



Hear Ye, Hear Ye: Participant Notices for Retirement Plans

Adrienne I. Moore

Sue is hired in November 2019 as the Human Resources Director for a company. The honeymoon period is short, as Sue finds herself holding open enrollment meetings and struggling to meet the requirements to offer the company's health plan to employees. After many sleepless nights, Sue enjoys a restful holiday and settles more into her role. Hoping to develop a better understanding for the company's retirement plan, Sue attends the fantastic Pensions on Peachtree (POP) conference hosted by Ferenczy Benefits Law Center (FBLC) the following spring. While there, she hears references made to safe harbor notices, QDIA notices, Summary Annual Reports, and quarterly participant fee disclosures—all of which she suspects apply to her company's plan. Unfortunately, Sue has no idea if any such notices have been provided. What can Sue do to get the plan back on track and to correct for any notices that were missed?

Notice requirements for retirement plans can be daunting. It may seem that, between the Department of Labor (DOL), Internal Revenue Service (IRS), and Pension Benefit Guaranty Corporation (PBGC), there is an unlimited array of notices that need to be provided. Luckily, many notices only need to be provided annually and many will not apply to a plan at all. Even better, if notices are missed, this can be corrected.

Types of Participant Notices

Participant notices depend on the type of plan (i.e., defined benefit or defined contribution), provisions of the plan (e.g., safe harbor contributions), and any events affecting the plan (e.g., termination). All notices have both content requirements and timing requirements. Generally, with regard to timing requirements, notices must be provided either on an ad hoc basis, quarterly, or annually. Within the ad hoc notices, there will typically be a timing requirement for how far in advance of the precipitating event the notice must go to participants. How can anyone keep this straight?

A Participant Notices Cheat Sheet

A good listing of the possible notices that must be provided can be found [here](#). The chart lists some of the notices that are required for retirement plans, along with each notice's timing requirement. The third column indicates where in the Internal Revenue Code (the "Code"), or corresponding Treasury Regulations and the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), or corresponding Labor Regulations to find the content requirements. While this list is by no means comprehensive, these are the most commonly required notices. (The list is in alphabetical order.)

How Do You Correct a Missed Notice?

Generally, the only way to fix a missed notice will be to provide it to participants as soon as possible. The effect of missing a notice will depend on the notice type. If the notice begins some type of waiting period, the clock restarts when the notice is actually given. For a standard plan termination covered by the PBGC, missing one of the required notices means starting the entire termination process over, including pushing back the termination date. If a blackout notice is missed, a new notice will typically have to be issued and the blackout period will have to be postponed.

Other notice failures come with a penalty. The DOL may assess a penalty of up to \$110 per day for failing to provide the Summary Annual Report timely. This same penalty scheme applies to the Summary Plan Description and any Summary of Material Modification, as well.

401(k) Safe Harbor Notice. Failure to provide the notice for a 401(k) safe harbor plan is considered to be an operational failure (that is, a failure to follow the terms of the plan document). The IRS has been clear, however, that a failure to provide the safe harbor notice does not simply subject the plan to ADP and ACP testing for the year. However, the IRS has not been clear about what the corrective action should be. The correction will depend on the impact of the failure on participants. If failure to provide the notice results in employees not knowing they were eligible to defer or not knowing how to defer to the plan, the employees may be deemed to be improperly excluded from the plan, requiring resolution under the Employee Plans Compliance Resolution System (EPCRS) (Revenue Procedure 2019-19, Sec. 6.02(7)). If employees were still aware of how to defer, the failure may be an administrative error and can be corrected by revising procedures. Unfortunately, because the IRS has been equivocal about what to do in this situation, the only way to ensure the proper correction of this failure is to submit the plan to the IRS's Voluntary Correction Program (VCP) under EPCRS.

Sue's Next Steps

How can Sue get her plan back in compliance? After attending POP, Sue knows that the safe harbor notice, Summary Annual Report (SAR), and quarterly benefit statements are all relevant for her plan. Her plan provides only a 3% safe harbor nonelective contribution to participants, so she now knows that, because of the recent changes in the law with the SECURE Act, her plan does not require a safe harbor notice for 2020 and later years. Sue is able to determine that the 2018 plan year SAR was distributed by her predecessor in October 2019, and she will not need to distribute the 2019 SAR until September 2020 at the earliest. Finally, after talking with FBLC, Sue checks with her plan's recordkeeper and learns that it provides quarterly benefit statements to all participants. Amazing! Sue has managed to avoid any notice failures.

Sue creates an annual checklist for herself and develops administrative procedures for the ad hoc notices she expects will arise under the plan. A few weeks later, Sue receives a call from her

third-party administrator letting her know that they found discrepancies in the census data. Sue's predecessor had incorrectly reported certain compensation and the result is that the plan failed ADP and ACP testing for a few prior years. It seems there will be no rest for Sue, but that is a Solution for another day.



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Ilene Ferenczy • ilene@ferenczylaw.com | Alison Cohen • acohen@ferenczylaw.com
Adrienne Moore • amoore@ferenczylaw.com | Adriana Starr • astarr@ferenczylaw.com
Tia Thornton • tthornton@ferenczylaw.com | Leah Dean • ldean@ferenczylaw.com

2635 Century Parkway Suite 200, Atlanta, GA 30345
T 404.320.1100 | F 404.320.1105 | www.ferenczylaw.com