



Issue 2011-7  
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# employee plans news

PROTECTING RETIREMENT BENEFITS THROUGH EDUCATING CUSTOMERS

Internal Revenue Service  
Tax Exempt and Government  
Entities Division

A Publication of Employee Plans

## What's Ahead for Employee Plans

- [2011-2012 Priority Guidance Plan](#) – includes over 37 retirement benefit items
- [ESOP Phone Forum](#) – technical and determination issues

## Contributions

- [After 70½](#) – continuing to contribute for employees who receive RMDs
- [Two Plans, Two Employers](#) – limits for your plan at work and your self-employed plan

## Just Released Guidance

- [Hybrid Plans](#) – Notice 2011-85
- [Opinion and Advisory Letters](#) – updated procedures

## Exam Update

- [LESE Exam Projects](#) – EP Exam Director discusses the Learn, Educate, Self-Correct, Enforce Projects
- [Form 5500 Non-Filer Project](#) – compliance check letters sent

## New on the Web

- [10% additional tax exceptions chart](#) (PDF)
- [Disaster Relief](#)
- [IRS List of Nonbank Trustees and Custodians](#) (PDF)
- [IRS Nationwide Tax Forum](#) – retirement plan presentations
- [Lists of Required Modifications](#)
- [Registered Tax Return Preparer Test](#) – topics and other information
- [Small Business Health Care Tax Credit](#) – claim credit on your 2010 tax return

## In the News

- [DOL Corner](#)
- [PBGC Insights](#)

## Recurring Columns

- [EP Published Guidance](#)
  - [Calendar of EP Benefits Conferences](#)
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## We're Glad You Asked!

### Are we required to continue making plan contributions for an employee who has turned 70½ and is receiving required minimum distributions?

Yes, you must continue contributions for an employee, even if they are receiving [RMDs](#). You must also give the employee the option to continue making salary deferrals, if the plan permits them. Otherwise, you will fail to follow the plan's terms, causing your plan to lose its qualified status. You may correct this failure through the Employee Plans Compliance Resolution System ([EPCRS](#)).

### How RMDs Work

A retirement plan participant must begin receiving RMDs annually starting with the year he or she reaches age 70½ or, if later, the year in which he or she retires. However, if the plan is a SEP or SIMPLE IRA plan or the participant is a 5% owner of the business sponsoring the retirement plan, the RMDs must begin once the participant is age 70 ½, regardless of whether he or she is retired. The first RMD payment can be delayed until April 1 of the year following the year in which the participant turns 70½ (or retires, if applicable). For all subsequent years, including the year containing that April 1, the participant must take the RMD by December 31.

### How Contributions Affect RMDs

When you calculate an employee's RMD, consider any contributions that you make for that employee. For defined contribution plans, [calculate the RMD](#) for an employee by dividing his or her prior December 31 account balance by a life expectancy factor in the applicable table contained in Appendix C of [Pub. 590](#). A defined benefit plan generally must make RMDs by distributing the participant's entire interest as calculated by the plan's formula in periodic annuity payments for:

- the participant's life,
- the joint lives of the participant and beneficiary, or
- a "period certain" (see [Treas. Reg. §1.401\(a\)\(9\)-6, A-3](#)).

### Additional Resources:

- FAQs: [Required Minimum Distributions](#)
- [RMD Comparison Chart](#) (IRAs vs. Defined Contribution Plans)
- [Publication 560](#), *Retirement Plans for Small Business (SEP, SIMPLE, and Qualified Plans)*

## We're Glad You Asked!

**I am employed by a company that has a SIMPLE IRA plan, and I participate in that plan. I do not have any ownership in that company. I'm also self-employed and have a SEP plan for my business. What's the maximum annual amount that can be contributed to each plan?**

The contribution limits for your SIMPLE IRA plan are separate from the limits for your SEP plan.

*Note: All dollar figures are for 2011 and are subject to [annual cost-of-living adjustments](#).*

### SIMPLE IRA Plans

#### Employee Contribution Limits

You can make salary deferrals (salary reduction contributions) of up to \$11,500 to a SIMPLE IRA plan. If you're age 50 or over, you can contribute an additional \$2,500 in [catch-up](#) contributions.

If you participate in more than one retirement plan (such as a 401(k) or a 403(b) plan) that allows you to make salary deferrals, your total employee contributions to all plans can't exceed your personal limit of \$16,500, plus an additional \$5,500 if you are age 50 or older. However, because the SIMPLE IRA plan limits your contributions to \$11,500, plus an additional \$2,500 catch-up contribution, this is the maximum amount you can contribute to your SIMPLE IRA plan.

#### Employer Contribution Limits

Your employer must either:

- match your salary deferrals, on a dollar-for-dollar basis, up to 3% of your compensation, or
- make a nonelective contribution of 2% of your compensation (taking into account no more than \$245,000 of compensation).

### SEP Plans

Your contributions to your SEP plan (that is not a [SARSEP](#)) are not reduced by the contributions you or your employer make to your employer's SIMPLE IRA plan.

SEP plans (that are not SARSEPs) only allow employer contributions. For a self-employed individual, contributions are limited to 25% of your net earnings from self-employment (not including contributions for yourself), up to \$49,000. You can calculate your plan contributions using the [tables and worksheets](#) in Pub. 560.

If **your** business sponsors another defined contribution plan in addition to your SEP plan (for example, a profit-sharing plan or a 401(k) plan), then your contributions for yourself to all these plans may not exceed 25% of your net earnings from self-employment (not including contributions for yourself), up to \$49,000.

Note that salary deferrals are not subject to the 25% limit and catch-up contributions are not subject to the \$49,000 limit.

#### Additional Resources:

- [SEP Plan](#) Web pages
- [SIMPLE IRA Plan](#) Web pages
- [Publication 560](#), *Retirement Plans for Small Business (SEP, SIMPLE, and Qualified Plans)*
- [Publication 590](#), *Individual Retirement Arrangements (IRAs)*

## Hybrid Plan Interest Crediting Rules – Certain Effective Dates Postponed

[Notice 2011-85](#), issued October 12, 2011, announces the postponement of effective dates for certain hybrid defined benefit plan interest crediting rules:

- IRC section [411\(b\)\(5\)](#) proposed hybrid plan regulations, when finalized, will be effective for plan years beginning on or after a date to be specified in the regulations that is not earlier than January 1, 2013, and related provisions of final hybrid plan regulations that are effective January 1, 2012 will be postponed.
- The deadline for plans to adopt amendments to comply with IRC section 411(a)(13) (other than section 411(a)(13)(A)) and section 411(b)(5) is extended to the last day of the first plan year before the plan year for which the proposed regulations, once finalized, apply to the plan.
- Relief from IRC section 411(d)(6) is expected to apply to an amendment that eliminates or reduces a section 411(d)(6) protected benefit, provided that the amendment is adopted by the last day of the first plan year before the plan year for which the proposed regulations, once finalized, apply to the plan and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of section 411(b)(5).

Notice 2011-85 also formalizes the special timing rule announced in [Announcement 2009-82](#) for providing section 204(h) notice of certain amendments adopted to change the interest crediting rate under a hybrid plan. The special timing rule only applies to amendments adopted after November 10, 2009, and on or before the last day of the first plan year that begins on or after January 1, 2009.

### Regulation Effective Dates Postponed

IRC section 411(b)(5) requires that the rate of any interest credit (or an equivalent amount) for any plan year provided under the terms of a hybrid plan not exceed a market rate of return.

The 2010 [proposed](#) and [final](#) hybrid plan regulations provide guidance on the interest crediting and market rate of return requirements. The final regulations are generally effective for plan years beginning on or after January 1, 2011. However, sections 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i) of the final regulations, which provide that the regulations set forth the exclusive list of interest crediting rates and combinations of rates that satisfy section 411(b)(5), are effective for plan years beginning on or after January 1, 2012, which is also when the proposed regulations are proposed to be effective. The proposed regulations would, in part, describe additional interest crediting rates that satisfy section 411(b)(5).

The proposed regulations, when finalized, will apply to plan years beginning on or after a date to be specified in the regulations, which will not be earlier than January 1, 2013. The IRS will also postpone the effective date of final regulation sections 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i) to match the effective date of the proposed regulations when they are finalized.

### Extended Amendment Adoption Deadlines

Notice 2011-85 extends the deadline for adopting an interim or discretionary amendment to comply with IRC section 411(a)(13) (other than section 411(a)(13)(A)) and section 411(b)(5) until the last day of the first plan year before the plan year for which the proposed hybrid plan regulations, once finalized, apply to the plan. Determination letter applications submitted between February 1, 2011, and January 31, 2012, won't consider the final regulations other than the requirements of IRC section 411(a)(13)(A), unless the plan has been amended for the final regulations. In this case, the IRS will only consider those parts of the final regulations that are effective in plan years beginning on or after January 1, 2011.

### Section 411(d)(6) Relief

When the proposed regulations become final, the IRS is expected to grant relief for a plan amendment that eliminates or reduces a protected benefit, if:

- the amendment is adopted by the last day of the first plan year before the plan year for which the proposed plan regulations, once finalized, apply to the plan; and
- the amendment eliminates or reduces the protected benefit only to the extent necessary to enable the plan to meet the requirements of IRC section 411(b)(5).

## Section 204(h) Notice Deadline

An ERISA section 204(h) amendment significantly reduces the rate of future benefit accruals and generally requires that a section 204(h) notice be sent to all affected parties at least 45 days before the amendment's effective date. Otherwise, the IRS assesses an excise tax against the plan administrator (see IRC section [4980F](#)).

[Announcement 2009-82](#) announced that the IRS would give relief to hybrid plans from the notice timing requirements for certain plan amendments adopted to change the interest crediting rate under a hybrid plan. Without relief, plans wouldn't have had enough time to comply with the notice timing requirements for their amendments effective as of the first day of their 2010 plan year. These amendments were for interest crediting rate changes adopted beginning when the announcement was issued through the deadline for amending plans for the Pension Protection Act of 2006.

Notice 2011-85 permits a hybrid plan to provide a section 204(h) notice up to 30 days after an amendment is effective, for an amendment that:

- changes an interest crediting rate under a statutory hybrid plan;
  - is adopted after November 10, 2009, and on or before the last day of the first plan year beginning on or after January 1, 2009; and
  - is effective no later than the first day of the first plan year beginning on or after January 1, 2010
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## **EPCU Project: Form 5500 Non-Filers and Late Filing Penalty Awareness**

The Employee Plans Compliance Unit has begun the [Form 5500 Non-Filer Project](#) to promote compliance with Form 5500 filing requirements.

### **The Project Process**

EPCU sends compliance check letters to plan sponsors for whom we have no record of a Form 5500 or 5500-SF filing with DOL (or Form 5500-EZ with IRS) 6-9 months after the return's due date. We ask the plan sponsors to either file the return or explain why it wasn't filed. If the plan sponsor files the return, we close our contact. Many times, we've found that a plan sponsor did file Form 5500, but it didn't match IRS records. In these cases, we update our records to reflect current plan information (for example, a correct EIN, plan number or plan sponsor name). If we don't receive a response, we close the compliance check and may send a referral to Employee Plans Examinations or the Department of Labor.

If the plan sponsor is required to, but doesn't file Form 5500, IRS will send them a [delinquency notice](#) (CP 403 Notice) asking employers to respond within 30 days. If they don't respond, IRS will send a subsequent notice (CP 406 Notice) requesting a response within 30 days. IRS doesn't grant extensions of time to reply to the CP 406 notice.

### **Late Filing Penalties**

Many plan sponsors we contacted weren't aware there is an IRS penalty for filing their Form 5500 late of \$25 per day until filed, up to a maximum of \$15,000. The DOL may also assess civil penalties for the late filing of the same Form 5500 of up to \$1,100 per day, with no maximum.

EPCU doesn't evaluate 'reasonable cause' explanations they receive during a non-filer compliance check. However, the IRS and DOL may abate or reduce penalties if there were mitigating circumstances or conditions that adversely affected the plan's ability to file a return.

### **DOL's Delinquent Filer Voluntary Compliance (DFVC) Program**

If a plan sponsor hasn't filed Form 5500 but is required to, there is an opportunity to substantially reduce DOL penalties and eliminate the IRS penalty under the [DFVC Program](#). (This program is not available to Form 5500-EZ filers. However, Form 5500-EZ filers may attach an explanation for filing late to their return to provide information they wish the IRS to consider before assessing penalties.) Plan sponsors should indicate on their return if they have been accepted by the DFVC Program to avoid IRS penalties.

### **Contacting the EPCU**

If you have questions about this project, please [email](#) us and we will be glad to answer them. Please include the words "Form 5500 Non-Filer Project" in the subject line.

## DOL Corner

The Department of Labor's Employee Benefits Security Administration (DOL/EBSA) announced new guidance as featured below. You can subscribe to [DOL/EBSA's](#) homepage for updates

### Proposed Definition of "Fiduciary" of Employee Benefit Plans

On September 19, DOL/EBSA announced that it will re-propose its rule on the definition of a fiduciary. The decision to re-propose is in part a response to requests from the public, including members of Congress, that the agency allow an opportunity for more input on the rule.

The decision to re-propose means that this initiative will benefit from additional input, review and consideration. The agency agrees with stakeholders and lawmakers that more public input and greater research will strengthen the rule. This extended input will supplement more than 260 written public comments already received, as well as two days of open hearings and more than three dozen individual meetings with interested parties held by the agency.

Consistent with the president's executive order, the extended rulemaking process will also ensure that the public receives a full opportunity to review the agency's updated economic analysis and revisions of the rule. DOL/EBSA will continue to coordinate closely with the Securities and Exchange Commission and the Commodities Futures Trading Commission to ensure that this effort is harmonized with other ongoing rulemakings.

Specifically, the agency anticipates revising provisions of the rule including, but not restricted to, clarifying that fiduciary advice is limited to individualized advice directed to specific parties, responding to concerns about the application of the regulation to routine appraisals and clarifying the limits of the rule's application to arm's length commercial transactions, such as swap transactions.

Also anticipated are exemptions addressing concerns about the impact of the new regulation on the current fee practices of brokers and advisers, and clarifying the continued applicability of exemptions that have long been in existence that allow brokers to receive commissions in connection with mutual funds, stocks and insurance products. The agency will carefully craft new or amended exemptions that can best preserve beneficial fee practices, while at the same time protecting plan participants and individual retirement account owners from abusive practices and conflicted advice.

The agency is seeking to amend a 1975 regulation, which defines when a person providing investment advice becomes a fiduciary under ERISA, in order to adapt the rule to the current retirement marketplace. The proposal's goal is to ensure that potential conflicts of interest among advisers are not allowed to compromise the quality of investment advice that millions of America's workers rely on, so they can retire with the dignity that they have worked hard to achieve. When finalized, this important initiative will safeguard workers who are saving for retirement as well as the businesses that provide retirement plans to America's working men and women.

The new proposed rule is expected to be issued in early 2012. For more information on the proposed rule, visit DOL/EBSA's website at <http://www.dol.gov/ebsa/regs/cmt-1210-AB32>.

### Electronic Disclosure by Employee Benefit Plans

On September 13, DOL/EBSA issued [Technical Release 2011-03](#) which provides an interim policy regarding the use of electronic media to satisfy the disclosure requirements under DOL/EBSA's [final participant-level fee disclosure regulation](#).

The participant fee disclosure regulation requires employers to disclose more information about plan and investment costs to workers who direct their own investments in ERISA-covered 401(k) and other individual account retirement plans. Under the final rule, plans generally have until at least May 31, 2012 to start giving better information on 401(k) and similar plan fees and expenses to an estimated 72 million participants.

The technical release allows plan administrators to furnish information required under the participant disclosure rule electronically. This includes the use of continuous access websites, if certain conditions and safeguards are met. The interim policy states that DOL/EBSA will not take enforcement action based solely on a plan administrator's use of electronic technologies to make the required disclosures under the participant fee disclosure regulation if the administrator complies with the conditions in the technical release.

The relief in the technical release is limited to the disclosures required under the final participant fee disclosure regulation.

## Form 5500 Version Selection Tool

To assist filers, DOL/EBSA has posted the [Form 5500 Version Selection Tool](#) on its website. With the switch to an all electronic filing system and changes to the Form 5500, filers may have questions about what to file for plan years prior to the current year or how to amend prior year filings. The Form 5500 Version Selection Tool will help to determine which version of the Form 5500 and which schedules to use. For informational copies of the Forms, visit [www.dol.gov/ebsa/5500main.html](http://www.dol.gov/ebsa/5500main.html). To file, go to [www.efast.dol.gov](http://www.efast.dol.gov). For more information on filing electronically, visit the [EFAST2 FAQs](#).

This tool will not provide detailed instructions specific to a plan's filing requirements. Filers need to review the instructions to the Form 5500/5500-SF for instructions that are applicable to their plan.

A filer should never submit the [Schedule SSA](#) or any form containing information concerning separated or deferred vested participants electronically to DOL/EBSA. All such information must be filed separately with the IRS.

If you intend to file a delinquent Form 5500/5500-SF annual return report under the Delinquent Filer Voluntary Compliance Program (DFVCP), you can use the online [DFVCP Penalty Calculator](#) to be certain you have calculated the amount due correctly. There is also the option to pay the DFVCP penalty electronically. Simply select the "Continue to DFVCP Penalty Calculator and Online Payment" box in this tool to get started.

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## PBGC Insights

**Regulatory Review.** In response to Executive Order 13563 on Improving Regulation and Regulatory Review, PBGC issued its plan to review regulations to ease administrative burden, simplify filings and provide relief for small businesses and plans. The plan explains how PBGC will select its regulations for review. The public is encouraged to submit comments on the plan or to nominate regulations for review: [regs.comments@pbgc.gov](mailto:regs.comments@pbgc.gov).

**Premium Penalty Relief; Alternative Premium Funding Target Election Relief.** On September 15, 2011, PBGC published a notice announcing relief from certain premium penalties in certain situations involving alternative premium funding target elections. This relief is in response to comments by premium payers and pension professionals and results from PBGC's regulatory review under Executive Order 13563.

**Appeal of 4062(e) Liability.** PBGC's Appeals Board rendered its first decision on August 8, 2011, regarding a plan sponsor's liability under ERISA section 4062(e) (triggered by a 20% or more reduction in active participants in a PBGC-covered defined benefit pension plan as the result of closure of a facility). The decision addresses several technical issues about when liability under section 4062(e) arises and the amount of that liability.

## Premium Filing Information and Reminders

- Plan Year 2011: Large and mid-size calendar year plans (100 or more participants for the prior plan year) have a Comprehensive Filing due to PBGC by October 17, 2011 (since October 15 is on a Saturday).
- Plan Year 2012: Filing requirements for 2012 are almost identical to those for 2011 and will be posted to PBGC's Payment Instructions & Addresses page in December 2011. For more information, including premium e-filing reminders, see the notice recently mailed to plan administrators.
- Here are some facts about premium e-filing via My Plan Administration Account (My PAA):
  - You can print a check voucher from PBGC's Online Premium Filing with My PAA page or from your My PAA Home page.
  - If you can see the Filing Manager page for a My PAA screen-prepared or imported filing, the filing has not been submitted.
  - Only the plan administrator or filing coordinator can submit a My PAA screen-prepared or imported filing.

- You can review a plan's account history online (on the Plan page) to confirm the premium status for each plan year (paid in full, overpaid, underpaid).
- You should keep your My PAA account current (email address) and active (log in regularly).
- For assistance, email [premiums@pbgc.gov](mailto:premiums@pbgc.gov) or call (800) 736-2444 and select the "premium" option.

**Customer Satisfaction.** The 2011 satisfaction score for premium filers increased to 75, the highest score in the history of the measure. Survey results show:

- Filers reported improvements in *Policy and Legislation*, in particular in their perceptions of the long-term viability of the pension insurance system and of PBGC's long-term financial outlook.
- Filers noted improvements in the clarity of the premium filing instructions.
- Those who contacted a PBGC representative reported across-the-board improvements in *Customer Care*.