of any designated investment managers.
 - ❖ A description of any brokerage window.

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- **Administrative Expense Information — Annual Statement.**
 - ❖ An explanation of any fees that **may be charged** to the plan for general administrative services such as:
 - Recordkeeping;
 - Accounting;
 - Asset Management Charges.
 - ❖ A description of how the fees are allocated.
 - Pro rata.
 - Per Capita.

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- **Individual Expense Information — Annual Statement.**
 - ❖ An explanation of any fees and expenses that may be charged to or deducted from the individual account of a specific participant or beneficiary based on the actions taken by that person. Examples include fees for:
 - Plan loans;
 - Distributions;
 - Qualified Domestic Relations Order (QDRO) processing.

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- **Frequency of Disclosure of Information.**
 - ❖ On or before the date on which a participant or beneficiary can first direct his investments and at least annually thereafter.
 - ❖ Change in information: must notify participant or beneficiary 30 to 90 days in advance of such change.

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- **Plan Related Information: Quarterly Statements.**
 - In addition to the plan-related information that must be furnished up front and annually, participants and beneficiaries must receive statements, at least quarterly, showing the dollar amount of the plan-related fees and expenses (whether "administrative" or "individual") **actually charged** or deducted from their individual accounts during the preceding quarter along with a description of the services for which the charge or deduction was made.
 - If applicable, an explanation should be provided that some administrative expenses were paid from operating expenses such as revenue sharing, 12b 1 or sub TA fees.
 - The quarterly statement should also include specific investment related expense charges such as front or back-end loads or redemption fees.
 - The quarterly disclosures may be included in the quarterly benefit statements required under ERISA §105.

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- Annual Statement: **Fees** that **may be charged**.
- Quarterly Statement: **Fees** that **were charged**.

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➤ **Investment Related Information — Annual Statement.**

- Must be provided before the date on which the participant can make the investment and at least annually thereafter with respect to each designated investment alternative offered under the plan.
- Identifying Information.
 - ❖ Name of each designated investment alternative.
 - ❖ The type or category of the investment (*e.g.*, money market fund, balanced fund, large cap fund).
- Performance Data.
 - ❖ Non-fixed return investment: average return for 1, 5 and 10 year period.
 - ❖ Fixed return investment: fixed or stated rate of return and term of investment.
 - ❖ Benchmarks: 1, 5 and 10 year periods.

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- Fee and expense information (non-fixed return investment).
- Fee and expense information (fixed income investments).
- Internet Web Site address containing significant information with respect to each designated investment alternative.
- Tables and charts similar to those included in appendix to the regulations.

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- A "designated investment alternative" means any investment alternative designated by the plan into which participants and beneficiaries may direct the investment assets held in, or contributed to, their individual accounts.
 - ❖ This term, does not include a brokerage window or self directed brokerage account.
 - ❖ The plan administrator is not required to provide the investment-related information for trustee-directed investments.

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Other Annual Notices.

- Safe Harbor 401(k) Plan Notice.
- QDIA (Qualified Default Investment Alternative) Notice
- EACA (Eligible Automatic Contribution Arrangement) Notice
- SAR (Summary Annual Report)

Safe Harbor 401(k), QDIA, and EACA are all due 30-90 days prior to the 1st day of the Plan Year and may be prepared as a single Notice.



Benefit Statement Requirements for Non-Participant-Directed Plans.



- **DC Plans without participant direction of investments.**
 - Statements must be provided at least once each calendar year and to any participant or beneficiary upon request.
 - The benefit statement must contain the following information:
 - ❖ The participant's total accrued benefit and vested percentage.
 - ❖ A description (where applicable) of any Social Security integration or floor-offset provision.
 - ❖ The value of each investment.

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- **Defined Benefit Plans.**
 - Statement must be provided at least once each three years and to any participant or beneficiary upon request.
 - The DB benefit statement must contain the following information:
 - ❖ The participant's total accrued benefit and vested percentage.
 - ❖ A description (where applicable) of any Social Security integration or floor-offset provision.

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Defined Benefit Plan Funding Notice and Annual Reporting Requirements.

- Effective in 2008, a DB plan insured by the PBGC must provide a DB funding notice to each plan participant and beneficiary, each labor organization representing participants and beneficiaries, and to the PBGC. The notice must be provided within 120 days after the close of each plan year.
- The DB funding notice must contain the following information:
 - A statement as to whether the plan's adjusted funding target attainment percentage ("**AFTAP**") for the current and two preceding years is at least 100%.



RECENT DEVELOPMENTS



I. Rev. Proc. 2016-47 waiver of 60 day rollover requirement in certain situations.

- IRC §§402(c)(3) and 408(d)(3) require that eligible rollover distributions from IRAs and tax-qualified retirement plans be rolled over into the same or another IRA or qualified plan within 60 days after the date of the distribution.



Rev. Proc. 2016-47 provides for a "self-certification" procedure for waiver of the 60 day period in 11 specific situations.

- 1) An error was committed by the financial institution receiving the contribution or making the distribution.
- 2) The distribution was in the form of a check and the check was misplaced and never cashed.



3) The distribution was deposited into and remained in an account that the taxpayer mistakenly thought was an IRA or a retirement plan.

4) The taxpayer's principal residence was severely damaged.

5) A member of the taxpayer's family died.

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6) The taxpayer or a member of the taxpayer's family was seriously ill.

7) The taxpayer was incarcerated.

8) Restrictions were imposed by a foreign country.

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9) A postal error occurred.

10) The distribution was made on account of an IRS levy and the proceeds of the levy were returned to the taxpayer.

11) The party making the distribution delayed providing information that the receiving plan or IRA required to complete the rollover despite reasonable efforts by the taxpayer to obtain the information.

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Rev. Proc. 2016-47 contains a "Certification for Late Rollover Contribution" that the taxpayer must complete and provide to the IRA custodian or plan administrator.

The IRA custodian or the plan administrator may rely on a taxpayer's self-certification unless the IRA custodian or plan administrator has actual knowledge that is contrary to the self-certification.

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Rollover Contribution must be completed as soon as practicable after the reason listed no longer prevents the taxpayer from making the contribution. Thirty days is deemed to be a safe harbor for this requirement.

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If a taxpayer fails to complete a rollover within 60 days for a reason other than the 11 listed in Rev. Proc. 2016-47, the taxpayer may file a private letter ruling request with the IRS to request a waiver.

Rev. Proc. 2003-16.

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II. Department of Labor (DOL) Final Fiduciary Rule.

- Fiduciary:
 - ERISA §404(a)(1)
 - ERISA §3(21)(A)
 - ERISA §3(38)
- Effective Date: June 9, 2017.

- 
- Final Rule: Fiduciary Providing Investment Advice: One of Three Things:
 - Represent or acknowledge that such person is acting as a fiduciary within the meaning of ERISA or the Internal Revenue Code (IRC) with respect to rendering investment advice;
 - Render investment advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient; or
 - Direct investment advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the Retirement Plan or IRA.



➤ Definition of Investment Advice — Three Steps:

- Determine whether the communication is in a category that would constitute "investment advice";
- Determine whether the communication is a "recommendation"; and
- Determine whether the recommendation falls under a safe harbor "exception" to being considered investment advice.

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➤ Non-Recommendation — Types of Communications that do NOT rise to the level of being a "recommendation" and, therefore, do not constitute investment advice:

- Marketing or making available a platform of investment alternatives;
- Selection and monitoring assistance for Plan Fiduciaries;
- General communications to the public;
- Investment Education.

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- Safe Harbor Exceptions:
 - "Sellers" exception — advice provided to banks, insurance carriers, Registered Investment Advisors (RIAs), federal registered broker-dealers, or plan fiduciaries independent of the seller with at least \$50 million under management ("sophisticated investor" / plan fiduciaries with financial expertise).
 - SWAP and security-based transactions. If the plan is represented by an independent fiduciary;
 - Certain activities by employees of the Plan sponsor provided that:
 - ❖ The employee does not receive a fee for such advice; and
 - ❖ The advice is given to a fellow employee as a plan participant or beneficiary.

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- The Best Interest Contract (BIC) Exemption.
- Transition Period Extended Until: July 1, 2019.

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During BIC Exemption Transition Period, Fiduciaries Must Comply With the Impartial Conduct Standards.

1. Give prudent advice that is in retirement investor's best interests.
2. Charge no more than reasonable compensation.
3. Avoid making misleading statements.



DOL Field Advice Bulletin (FAB) 2017-03 (August 30, 2017).

- DOL will **not enforce** the limitation on arbitration provisions in the BIC Exemption.



➤ The Best Interest Contract (BIC) Exemption:

- Allows receipt by fiduciaries of common forms of variable rate compensation including commissions, sales loads, 12b 1 fees, revenue sharing and payments from third parties that provide investment products.
- BIC exemption only applies to "financial institutions".
 - ❖ RIAs, banks, insurance companies, broker-dealers.

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• Available with respect to "retirement investors":

- ❖ Plan participants, IRA owners, Plan or IRA fiduciaries who are not eligible for the sophisticated "counterparty" exceptions described by the Regulations.
- Advice to IRAs and non-ERISA plans require a written contract.
- For ERISA plans, no contract is required for recommendations to retirement investors.

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- Where a BIC is required, the financial institution must:
 - ❖ Acknowledge its fiduciary status in writing;
 - ❖ Commit to adhere to the "impartial conduct standards";
 - ❖ Give certain warranties regarding conflicts of interest.

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- BIC Exception: Three levels of disclosure:
 - ❖ Pre-transaction disclosures — relating to standard of care and any conflicts of interest;
 - ❖ Transaction disclosures including fees and costs;
 - ❖ More extensive web-based disclosures.

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- Level to Level Transactions:
 - ❖ Applies if the only fee received is a pre-disclosed level fee such as a fixed percentage of assets or a fixed dollar amount that does not vary based on the investments made;
 - ❖ The DOL prefers these fee arrangements.

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- Financial Institutions must notify the DOL of their intention to use the BIC exception.

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III. ERISA Fiduciary Issues.

- ***Tibble v. Edison Int'l.***, 135 S.Ct. 1823 (2015).
 - Fiduciary duty to monitor retirement plan investments.
 - ❖ Prudent at selection of investment
 - ❖ Investments regularly reviewed.
 - ERISA 6 year Statute of Limitations(SOL) is ongoing for investment options.
 - ❖ SOL is not limited to initial selection of investment.

Fiduciary Investment Lessons from ***Tibble v. Edison Int'l.***

- Trustees and investment fiduciaries must actively, periodically, and systematically review a plan's investments to ensure that they are prudent and meet ERISA's fiduciary requirements.
- Trustees should reconsider whether retail-class shares, rather than institutional-class shares, are prudent or proper investment options for a plan.
- Fiduciaries should strongly consider the engagement of a professional investment advisor to assist and monitor investment decisions.
- Trustees and advisors should develop, implement, and document an investment process and investment decisions.



RETIREMENT

➤ **401(k) Fee Litigation Cases.**

Suits alleging excess fees and/or poor fund selection have been filed against many investment providers including Fidelity, Edward Jones, Morgan Stanley, Franklin Templeton, and Allianz.

The suits are filed on behalf of employees of these companies regarding 401(k) plans covering such employees.

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RETIREMENT

➤ **Colleges and Universities Sued Over Retirement Plans.**

Colleges and universities have been sued over excessive fees and excessive numbers of investment options. In some cases plans provide hundreds of investment options.

Suits have been filed against MIT, Yale, Duke, NYU, Emory, and several other institutions.

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IV. PBGC Expansion of Missing Participant Program.

PBGC has proposed expanding its missing participant program to include retirement plans not currently covered by the PBGC.

Effective Date: January 1, 2018



The expanded program will include the following types of **terminating plans**:

- Most Defined Contribution Plans (e.g., 401(k) plans).
- Multiemployer Defined Benefit Plans covered by PBGC's Insurance Program.
- Small Professional Service Defined Benefit Plans (< 25 participants) not covered by the PBGC's insurance program.



- The program will be voluntary for defined contribution plans and defined benefit plans **not** covered by the PBGC.
- Note: Applies to **TERMINATING PLANS** only.

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- The program remains mandatory for PBGC-insured single employer plans and will be mandatory for PBGC-insured multiemployer plans. Upon termination, these plans must:
 - ❖ Transfer the benefits of missing participants to the PBGC, or
 - ❖ Purchase annuities and provide the PBGC information about the annuity provider.

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Starting in **2018**, a **terminated defined contribution plan** can:

- Transfer the accounts of missing participants to the PBGC, or
- Send PBGC information about where the accounts of missing participants were established (IRA or Annuity Provider).

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