



# Employers Now Have New Opportunities For Self-Correction Under EPCRS

Insights

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The Internal Revenue Service recently amended its Employee Plans Compliance Resolution System (EPCRS) to allow more retirement plan qualification failures to be self-corrected, including retroactive plan amendments. This is welcome news for employers. The changes to EPCRS in Revenue Proc. 2019-19 are intended to facilitate plan compliance while reducing associated costs by allowing plan sponsors more opportunities to self-correct. The changes took effect on April 19, 2019, and supersede Revenue Procedure 2018-52.

## Background

EPCRS permits employers that sponsor retirement plans (including SEP and SIMPLE IRA plans) to identify and follow delineated procedures to correct failures in the plan's documentation and operations that violate Sections 401(a), 403(a), 403(b), 408(k), or 408(p) of the Code. EPCRS offers three types of correction programs:

1. **Self-Correction Program (SCP)** – allows employers to correct certain plan failures without contacting the IRS or paying a user fee. Under SCP, an employer simply corrects the error based on EPCRS guidance and documents the correction internally. SCP is available for “insignificant” failures or significant failures that are corrected no later than the end of the second plan year following the year in which the failure occurred. Previously, SCP did not allow correction by retroactive amendment to conform the plan terms to the administrative practices giving rise to the failure or to correct failures to timely adopt required amendments to maintain qualified status.
2. **Voluntary Correction Program (VCP)** – allows employers to correct failures not eligible for self-correction by submitting an application to the IRS with a proposed correction of the failures. If successful, the IRS will approve the proposed correction and issue a compliance statement approving the correction, including any modifications to the proposed correction required by the IRS.
3. **Audit CAP** – generally provides for correction of failures that are discovered during an IRS audit or otherwise not corrected under SCP or VCP.

Employers generally prefer to utilize SCP when available because they can avoid submitting a formal application to the IRS, which requires payment of the user fee ranging from \$1,500 to \$3,500 depending on the plan's net assets.

## **Revenue Procedure 2019-19**

Revenue Procedure 2019-19 expands the applicability of SCP by permitting the self-correction of certain plan document failures, providing additional correction options and possible relief from deemed distributions for certain failures involving plan loans to participants, and adding new opportunities for correcting certain operational failures by plan amendment. As a result, employers have more opportunity to correct these failures without being required to file a VCP submission with the IRS and paying the associated user fee. We have summarized the more significant opportunities provided by Rev. Proc. 2019-19 below.

### ***Correcting Plan Document Failures By Retroactive Amendment***

If otherwise eligible to correct under SCP, the sponsor of a qualified retirement plan may correct certain plan document failures under SCP other than the initial failure to adopt a qualified plan or the failure to adopt a written 403(b) plan document timely. Plan document failures under SCP are always treated as significant failures and may only be corrected under SCP if the plan, as of the date of correction, has a favorable determination letter and the correction is made within the SCP correction period.

The correction period generally extends to the last day of the second plan year following the plan year for which the failure occurred, though an extension to the SCP correction period is available if the failure relates only to transferred assets or to a plan assumed in connection with a corporate merger, acquisition, or other similar employer transaction. Importantly, the late adoption of discretionary amendments is not considered a plan document failure eligible for correction under these new provisions.

### ***Correcting Administrative Failures By Retroactive Amendment***

An employer may utilize a retroactive amendment to conform the written plan to the plan's operations under the SCP if three conditions are satisfied:

- the corrective amendment results in an increase of a participant's benefit, right, or feature under the plan;
- the increase in the benefit, right, or feature is provided to all employees eligible to participate in the plan; and
- the increase in the benefit, right, or feature was permitted under the Code and satisfies the correction principles in section 6.02 of Rev. Proc. 2019-19 and any other applicable rules in the EPCRS revenue procedure.

Self-correction through use of a retroactive amendment is not available if the operational failure does not provide for a uniform increase in benefits, rights or features to all employees eligible to participate in the plan. However, correction under VCP may still be an option.

### ***Correcting Plan Loan Failures***

The SCP provisions now expressly permit correction of a failure to repay a plan loan according to plan terms (i.e., a defaulted loan). The correction methods for this failure under Rev. Proc 2019-19 are generally the same as those provided under the previous Revenue Procedure – correction by either a single-sum repayment, re-amortization of the outstanding loan balance, or a combination of the two. However, this correction method is not available if the five-year maximum period for repayment of the loan has expired.

- ***Failure To Limit Number Of Plan Loans***

Employers may now correct a failure resulting from granting a participant more loans than are allowed by the plan's terms by adopting a retroactive plan amendment if certain conditions are met. Section 2.07(3) of Appendix B addresses this new correction method and provides that the correction is only available if: (i) the amendment satisfies Code Section 401(a); (ii) the plan amendment would have satisfied all legal requirements in effect on the date the defective loans were first made available; and (iii) the plan loans (including plan loans that exceed the number permitted under the terms of the plan) were available to either all participants or solely to one or more participants who were non-highly compensated employees.

- ***Failure To Obtain Spousal Consent For Plan Loans As Required By Plan Terms***

The SCP provisions now expressly permit correction of a failure to obtain spousal consent for a plan loan. Employers may self-correct an error to obtain spousal consent for plan loans by notifying the affected participant and spouse, and obtaining spousal consent for the plan loan. If spousal consent is not obtained, the failure must be corrected using either VCP

- ***Reporting Deemed Distributions***

Prior EPCRS guidance required that a deemed distribution under Code Section 72(p)(1) be reported as a taxable distribution for the year of default on Form 1099-R (Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.) if a plan loan failure is not corrected. However, an employer could request permission in a VCP application to report the deemed distribution on Form 1099-R in the year of correction instead of the year of the failure). Under Rev. Proc. 2019-19, a deemed distribution may now be reported in the year of correction instead of the year of the failure with no need to make a specific request.

## **What This Means For Employers**

Revenue Procedure 2019-19 offers new opportunities for employers to more efficiently address plan compliance issues. Employers should regularly review their plan's compliance and take immediate action when issues are uncovered. As described above, SCP is only available for a limited window of time following significant failures, after which point the only voluntary recourse available is through VCP. Employers should strategize plan corrections with their advisors or ERISA counsel to confirm what options are available to them and ensure that the corrective action chosen is in the best interests of the plan and participants

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