2021 Employee Benefit Plan Updates

WEALTH ADVISORY | OUTSOURCING | AUDIT, TAX, AND CONSULTING

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Top Three Hot Topics in 2021

1. SAS No. 136

In July 2019, the AICPA issued Statement on Auditing Standards No. 136, *Forming an Opinion and Reporting on Financial Statements of Employee Benefit Plans Subject to ERISA* (SAS 136). The standard was originally set to become effective for periods ending on or after December 15, 2020. However, in May 2020 the AICPA Auditing Standards Board voted to delay implementation to plan periods ending on or after December 15, 2021, due to the ongoing coronavirus pandemic.

SAS 136 is meant to clarify current reporting requirements and to increase the transparency of the auditor's report as it relates to employee benefit plan audits under ERISA. The impact of the changes set forth by the new standard will be significant to the form and content of the auditor's report. Most notably will be the elimination of what is currently known as a "DOL limited scope" audit, resulting in a disclaimer of opinion due to the certified investment information not being audited. Under the new standard, these will now be referred to as "ERISA section 103(a)(3)(C)" audits, as they will no longer be considered to have a scope limitation but rather permit the auditor to issue an unmodified opinion. The disclaimer of opinion will be removed from the auditor's report, which will instead include a new, two-pronged opinion distinct to ERISA employee benefit plan audits. This opinion will state whether the information not covered by the certification is presented fairly and whether the certified investment information in the financial statements agrees to or is derived from the certified investments statements.

SAS 136 also addresses both the auditor's and management's responsibility. The standard includes new requirements for auditors as it relates to engagement acceptance, risk assessment, review of Form 5500, obtaining representations from management, and communication of reportable findings with those charged with governance. Management's responsibilities to maintain a current plan instrument, administer the plan in conformity with plan provisions, maintain sufficient records on each participant, and provide a substantially completed draft Form 5500 will be included in both the engagement letter and management representation letter for the audit.

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2. Form 5500 changes

To conform to the new SAS 136, the instructions for questions on the Form 5500, Schedule H, Part III, regarding the accountant's opinion have been revised. The instructions for Line 3a have been updated to note that SAS 136 permits the issuance of an unmodified opinion under an ERISA section 103(a)(3)(C) audit that had no modifications. The instructions for Line 3b have also been updated to replace a yes/no question with appropriate options to permit filers to indicate more accurately whether there have been any permissible limitations on the scope of the audit pursuant to the DOL's regulations. These changes have been already reflected on the 2020 Form 5500 due to the fact that it was updated for SAS 136 prior to the delay of the effective date.

3. Cybersecurity

This year the U.S. Department of Labor announced guidance for plan sponsors, record keepers, plan fiduciaries, and plan participants on the best practices for maintaining cybersecurity. Out of the thousands of retirement plans, it is estimated there is in excess of $9.3 trillion in U.S. retirement plan assets. Retirement plans often hold millions of dollars or more in assets and maintain personal data on participants, which can make them attractive targets for cybercriminals. Plan governance/fiduciaries have the responsibility to maintain proper controls and practices to keep these assets safe.

The following listing of best practices was prepared and issued by the Employee Benefits Security Administration United States Department of Labor (source: Cybersecurity Program Best Practices):

- Have a formal, well documented cybersecurity program.
- Conduct prudent annual risk assessments.
- Have a reliable annual third-party audit of security controls.
- Clearly define and assign information security roles and responsibilities.
- Have strong access control procedures.
- Ensure that any assets or data stored in a cloud or managed by a third-party service provider are subject to appropriate security reviews and independent security assessments.
- Conduct periodic cybersecurity awareness training.
- Implement and manage a secure system development life cycle (SDLC) program.
- Have an effective business resiliency program addressing business continuity, disaster recovery, and incident response.
- Encrypt sensitive data, stored and in transit.
- Implement strong technical controls in accordance with best security practices.
- Appropriately respond to any past cybersecurity incidents.

CLA provided a webinar on this topic in October 2021 (see an archived copy) and issued a recent white paper outlining four basic steps that can help you prevent data breaches, cyber assaults, and ransomware attacks.

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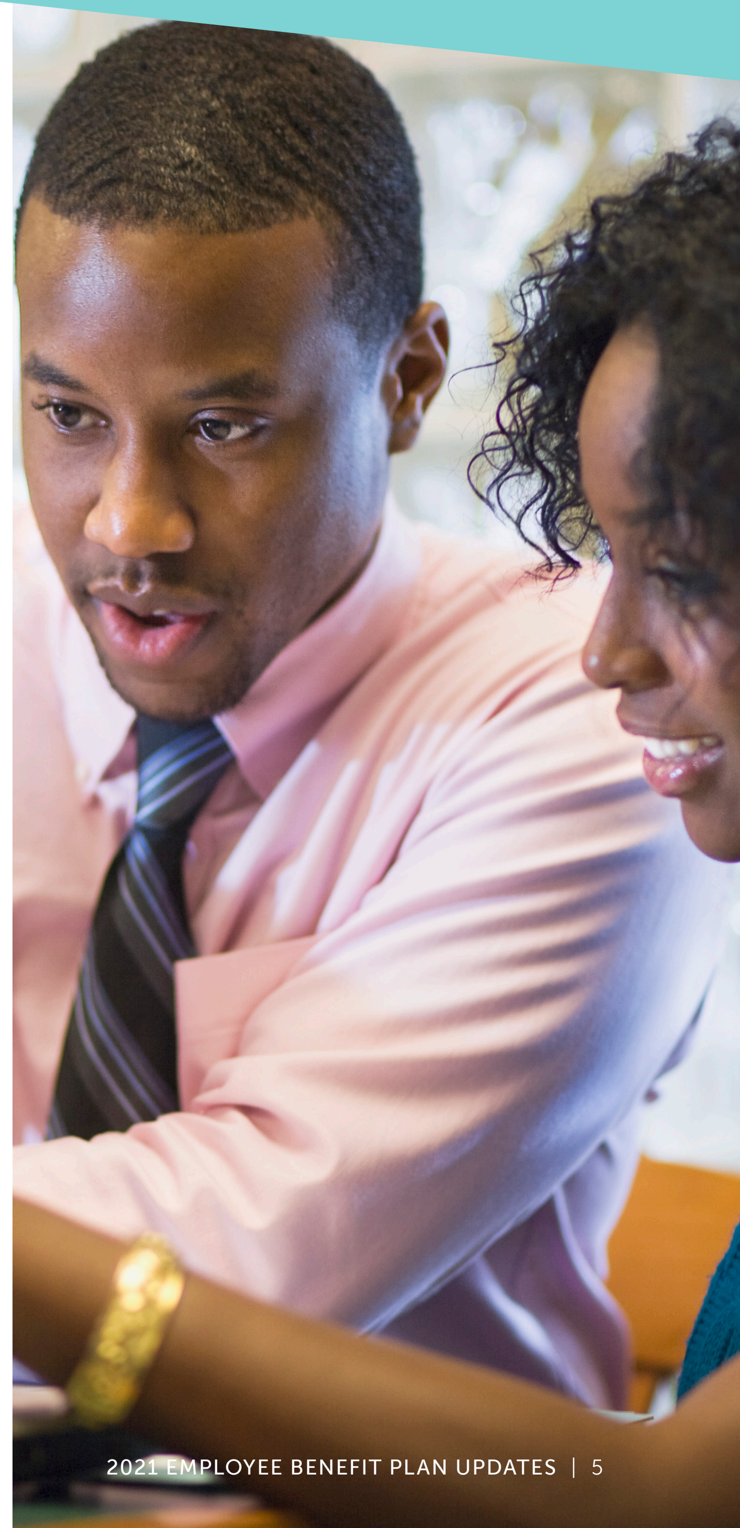
Other Accounting and Auditing Matters

ASU 2018-13

The Financial Accounting Standards Board (FASB) issued ASU 2018-13, *Fair Value Measurement (Topic 820) Disclosure Framework-Changes to the Disclosure Requirements for Fair Value Measurement*, in August 2018, which amended certain fair value disclosures. The amendments remove certain requirements related to the transfer between Level 1 and Level 2 investments as well as modify certain disclosures currently required for Level 3 investments. The ASU is effective for fiscal years beginning after December 15, 2019.

ASU 2018-14

The FASB issued ASU 2018-14, *Compensation-Retirement Benefits-Defined Benefit Plans-General (Subtopic 715-20): Disclosure Framework-Changes to the Disclosure Requirements for Defined Benefit Plans*, in August 2018, which amends ASC 715 to modify and clarify disclosure requirements related to defined benefit and other postretirement plans. While the majority of the changes will likely only have an impact on corporate financial statement disclosures, the amendment does remove the current requirement that nonpublic entities, including employee benefit plan financial statements, with Level 3 plan assets in the fair value hierarchy provide a reconciliation of the opening balances to the closing balances. However, these entities would still be required to disclose transfers of plan assets into and out of Level 3 investments and any purchases of Level 3 assets by the plan. For public entities, the amendments are effective for fiscal years ending after December 15, 2020. For all other entities, the ASU is effective for fiscal years ending after December 15, 2021. Early adoption is permitted.



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CARES Act

In March 2020, the *Coronavirus Aid, Relief, and Economic Security Act* (CARES Act) was signed into law. Certain provisions of the CARES Act included retirement plan implications for both defined contribution and defined benefit plans.

Certain provisions of the CARES Act included retirement plan implications.

Coronavirus-related distributions
Individuals impacted by the virus could withdraw up to $100,000 from their accounts with no 10% penalty. These participants have the option to recontribute the funds within three years without impacting IRS contribution limits or have the option to pay applicable taxes on the distribution ratably over a three-year period.

Enhanced plan loan provisions
The relief bill increased plan loan limits from $50,000 to $100,000 and increased the eligible amount borrowed from 50% to 100% of the qualified individual's vested account balance. Additionally, if outstanding loans were due by the end of the 2020, the CARES Act permitted a one-year extension with re-amortization of the payments.

Required minimum distribution (RMD) delays
RMDs for defined contribution plans, IRAs, and 457 plans were delayed for one year under the CARES Act. The delay applies to both 2019 RMDs that were previously required to be taken by April 1, 2020 as well as 2020 RMDs. IRS Notice 2020-51 was subsequently issued to extend the 60-day rollover period for any RMDs previously taken in 2020 to August 31, 2020, and also allow a taxpayer the opportunity to repay a 2020 RMD previously taken by August 31, 2020. The notice also clarified that this waiver does not apply to RMDs from defined benefit plans.

Relief for single-employer defined benefit plans
Under the CARES Act, organizations who sponsor single-employer defined benefit plans were given the option to delay any 2020 payments of minimum annual required contributions to January 1, 2021. The CARES Act also provided temporary relief for required benefit restrictions by allowing a plan to use its prior plan year adjusted funding target attainment percentage (AFTAP) to avoid triggering certain benefit restrictions in 2020.

The CARES Act provisions expired on December 30, 2020. As a reminder to plan sponsors that adopted these provisions, the plan amendments resulting from the CARES Act are required to be executed by the end of the plan year beginning January 1, 2022.

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Consolidated Appropriations Act, 2021

This bill extended certain provisions of the CARES Act and provided new relief for retirement plan participants and plan sponsors.

In December 2020, the *Consolidated Appropriations Act, 2021* was signed into law as part of the latest COVID-19 relief bill. This new bill extended certain provisions of the CARES Act as well as provided for new relief for retirement plan participants and plan sponsors.

New distribution provisions

While the bill did not extend the time available for participants to take a coronavirus-related distribution beyond 2020, it allowed for similar distributions from retirement plans for participants affected by disasters other than the COVID-19 pandemic. Similar to the CARES Act provisions, qualifying distributions are penalty free, income tax on these distributions may be spread over a three-year period, and participants may repay them within three years to avoid paying taxes. These provisions are available for a 180-day period after enactment of the bill.

Extension of CARES Act loan provisions

The enhanced loan provisions of the CARES Act were extended for an additional 180-day period after enactment of the bill for participants affected by disasters other than the COVID-19 pandemic.

Partial plan termination relief

In general, if 20% of a plan's participants are terminated, a partial plan termination is deemed to have occurred and the affected participants become immediately 100% vested in their employer account balances. This bill provides relief for plan sponsors in that a plan shall not be treated as having a partial plan termination if, as of March 31, 2021, the plan still covers at least 80% of the active participants as of March 13, 2020. This bill essentially allows plan sponsors until March 31, 2021 to rehire laid-off workers to avoid triggering a partial plan termination.

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SECURE Act of 2019

The SECURE Act was the first major change to retirement plan legislation since 2006.

In December 2019, the *Setting Every Community Up for Retirement Enhancement Act* (SECURE Act) was signed into law, enacting the first major change to retirement plan legislation since the *Pension Protection Act of 2006*. The main goal of the law was to incentivize employers to increase access to workplace plans in an effort to enhance retirement savings.

Potentially one of the most impactful changes is a provision that allows unrelated employers to establish a shared defined contribution plan, called a multiple-employer plan (MEP). While MEPs have been around for some time, under old legislation the participating employers were required to be related in some way. MEPs can be lucrative to small employers as it spreads plan expenses and administrative duties across all participating employers that would otherwise be the responsibility of each employer.

The SECURE Act also provides an exemption, under certain circumstances, to the application of the "unified plan rule" also referred to as the "one-bad-apple rule." This rule can lead to the disqualification of an entire MEP due to the mistake of one participating employer. The new law shields employers who join a MEP from liability for potential misconduct perpetrated by other employers who are in the same MEP.

Other notable changes as a result of the SECURE Act include, but are not limited to:

- Increasing the required minimum distribution (RMD) age for retirement accounts from age 70½ to age 72.
- Requiring employers who offer a defined contribution plan to provide dual eligibility for long-term, part-time employees, giving them the ability to participate in 401(k) plans if they worked more than 1,000 hours in one year,
  or 500 hours in each of three consecutive years. However, employers are not required to provide matching or nonelective contributions to the employees
  eligible under the latter rule.
- Repealing the maximum age for traditional IRA contributions as long as the taxpayer has earned income (previously this was age 70½).
- Increasing the automatic escalation safe harbor cap from 10% to 15%.
- Increasing the federal tax credit from $500 to up to $5,000 for new plan start-up costs.
- Providing a tax credit up to $500 per year for three years for small employers (fewer than 100 participants) who add an automatic enrollment provision to their plan.
- Providing fiduciary safe harbor to plan sponsors as an incentive to offer annuities as investment options in defined contribution plans.

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Strong Practices for Plan Management

New DOL guidance on missing participants

When plan participants move between places of employment, many leave their retirement accounts behind. This has resulted in a growing number of participants that cannot be located due to name and address changes or other factors, including missing or outdated beneficiary information. In recent years, the DOL has placed an emphasis on the importance for plan sponsors to locate missing participants.

In January 2021, the Employee Benefits Security Administration division of the DOL released three sets of new guidance to provide clarity for plan sponsors with respect to missing participants. The guidance that will be most applicable to all types of retirement plans is titled "*Missing Participants — Best Practices for Pension Plans*." Within the new guidance, the DOL lists a variety of steps and processes plan management can take to locate missing participants. Examples of these steps include, but are not limited to:

- Sending certified mail to last known addresses.
- Contacting designated beneficiaries or emergency contacts.
- Using online search engines and public record databases.
- Attempting contact via email, telephone, or social media.

While not all methods may be appropriate in all situations, the guidance provides some clarity as to the fiduciary responsibility of plan sponsors. Regardless of what methods are used, plan management should document their attempts to locate missing participants.

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Reasonableness of fees

Fee reasonableness continues to be one of the key issues in plan lawsuits and fees continue to be in the spotlight. Conduct benchmarking studies internally or through the use of an investment advisor. Fee disclosures from all covered service providers are required to be provided to plan participants on an annual basis. Plan fiduciaries should review these disclosures annually to determine the reasonableness of fees incurred by the plan. Document these discussions in committee meeting minutes.

Benchmarking investments

Investment advisors generally offer investment benchmarking as part of their services. Benchmarking enables plan fiduciaries to demonstrate they have fulfilled their fiduciary responsibility as it relates to oversight of the investment options offered within the plan. Various items are benchmarked, most notably investment performance and fees. These discussions with investment advisors should be documented in committee meeting minutes and should occur no less frequently than annually.

Plan sponsor fiduciary duties

Fiduciary responsibilities continue to be at the forefront of DOL hot topics. ERISA requires that fiduciaries manage the plan with only the interests of the participants and their beneficiaries in mind. This includes a variety of responsibilities, including the selection of service providers, due care related to investment offerings, education and access to resources for plan participants, choosing a "qualified auditor" to perform the audit of the benefit plan, and management of the plan operations.

Plan management should have policies and procedures in place to demonstrate appropriate fiduciary responsibility and enable proper control over the administration of the plan. It is important that the plan administrators, plan

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management, retirement/investment committees, and/or board of directors charged with oversight of the plan document establish or document in writing the following common practices and procedures:

- Annual governance meetings with proper documentation regarding the following (as applicable):
    - Any plan changes/amendments
    - Approved discretionary employer contributions
    - Investment performance and fee review
    - Service provider changes
    - Participant complaints
    - Contribution remittance policy
    - Annual trust/custodial report and participant statement review
    - Changes in plan management
    - Annual nondiscrimination testing review
    - Review/approval of the audited retirement plan financial statements
- Verify all plan documents, amendments, trust documents, policy statements, minutes, and correspondence with government agencies and attorneys are properly adhered to, securely stored, and readily available.
- Review procedures and investment policies. Additionally, if the plan does not currently engage an independent investment advisor, we recommend engaging one that can help verify the plan sponsor is fulfilling their fiduciary duties and help provide comprehensive employee education and communication.

Participant contribution remittances

The DOL continues to emphasize the importance of timely remittance of participant withholdings into the plan. While there is a safe harbor of seven business days for small plans (plans with under 100 participants), the guideline for large plans continues to be "as soon as administratively feasible." The DOL interpretation of this regulation is generally within one to three business days.

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DOL fiduciary rule for investment advice

In April 2016, the DOL issued the final fiduciary advice regulatory package, which revised the definition of a fiduciary. Under the proposed rule, a fiduciary was defined as a person who renders investment advice for a fee or other compensation (direct or indirect), which would have greatly expanded the number of advisors considered to be fiduciaries under ERISA. This rule had been pushed back several times and had been set to finally go into effect January 1, 2019. However, in March 2018, the Fifth Circuit Court of Appeals vacated the rule in a 2-1 decision stating that it constituted "unreasonableness" and the DOL's implementation of the rule was "an arbitrary and capricious exercise of administrative power." This decision was confirmed by the Fifth Circuit Court in June 2018.

In June 2020, the DOL announced a new less-restrictive fiduciary rule to replace the vacated 2016 rule. The new proposal, entitled *Improving Investment Advice for Workers and Retirees*, reinstates the "five-part test" for determining if a paid advisor is a fiduciary, which was part of the original ERISA guidance issued in 1975. Under the five-part test, an advisor is considered to be providing investment advice if these five criteria are met:

1. The advisor renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property
2. The advisor renders such advice on a regular basis
3. The advice is pursuant to a mutual agreement, arrangement, or understanding with the plan, plan fiduciary, or IRA owner
4. The advice will serve as a primary basis for investment decisions with respect to the plan or IRA assets
5. The advice will be individualized based on the particular needs of the plan or IRA

In addition to reinstating the five-part test, the DOL also proposed an exemption that allows investment advice fiduciaries to be paid for their services that would otherwise be deemed a conflict of interest. The exemption, PTE 2020-02, would be conditional on the advisor meeting impartial conduct standards, as defined by the DOL.

In December 2020, the DOL published the final version of the new fiduciary rule, which formally went into effect on February 16, 2021. However, at the time, the DOL indicated it would provide transitional relief through December 21, 2021 and would not enforce the new rule prior to that date. Most recently, in October 2021, the DOL announced that it is extending the grace period through January 2022 and won't enforce certain disclosure requirements pertaining to rollovers until June 2022.

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Focus on audit quality

The DOL continues its heightened focus on employee benefit plan audit quality, including the proposal of a six-point plan to improve audits. The six-point plan includes the areas of pre-licensure, standards and ethics, CPA learning and support, peer review, practice monitoring of the future, and enforcement. It is crucial to engage the services of a qualified employee benefit plan auditor to protect the fiduciaries of the plan. The focus on audit quality and transparency aligns with many of the provisions found in the new EBP SAS 136, as discussed earlier in the "Other accounting and auditing matters" section.

Service organization control reports

The AICPA and DOL have emphasized the importance of reviewing service organization control (SOC) reports as they relate to benefit plan administration. A SOC 1 report is a type of audit report specifically designed to evaluate the effectiveness of controls at a service organization, such as a plan custodian or recordkeeper. The information and controls found in the SOC 1 report are useful to plan sponsors and auditors in evaluating internal controls at the service organization.

A key part of SOC 1 reports relates to the complementary user entity controls. The service organization requires the plan sponsor to implement these controls to increase the reliability of the control objectives outlined in the report. Plan management should review the SOC 1 reports as they relate to their plans and put adequate controls in place at the user entity level.

Mergers and acquisitions

In our constantly evolving economy, there has been an increase in merger and acquisition activity over the past year. Many times, the benefit plan is the last item prioritized — and rushed decisions may cause challenges. Proper due diligence of the acquiring plans and evaluation of benefits is very important to employee retention as well as understanding the risk of acquiring plans. The acquiring entity should research if the plans have properly complied with all regulatory matters, including Form 5500 filings and audit requirements.

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Service provider changes

There are many reasons plan sponsors change retirement plan service providers — whether to find a cheaper or better offering or due to business-level changes (merger, acquisition, etc.). Although a good service provider will provide a transfer checklist and timeline and primarily process the necessary transfer procedures, the plan sponsor is ultimately responsible. The plan sponsor is accountable to make sure the transfer is handled properly, plan provisions are correctly reflected with the new service provider, and all participants are properly notified of the change.

The plan sponsor must also review and approve the following (as applicable):

- All plan asset transactions
- Participant data transfers
- Deferral and investment elections
- Participant communications regarding the blackout date/s and investment fund mapping
- New plan documents and service agreements

Prior to the termination of the current service provider, we recommend the plan sponsor verify their records are complete and include the items listed below. Once the service provider's contract has been formally terminated, the plan sponsor is required to maintain the following from inception of the plan:

- Plan document
- Summary plan description
- Adoption agreement (if applicable)
- Trustee agreement (if applicable)
- IRS opinion/determination letter
- ERISA bonding agreements
- Service provider agreements
- Annual participant statements
- Annual trust/custodial/investment statements
- Annual payroll and W2 statements
- Annual plan census files
- Participant eligibility files

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Plan Design Trends

Automatic enrollment and escalation

Many plan sponsors are using automatic enrollment to increase participation in their benefit plans. When automatic enrollment is put in place, a participant is automatically enrolled at a set percentage and must affirmatively opt out of participation in the plan. Many organizations who have successfully implemented auto-enrollment also offer annual automatic increases in deferral percentages, which further increases employee participation.

Participant education

Organizations are enhancing their employee education programs and including financial wellness in their overall employee wellness programs. Many investment advisors also offer one-on-one financial coaching for plan participants in order to help employees meet personal retirement and financial goals.

Increased automation

Many plan sponsors have shifted benefit plan enrollment online as more and more organizations move toward a paperless work environment. Third-party administrators and plan custodians offer many online tools on plan websites and through use of mobile apps. Given this increased automation in the employee benefit plan industry, it is important to educate employees on cybersecurity risks, as discussed earlier.

Contribution source options for participants

In addition to pre-tax contributions, participants may want the option of making Roth or after-tax contributions. If your plan already provides a Roth option, we recommend consulting with the plan's service provider to determine if there is an option to add in-plan conversions between pre-tax, Roth, and after-tax balances.

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We Can Help With What Matters Most

Employee benefit plan oversight can fall to a variety of individuals within an organization, from chief financial officers to human resource directors, and from board members to independent trustees. No matter your role, serving as a fiduciary is an important responsibility, and it is difficult to stay abreast of all regulatory requirements in operating the plan.

Our team's commitment to client service starts with making your audit go as smoothly as possible. After that, we provide additional value focused on helping you protect who matters most: your plan participants.

Contact Us

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