

Plan Sponsor Quarterly Update

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Welcome to Plan Sponsor Quarterly Update

As your Third-Party Administrator (TPA), we are privileged to have the opportunity to work with you as a valued plan sponsor client. As part of our commitment to delivering industry insights to assist you, we are delighted to introduce a new quarterly plan sponsor newsletter in 2022!

Each quarter, we will deliver three articles, written by Kelsey Mayo, Partner, Lead Employee Benefits Attorney, Poyner Spruill, to keep you informed of legislative changes in Washington D.C., as well as provide best practice insights on various topics relevant to the management of your plan. We'll also provide a quarterly "hot topic" article, that features a subject garnering attention in the plan sponsor community.

In this first quarterly issue (January 2022), Kelsey provides insights on the Build Back Better Act, that is making its way through the Senate, and outlines potential implications for you and your participants, should the Bill pass in its current form. In the best practice arena, Kelsey outlines the various tests in the upcoming testing season, and the steps plan sponsors can take now to begin coordinating getting census data ready on time. Finally, Kelsey provides a very important article on plan theft and outlines some of the best practice suggestions included in the Department of Labor's 12 prong-cybersecurity best practice summary (referenced here). We welcome you to our first quarterly issue and please feel free to reach out to us, if you wish to further discuss any or all of these topics. Best wishes to you and your teams for a happy, successful and safe new year!



What's New in Washington D.C.

Legislative Update by Kelsey Mayo, Partner, Poyner Spruill

Kelsey's practice is focused in the areas of Employee Benefits and Executive Compensation. She works with business owners and HR

executives to understand and manage employee benefits and executive compensation arrangements. She routinely represents clients before the Internal Revenue Service, Department of Labor, and Pension Benefit Guarantee Corporation and has extensive experience in virtually all aspects of employee benefit plans and executive compensation arrangements.

Talk of the Build Back Better Act has been ubiquitous lately. At the time of this writing in December of 2021, the bill has passed the House of Representatives and is slowly making its way through the Senate (and the news outlets). Though discussions have generally centered on the bill's proposed changes for healthcare and education, the Act also contains a number of retirement-related provisions.

A summary of these provisions from the bill's most recent iteration is included below. Though the bill will certainly change, these touchpoints provide a window into current thinking in Washington.

1. Limiting Roth Conversions. The Act would limit and even completely curb Roth conversions. All individuals would be prohibited from converting after-tax contributions to Roth, beginning in 2022. This means that the "Mega Roth" plan design structures and "Back Door Roth IRAs" would have to cease almost immediately if the Act is passed as currently drafted. In addition, certain high earners would be prohibited from making Roth conversions of pre-tax money (whether in-plan or in a Roth rollover) beginning in 2032 (assuming that provision isn't walked back in the next 10 years!).



2. Changes Regarding Individuals with Large Accounts.

In the wake of publicity surrounding wealthy Americans with retirement accounts that total in the billions of dollars, the House passed a number of measures aimed at these large accumulations, although they don't apply until 2029 (assuming the provisions aren't walked back before that date).

A. Required reporting for large accounts. Your plan would have a new annual reporting obligation for any vested retirement plan accounts exceeding \$2.5 million.

B. Required distributions from large accounts. If the total of a high earner's account balances exceeds \$10 million, that person would be required to take a minimum distribution the following year equal to 50% of the amount exceeding \$10 million. An additional minimum distribution—aimed at limiting Roth accumulations—could apply if the aggregate balances exceed \$20 million.

C. Cap on IRA contributions. High-earning individuals would be prohibited from contributing to an IRA if their aggregate defined contribution and IRA account balances exceeds \$10 million.

Notably, the limitations on IRA investments that were originally proposed are not in the version passed by the House.

Plan sponsors are encouraged to follow the bill's progression. If your plan utilizes after-tax contributions, now is a great time to talk to your TPA and plan advisor about whether and how plan design changes can be implemented if needed to respond to the Act.

Best Practices for Plan Sponsors: Gearing Up for Testing Season

by Kelsey Mayo, Partner, Poyner Spruill

As the holiday season draws to a close, what better way to ring in the new year than by getting ready for a different type of season: plan testing season! Though this season comes with less lights and fewer sparkles than the season preceding it, it too can be a time for reflection and growth.

What does “testing season” mean?



Qualified plans provide great tax benefits—a tax deferral for participants and an immediate deduction for plan sponsors. In exchange for these benefits, the plan

must jump through a number of hoops, including annual testing. These annual tests will include some or all of the following:

- **Nondiscrimination (ADP/ACP/401(a)(4)) Testing:** These tests look at contributions made for both highly compensated employees¹ (HCEs) and non-highly compensated employees (NHCEs) to determine whether the plan is impermissibly discriminating in favor of HCEs. The ADP (“Actual Deferral Percentage”) test compares average deferrals made by HCEs to those made by NCHes. The ACP (“Actual Contribution Percentage”) tests compares matching contributions received and after-tax contributions made by HCEs to those received and made by NCHes. And the 401(a)(4) test looks at whether other benefits (such as defined benefit plans or profit sharing contributions) sufficiently benefit NHCEs. Safe harbor plans may automatically satisfy one or more of these tests.
- **Top Heavy Testing:** This test looks at total benefits or assets in a plan, to determine whether key employees² have a disproportionate amount of assets as compared to non-key employees. This generally looks to see whether key employees hold more than 60% of such benefits or assets.

- **Coverage Testing:** This test looks to see whether the plan benefits the required amount of non-HCEs.
- **Annual Additions Testing:** This test looks to see whether the total amount of benefits for a participant is within IRS statutory limits. The annual contribution limit for defined contribution plans in 2022 is \$61,000 (\$67,500 for those eligible for catch-up contributions). The annual benefit limit for defined benefits plans in 2022 is \$245,000.
- **Annual Deferral Limit:** This test looks to see whether the total amount a participant has deferred during the plan year is within IRS statutory limits. The annual deferral limit in 2022 is \$20,500 (\$27,000 for those eligible for catch-up contributions).
- **Allowable Deduction Testing:** This test looks at total employer contributions in a plan year to determine whether the employer has contributed more than 25% of the total of all participants’ compensation for the plan year to the plan.

I have a safe harbor plan, so am I subject to testing season?

Being a safe harbor plan, however, does not exempt a plan from all testing. Safe harbor plans do generally automatically satisfy the ADP and/or ACP tests. Some safe harbor plans may also be exempt from top heavy testing. However, the other tests noted above do apply. Therefore, it is equally important for safe harbor plans to be tested.

What are some best practices to make sure I’m ready to take full advantage of this season?

The most important thing a plan sponsor can do is to provide complete and accurate census data (and as soon as possible after year end). Testing errors often occur because incomplete data is provided. Common errors include not providing data for the entire employee population, providing incomplete compensation information, and not identifying companies that are related (particularly if ownership has changed or the owner or the owner’s spouse has sold/acquired an interest in another business).

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¹A highly compensated employee is generally one who either: (1) owns more than 5% of the company sponsoring the plan at any time during the current or previous year or (2) satisfied an income threshold in the prior year. This income threshold is indexed annually. In 2022, you would look to see whether the employee made more than \$130,000 in 2021. Employers can also make top-paid group elections. See Code Section 414(q).

²A key employee is generally one who: (1) owns more than 5% of the company sponsoring the plan, (2) owns more than 1% of the company sponsoring the plan and makes more than \$150,000 annually, or (3) is an officer of the company sponsoring the plan and makes more than \$200,000 in 2022 (indexed annually).

Gearing Up for Testing Season (continued)

Reach out to your TPA and advisor now to begin coordinating on census data preparation. Does your TPA need information presented differently than last year? Do you have the information required, and is it complete? Start working now to get census data ready on time.

After testing is complete, reflect: How did plan administration go this past year? Did we uncover any errors during testing? What practices can we put in place now to avoid these errors in the future?



Testing season can be stressful, but careful planning can help ensure that it runs as smoothly as possible. Your TPA and advisor partners are here to provide support along the way!

What if a test is failed or an error is discovered?

While no one likes to hear they failed, take heart, it is common to discover a testing failure (and sometimes to discover other errors as well)! Now is the best time to find and correct these things.

For example, if ADP and ACP testing reveals excess contributions to HCEs, you can refund those excess contributions without excise taxes so long as the contribution is made within two and a half months after the end of the plan year (March 15th for calendar year plans).

Errors caught quickly are also often eligible for self-correction under the IRS's self correction program (SCP) part of its Employee Plans Compliance Resolution System (EPCRS).

Thus, it is vital to get that accurate and complete census data in early to preserve your best options. Talk to your TPA now about any changes that have occurred and any questions you have. Working together you will have a successful season!

PASSED

HOT TOPIC: Plan Theft as DOL Area of Focus

by Kelsey Mayo, Partner, Poyner Spruill



Plan theft is a perennial hot-button issue in the benefit plan arena. Recent estimates show that defined contribution plans alone guard benefits for over 106 million participants and over \$6.3 trillion in assets. Plan sponsors, administrators, and fiduciaries should ensure that they are implementing reasonable processes to routinely evaluate areas of risk and methods of risk mitigation.

In response to a Government Accountability Office study affirming the vulnerability of retirement plan data, the Department of Labor (DOL) released a three-piece cybersecurity guidance package for plan sponsors, service providers, and participants. The package contains: **(1) a 12-prong**

cybersecurity best practices summary, (2) tips for hiring service providers, and (3) online security tips for participants and beneficiaries. Importantly for plan sponsors, the DOL characterizes the mitigation of cybersecurity risk as a fiduciary duty. The package reflects what the DOL likely believes are cybersecurity standards fiduciaries should evaluate and pursue. As a plan sponsor, you should carefully evaluate the guidance to ensure you are meeting your fiduciary duties.



There are several actions that plan sponsors should take in response to the guidance package:

- 1. Consider posting and/or distributing the online security tips for participants.** This is not a required disclosure; however, it is an easy action to take as part of a participant education program and may be viewed favorably in the unfortunate event there is theft from the plan.
- 2. Evaluate current vendor selection procedures** to incorporate the DOL's suggestions in the tips for hiring service providers. Notably, the DOL recommends specific inquiries of potential plan vendors and contractual provisions a fiduciary should request. As part of the prudent monitoring of vendors, sponsors may want to ask these questions and update contracts, to the extent possible.
- 3. Review the 12-prong cybersecurity best practices summary** and update procedures. Perhaps the most substantive piece of the package, this summary is framed as best practice recommendations for plan service providers, such as third party administrators and recordkeepers. Conceptually, however, these standards also apply to plan-related information maintained by the plan fiduciary—and enforcement actions already implemented confirm this suspicion. Therefore, plan sponsors should evaluate their own internal cybersecurity policies against the 12-prongs, in addition to evaluating the cybersecurity policies of their plan service providers.

To see the DOL 12-prong best practices summary, go to: <https://www.dol.gov/sites/dolgov/files/ebsa/key-topics/retirement-benefits/cybersecurity/best-practices.pdf>

We strongly recommend reviewing the twelve prongs, in-depth. However, a few key takeaways are that fiduciaries should look for the following in evaluating cybersecurity practices:

- A well-documented, comprehensive cybersecurity program, led by senior personnel;
- Annual reviews, updates, and assessments of the program and the company's compliance;
- Annual training of personnel, **emphasizing identity theft** (in our experience, off-the-shelf cybersecurity training programs may need to be supplemented to address how identity theft occurs in the plan context);
- Strong access and security procedures to protect plan data—both when stored on the system and when being shared;
- A process to maintain current participant data, specifically **including a procedure to ensure the plan sponsor's data matches the plan vendor's data**; and
- Comprehensive resiliency plan addressing business continuity, disaster recovery, and incident response.

The items above are broad categories—the DOL guidance provides specific items on each of these points. Reach out to your TPA and plan advisor today for more detail on implementing these best practices (and in evaluating how they, too, are responding to the guidance).