

# 2024 Annual Employee Benefits Compliance Checklist

## Corporate Counsel

### Considerations for Corporate Counsel

The following checklist highlights key issues for corporate counsel with respect to employee benefit plans and executive compensation arrangements.

#### Amendments and Considerations for All Qualified Retirement Plans

- Prudent Fiduciary Procedures:** Any entity sponsoring a retirement plan is a fiduciary of the plan and a co-fiduciary with other fiduciaries named in the plan, such as the plan administrator or the investment fiduciary. Best practice is for investment fiduciaries responsible for selecting and monitoring plan investments to meet on a regular basis (preferably, quarterly) to review the performance of such investments and the reasonableness of investment-related fees that are paid directly from plan assets. Minutes of such meetings recording the fiduciaries' decisions should be maintained. Such fiduciaries should report annually to the corporate board or its delegate.

Corporate counsel should determine that the applicable plan fiduciaries have met during the year, maintained minutes, and reported on their activities to the appropriate board, individual, or committee.

- SECURE, SECURE 2.0 and CARES Act Amendments:** Amendments to conform to the SECURE Act of 2019 (SECURE Act), the Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act), and the SECURE 2.0 Act of 2022 (SECURE 2.0) must be adopted by **December 31, 2026, for qualified plans**. Plan administrators should carefully document changes implemented under the SECURE Act, CARES Act, and SECURE 2.0 so that amendments adopted later will accurately reflect administration.
- Discretionary Plan Amendments:** Plan amendments reflecting discretionary changes that became effective in the current plan year (other than the SECURE Act, CARES Act, and SECURE 2.0 changes discussed above) must be **adopted by the last day of the plan year** (e.g., December 31, 2024, for a calendar year plan). An increase in benefits, the addition of a new participating employer, and the addition of a new type of contribution are examples of discretionary changes that would need to be documented in plan amendments adopted by the end of the year. For defined benefit plans, advance participant notice may be required if an amendment significantly reduces the rate of future benefit accruals, such as a pension plan freeze.

#### Stock-Based, Executive, and Director Compensation

- ISO Exercises and ESPP Share Transfer Reporting:** Employers whose employees exercised an incentive stock option (ISO) in 2024 or made an initial transfer in 2024 of shares acquired under an employee stock purchase plan (ESPP) within the meaning of Code section 423, are subject to information reporting. Employers will report information to employees and the IRS relating to ISO exercises and initial transfers of ESPP shares on IRS Forms 3921 and 3922. The **IRS filing deadline is February 28, 2025** (paper filing), or **March 31, 2025** (electronic filing). Employers must **provide this year's employee statements by January 31, 2025**. Note

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that these filings apply to all companies offering ISOs or an ESPP, not just publicly traded employers.

- FICA Taxation of Nonqualified Deferred Compensation Plans:** Nonqualified deferred compensation plans are subject to special rules on the timing of Federal Insurance Contributions Act (FICA) taxation. In general, amounts deferred are taken into account in the year those amounts are first vested, rather than at the time of payment. This rule often results in a smaller portion of the deferred benefit being subject to Social Security and (depending on plan design) Medicare taxes than would be the case if taxes were withheld and paid upon distribution. A number of factors affect the amount of compensation taken into account for a given year, and the proper year of taxation must be carefully assessed in the case of defined benefit-type nonqualified plans. Employers have until **December 31, 2024**, to withhold and pay FICA taxes on compensation deferrals that are subject to this rule in 2024.
- Nonqualified Plan Deferral Elections for 2025 Compensation:** Elections to defer compensation earned in 2025 must be completed by **December 31, 2024**, absent very limited exceptions. If a company plans to rely on any exception to the December 31, 2024, deadline, legal counsel should be consulted before year end.
- For Deferred Compensation That Vests in 2025 or Later Years, Review and Correct any Code section 409A Violations:** Employers should review all nonqualified deferred compensation plans or agreements, under which compensation vests in 2025 or later years, to ensure that there are no Code section 409A violations. If employers identify the violation **before the end of 2024**, then documentary violations with respect to unvested amounts generally can be corrected by **December 31, 2024**, without penalties. Code section 409A corrections should correspond to methods described in formal guidance and should be reviewed by legal counsel.
- For Tax-Exempt and Governmental Entities That Have Code section 457(f) Arrangements:** Such employers should review all employment agreements and Code section 457(f) arrangements for deferrals of compensation that vest in 2024 to confirm whether such amounts have been included in the employee's wages for 2024 and whether applicable FICA and income tax withholding occurred. If inclusion and withholding for any deferrals of compensation that vested in 2024 (or prior years) have not already occurred, action should be taken **by December 31, 2024**, in consultation with legal counsel.
- Identify 2025 Specified Employees Under Code section 409A:** Unless a different identification period has been elected, publicly traded employers must identify individuals who were specified employees in the 12-month period ending on **December 31, 2024**. Specified employee status for these individuals applies for the 12-month period beginning April 1, 2025. If an employer intends to change their specified employee determination and effective dates, legal counsel should be consulted.
- Changes to Definition of "Covered Employee" under Code section 162(m):** Code section 162(m) limits the deductibility of compensation in excess of \$1 million paid to certain officers of a publicly traded employer. Significant changes to expand this limitation were made to Code section 162(m) in 2017. The American Rescue Plan Act of 2021 (ARPA) added five additional employees to the group for whom a compensation deduction is limited, reaching any employee

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(not limited to officers) who is among the five highest-compensated employees for the taxable year, other than individuals already covered under the 2017 legislative changes. ARPA's changes are effective for taxable years beginning after **December 31, 2026**. In assessing the impact of an expanded Code section 162(m), relevant compensation will include long-term equity awards and cash incentives granted in 2025 that vest or become payable in 2028.

- **Evaluate Remaining Share Reserve for Equity Incentive Plans:** A publicly traded employer should determine whether the remaining share reserve under its equity incentive plan is sufficient for grants planned through 2025 and, ideally, 2026. If not, an employer should begin preparing now for share increase and other amendments that may be necessary or desirable. Share increases and certain other changes are required to be approved by shareholders under New York Stock Exchange and Nasdaq Stock Market listing requirements and under tax rules relating to ISOs, where ISOs are offered under a plan. An employer should consider both the timing of its annual meeting and its regular grant schedule as part of this planning.

If you have any questions regarding this checklist, please contact any member of the Employee Benefits & Executive Compensation Section at Williams Mullen.

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