Plan Sponsors May Be Able to Use Surplus 401(h) Assets to Pay Medical Benefits for Older Active Employees

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Plan sponsors with overfunded Code Section 401(h) retiree medical accounts (each, a "***401(h) Account***") now have another way to use that surplus. Assets in a 401(h) Account can be used only for retiree medical benefits, and they cannot be returned to the employer until all retiree medical liabilities have been satisfied. As a result, surplus assets often go unused. In Rev. Rul. 2026-22, the IRS confirmed that these assets may also pay medical benefits for employees who are still working, and for their spouses and dependents. The condition is that the pension plan must permit those employees to take in-service distributions at age 59½ under Code Section 401(a)(36). Doing so does not violate Code Section 401(h) and does not put the plan's tax-qualified status at risk.

Under Treas. Reg. § 1.401-14(b)(1), an employee who is still working counts as "retired" for 401(h) purposes if the employee can receive retirement benefits under the plan without leaving employment. Employees eligible for age 59½ in-service distributions meet that test. The IRS expressly declined to say whether these employees can be treated as retired for any other tax purpose.

What Plan Sponsors Should Do

Sponsors with overfunded 401(h) Accounts should work with counsel to take the following steps:

- **Check the pension plan's distribution terms.** Confirm whether the plan permits in-service distributions at age 59½. If it does not, decide whether adding them makes sense for the plan.
- **Amend the plan.** The plan must be amended to allow the 401(h) Account to pay medical benefits for these employees under the active medical plan.
- **Confirm ongoing compliance.** Make sure the plan still meets the Code Section 401(h) requirements.
- **Compare the plan sponsor's facts with the ruling's facts.** In the ruling, no Code Section 420 transfers had been made to the 401(h) Account, and the account did not pay benefits for key employees. Sponsors whose facts differ should get advice before relying on the ruling.

A copy of Rev. Rul. 2026-22 is available here.

Retirement Plan Year-End Amendments and Action Items

There have been very few required amendments for retirement plans the past several years. 2026 is different! In case you haven't already heard, non-governmental retirement plans must be

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amended for required and discretionary changes under the CARES Act, SECURE Act, and SECURE 2.0 Act on or before December 31, 2026. Plan sponsors should consult plan counsel as soon as possible to ensure that the amendments can be drafted, finalized, and signed by the end of the year.

Plan sponsors also may need to adopt certain plan amendments, including, without limitation:

- Amendments to implement any discretionary plan design changes that are intended to be effective in 2026; and
- If the plan sponsor's controlled group acquired any new entities during the plan year and those entities have employees who will participate in the retirement plan, amendments to reflect their participation and any amendments necessary to credit prior service.

In addition to adopting any required and discretionary plan amendment by the end of the year, the following non-exhaustive list describes the annual notices for retirement plans, which generally must be distributed within a reasonable time prior to the start of the plan year. For calendar year plans, providing the notices outlined below by December 1, 2026, will meet that requirement in most cases.

- **Safe Harbor 401(k) Notice**: For 401(k) plans that are designed to comply with the safe harbor requirements of the Code.
- **Automatic Enrollment Notices**: For any plan that includes automatic enrollment provisions, which include qualified automatic contribution arrangements and eligible automatic contribution arrangements.
- **Qualified Default Investment Alternative ("*QDIA*") Notice**: For plans with participant-directed investments that include a QDIA in which a participant's account will be invested if the participant fails to make an investment election.
- **Annual Funding Notice**: For defined benefit plans.

Participant-directed individual account plans, such as 401(k) plans, operating on a calendar year plan year also must distribute third-quarter fee disclosure notices by November 14, 2026. Note that November 14 falls on a weekend in 2026, so plan sponsors should prepare accordingly.

Finally, plan sponsors should consider making necessary updates to summary plan descriptions and enrollment materials to reflect any plan amendments and changes to the various plan limits for 2027. It is expected that the IRS will publish the updated annual limits soon.

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