Overcoming Plan Testing Challenges in the Age of COVID-19

A webinar was held for Newport clients on Wednesday, April 29, 2020, to review the qualified plan compliance challenges, and the prospect of non-qualified plans, during these challenging economic times. The following are the FAQs from the webinar.

Please note: Newport will not provide legal advice. The information below is based on retirement plan rules and how they are generally applied. You should seek advice from your ERISA/employee benefits counsel on how retirement plan rules impact your specific plan.

Compliance Topics

PLAN TERMINATIONS

1. **Are you aware of any relief to eliminate the requirement to fully vest participants impacted by a partial plan termination?**

   No, we are not aware of any proposed legislation that would eliminate the requirement to fully vested participants affected by a partial plan termination.

2. **If a plan is fully terminating, is the sponsor required to fully vest all participants?**

   Yes, participants become fully vested in all sources as a result of a full plan termination.

TESTING

3. **Does the age 50+ catch-up contributions affect the calculation of HCE and NHCE deferral percentages?**

   No, catch-up contributions are excluded from ADP testing.

4. **Can you use the prior year testing method for 2020, and then go back to the current year method for 2021?**

   It is our understanding that a sponsor can elect to change from the prior year method to the current year method, but must then stay with the current year method for at least five years. The ability to change from 2020 to 2021 may depend on any elections dating back to the time period from 2015-2019.

RELIEF/REGULATORY PROPOSALS

5. Are you aware of any proposed regulations increasing the contribution limits for qualified plans in 2020?

To date, no relief has been granted that would increase the annual contribution limits for qualified plans. Newport will continue to provide updates as legislation is adopted via the Plan Sponsor website Message Center and on newportgroup.com.

6. If a partial plan termination occurs and distributions are made to terminated employees, but at a later date the DOL temporarily eliminates the requirement to fully vest participants, how can the non-vested money be reclaimed from terminated participants?

To date, no relief or guidance has been received. Newport will continue to provide updates as legislation is adopted via the Plan Sponsor website Message Center and on newportgroup.com.

7. Has the DOL/EBSA extended the due date for Form 5500 filings (including Form 5500-SF and 5500-EZ) due to COVID-19?

Yes, some relief has been provided in this area. The IRS issued Notice 2020-23, which, coupled with DOL/EBSA Notice 2020-01, provides an extension for any government filings (including Form 5500) due between April 1, 2020, and July 14, 2020. The due date for such filings is now July 15, 2020. Should additional relief be provided, Newport will alert plan sponsors and advisors via the Plan Sponsor website Message Center and on newportgroup.com.

MISCELLANEOUS

8. Does the ability to apply for unemployment have any impact on determining whether an employee can be considered "furloughed" or "laid off?"

Collecting unemployment does not necessarily mean termination for retirement plan purposes because furloughed employees may be eligible for unemployment. Ultimately, the decision must be made by the plan sponsor. It is important to be consistent with this determination and document for precedence, accordingly.

9. How should hours be credited for those on furlough?

The answer depends on how an "hour" is defined in your plan document. We would encourage you to review with your Newport representative, and also with your internal or external legal counsel.

10. Can a plan use Payroll Protection Program (PPP) funds to satisfy required retirement plan contributions?

Section 1102 of the CARES Act includes "payment of any retirement benefit" under the definition of payroll costs. The Small Business Administration (SBA), in consultation with the Department of Treasury, issued FAQs on April 7, 2020. It appears employer contributions to a defined benefit or defined contribution plan would qualify if these contributions would normally be funded each payroll period (e.g., matching contributions) or annually (e.g., required minimum contributions).

11. I'm working to eliminate the safe harbor on our plan so we can suspend the employer match. I know that HCE's may be affected. What do I need to know, and what do I need to inform them?

The mid-year elimination of the safe harbor match will most likely make the plan subject to ADP/ACP testing for the entire year using the current year method. This may limit the HCE deferrals based on what the NHCE average deferral percentage is for the year. The suspension or removal will require a 30-day notice to all participants of the change. There is no additional requirement for a notice to HCE, but it may be helpful to let the HCE know that they may be subject to limitation or refunds. Preliminary testing would be helpful to get a sense of what the results may be to allow for adjustments to deferrals prior to the year-end. We encourage you to review with your Newport representative.

12. **What can I do for my HCE's if I need to return their retirement contributions, effectively reducing their overall total compensation package?**

    We recommend making sure you understand the bigger picture of the total compensation package by benchmarking your program against the marketplace. Looking at base salary, annual incentives/bonuses, long-term incentives, other benefits, and both qualified and non-qualified plans can help you determine how you might message any "take-away" in retirement plans to stay competitive in the market for executive talent. Newport's Compensation Consulting team is available to help with this.

Non-Qualified Plans

1. **Can you roll a non-qualified deferred compensation plan (NQDCP) into another NQDCP?**

   No, this is not permitted. An employer would need to establish a new, separate plan.

2. **Are you aware of any relief from the mandatory six-month delay in non-qualified plan distributions?**

   To date, no relief has been received. Newport will continue to provide updates as legislation is adopted via the Message Center on newportgroup.com.

3. **Has there been any further guidance on allowing for mid-year election changes for participants in light of COVID-19?**

   To date, no guidance has been received. Newport will continue to provide updates via the Plan Sponsor website Message Center and on newportgroup.com.

If you have any questions, please contact your Newport representative.