

Publications

Retirement Plan “Inadvertent Benefit Overpayments” Get Needed First Round of IRS Guidance

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Section 301 of the SECURE 2.0 Act (Pub. L. 117-328) provided retirement plan sponsors latitude to forgo recouping certain “inadvertent benefit overpayments.” However, it left many of the interpretive questions to the regulators, including what constitutes an inadvertent overpayment. On October 15, 2024, the IRS issued [Notice 2024-77](#), to provide interim guidance to help plan sponsors and fiduciaries comply with section 301.

Although Notice 2024-77 is effective as of October 15, 2024, the IRS and the Treasury Department have requested comments on the guidance in the Notice. Those interested in submitting comments must do so by December 16, 2024.

Background

Prior to SECURE 2.0, plan sponsors were generally required to take corrective action to recoup or otherwise restore certain retirement plan benefit overpayments, and to inform the participant or other recipient that an overpayment was not eligible for tax-free rollover treatment, in accordance with the principles set forth in the IRS’ Employee Plans Compliance Resolution System (“EPCRS”) (currently, Revenue Procedure 2021-30). There were also questions about the extent to which plan fiduciaries were required, under ERISA, to attempt to recoup benefit overpayments from participants or beneficiaries.

In response to these questions and concerns about certain recoupment practices, Congress created new rules under ERISA and the Internal Revenue Code (the “Code”) to help sponsors and fiduciaries address, among other things, “inadvertent benefit overpayments.” For example, new Code section 414(aa) permits plan sponsors to refrain from taking corrective action to recoup or restore an inadvertent benefit overpayment, subject to certain exceptions, and new Code section 402(c)(12) allows the overpayment to be treated as an eligible rollover distribution in certain cases.

Section 301 of the SECURE Act was effective as of December 29, 2022, but the statute left unresolved a number of interpretative and administrative questions. For example, Congress did not define “inadvertent benefit overpayment” and, instead, left that to the regulators.

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Notice 2024-77

Notice 2024-77 provides the first round of guidance regarding the scope of the new overpayment relief and explains what options are available to plan sponsors under EPCRS in light of the relief.

Importantly, Notice 2024-77 makes clear that plan sponsors may continue to seek recoupment of inadvertent benefit overpayments from participants and beneficiaries. However, it does not address the new conditions on the recoupment of benefit overpayments under ERISA section 206(h), added by section 301(a) of SECURE 2.0.

The guidance is set forth in question and answer format and is summarized below. Notably, the Notice is effective as of October 15, 2024, and provides for a good faith, reasonable compliance standard prior to its effective date (and to the extent the Notice is followed, that is deemed to meet this good faith standard).

1. What is an “inadvertent benefit overpayment” (Q&A-1)?

An “inadvertent benefit overpayment” is an eligible inadvertent failure (as defined in section 305(e) of SECURE 2.0 Act) that occurs due to a payment made from a Code section 401(a) qualified plan, section 403(a) annuity, section 403(b) tax-sheltered annuity or a governmental plan that exceeded the amount payable under the terms of the plan or a limitation provided in the Code or regulations.

An “eligible inadvertent failure” is a failure that (1) occurs despite the existence of established practices and procedures (see section 4.04 of Rev. Proc. 2021-30), (2) is not egregious, (3) does not relate to the diversion or misuse of plan assets, and (4) is not directly or indirectly related to an abusive tax avoidance transaction.^[1]

An overpayment also includes a payment made before a distribution is permitted under the Code or under the terms of the plan (*i.e.*, an impermissible in-service distribution). However, an inadvertent benefit overpayment does not include (1) a payment made to a disqualified person as defined in Code section 4975(e)(2) or owner-employee as defined in Code section 401(c), or (2) a payment that is made pursuant to a correction method provided under Rev. Proc. 2021-30 for a different qualification failure.

2. What is the impact on the existing overpayment correction procedures under EPCRS (Q&A-2)?

Except for failures related to Code section 401(a)(17) (compensation limit), Code section 415 (contribution and benefit limits), and Code section 436 (defined benefit funding-based restrictions), there is no requirement under the Code to restore the overpayment to the plan. Therefore, the corrective payment referenced in EPCRS (section 6.06 (and section 2.04 or 2.05 of Appendix B) of Rev. Proc. 2021-30) is optional.

Note that related failures may still require a corrective payment, such as (1) an overpayment due to an incorrect allocation of a profit-sharing contribution under a plan resulting in benefit underpayments to others, or (2) to prevent or restore an impermissible forfeiture in accordance with Code section 411.

3. Can plan sponsors still seek recoupment of inadvertent benefit overpayments from overpayment recipients (Q&A-3)?

Yes. Even though plan sponsors are not required to seek recoupment of inadvertent benefit overpayments from the recipient, they are still permitted to do so. For example, a plan sponsor may continue to use the overpayment correction methods under EPCRS (see section 6.06(3)(c) and (4)(c) (and section 2.05(2)(c) of Appendix B) of Rev. Proc. 2021-30). However, consideration should be given to ERISA section 206(h), which as noted above, imposes certain conditions on in recoupment from a participant or beneficiary. Notice 2024-77 does not address ERISA section 206(h).

4. Are inadvertent benefit overpayments eligible rollover distributions (Q&A-4)?

In the case of an inadvertent benefit overpayment that was transferred to an eligible retirement plan, any portion of the overpayment for which recoupment is not sought retains its treatment as an eligible rollover distribution, provided that the payment would have been an eligible rollover distribution but for being an overpayment and the overpayment is not attributable to a Code section 401(a)(17) or 415 failure.

Any portion of the overpayment for which recoupment is sought is treated as an eligible rollover distribution (if it otherwise would have been absent the overpayment) if repaid to the originating plan. Therefore, the amount that is sought and transferred back to the originating plan is treated both as an eligible rollover distribution from the originating plan and as an eligible rollover distribution transferred back to the originating plan, regardless of the plan terms.

However, if the portion of the overpayment for which recoupment is sought is not repaid to the originating plan, it is not treated as an eligible rollover distribution, and in accordance with EPCRS, the plan sponsor must notify the individual that the unreturned portion is not eligible for favorable tax treatment (*i.e.*, not eligible for tax-free rollover). This notice can be combined with the recoupment request.

These rules apply as of December 29, 2022, regardless of when the inadvertent benefit overpayment was made.

5. What is the correction procedure for an inadvertent benefit overpayment resulting from a Code section 436 failure (Q&A-5)?

For a Code section 436 failure that occurs as a result of an inadvertent benefit overpayment, to the extent the overpayment is not recouped on behalf of the plan from the recipient, the plan sponsor or another person must make a corrective payment under the applicable EPCRS provisions. The rollover treatment for the overpayment follows the rules under Q&A-4 above.

6. What is the correction procedure for an inadvertent benefit overpayment resulting from a Code section 401(a)(17) or 415 failure (Q&A-6)?

A plan must observe the limitations imposed by Code sections 401(a)(17) and 415 and may enforce those limitations using any method approved by the IRS for recouping benefits previously paid or allocations previously made in excess of those limitations. Therefore, in the case of a Code section 401(a)(17) or 415 failure, a corrective payment must be made to the plan (either by the individual or the plan sponsor or another party) in accordance with EPCRS. To the extent that the overpayment is not recouped by the recipient, it is not treated as an eligible rollover distribution, and as noted in Q&A-4 above, the plan sponsor must notify the individual that any unreturned portion is not eligible for favorable tax treatment (*i.e.*, not eligible for tax-free rollover). This notice can be combined with the recoupment request.

7. Can a retroactive plan amendment to increase benefits be permitted if the benefit now violates Code sections 401(a)(17), 415, or 436 for a past year (Q&A-7)?

No. Although a plan sponsor has the ability to correct inadvertent benefit overpayments by plan amendment, an amendment to increase past benefit payments in a manner that results in a violation of Code sections 401(a)(17) or 415 for a past year is not permitted. Similarly, an amendment to increase past benefits that results in a Code section 436 failure for a past year is permitted only if contributions are made in accordance with Code section 436(c)(2) and section 6.02(4) of Rev. Proc. 2021-30.

8. Are there any provisions of EPCRS that are modified or are no longer applicable for inadvertent benefit overpayments (Q&A-8)?

The following provisions of Rev. Proc. 2021-30 (EPCRS) are modified or are no longer applicable with respect to an inadvertent benefit overpayment:

- the definition of “overpayment” is revised by Notice 2024-77;
- the requirement to notify an individual that an overpayment is not an eligible rollover distribution no longer applies if recoupment is not sought (or sought and returned);
- the requirement of a corrective payment (other than as noted above for Code section 401(a)(17), 415, or 436 failures); and
- the 6% excise tax (Code section 4973) and additional 10% tax (Code section 72(t)) relief no longer applies if overpayment is eligible for rollover treatment.

Next Steps

Notice 2024-77 is helpful for plans that wish to update plan procedures for addressing overpayments. For any plan overpayment, be sure to consider EPCRS correction methods (as modified by the Notice) and the available correction procedures for an inadvertent benefit overpayment. Remember that the rollover treatment varies depending on if recoupment is sought, which also impacts the applicable reporting and withholding treatment. Last but not least, it is important to keep in mind that ERISA section 206(h) imposes certain conditions on a fiduciary’s ability to recoup benefit overpayments from participants and beneficiaries.