

401(k) Plans For Small Businesses

Why 401(k) Plans?

401(k) plans can be a powerful tool in promoting financial security in retirement. They are a valuable option for businesses considering expanding their employee benefits to include a retirement plan, providing benefits to employees and their employers.

Employers start a 401(k) for a host of reasons:

- A well-designed 401(k) plan can help attract and keep talented employees.
- It allows participants to decide how much to contribute to their accounts on a before-tax basis.
- Employers are entitled to a tax deduction for their contributions to employees' accounts.
- A 401(k) plan benefits a mix of rank-and-file employees and owner/managers.
- The money contributed may grow through investments in stocks, mutual funds, money market funds, savings accounts, and other investment vehicles.
- Contributions and earnings generally are not taxed by the Federal government or by most State governments until they are distributed.
- A 401(k) plan may allow participants to take their benefits with them when they leave the company, easing administrative burdens.

This expanded version of the printed booklet highlights some of a 401(k) plan's advantages, some of your options and responsibilities as an employer operating a 401(k), and the differences among the types of 401(k) plans. For more information, a list of resources for you and for prospective 401(k) participants is included at the end of this booklet.

Establishing A 401(k) Plan

When you establish a 401(k) plan you must take certain basic actions. For instance, one of your first decisions will be whether to set up the plan yourself or consult a professional or financial institution – such as a bank, mutual fund provider, or insurance company – to help you establish and maintain the plan.

Initial Actions

Here are four basic actions necessary to have a tax-advantaged 401(k) plan:

- Adopt A Written Plan
- Arrange A Trust Fund For The Plan's Assets
- Develop A Record Keeping System
- Provide Plan Information To Participants

Adopt A Written Plan

Plans begin with a written document that will serve as the foundation for day-to-day plan operations. If you have hired someone to help with your plan, that person likely will provide it. If not, consider obtaining assistance from a financial institution or retirement plan professional. In either case, you are bound by the terms of the plan document.

Before beginning the plan document, however, you will need to decide on the type of 401(k) plan that is best for you – a traditional 401(k), a safe harbor 401(k), or a SIMPLE 401(k) plan.

A **traditional 401(k) plan** offers the maximum flexibility of the three types of plans. Employers have discretion to make contributions on behalf of all participants, to Match employees' deferrals, or

do both. These contributions can be subject to a vesting schedule (which provides that an employee's right to employer contributions becomes nonforfeitable only after a period of time). In addition, a traditional 401(k) allows participants to make pre-tax contributions through payroll deductions. Annual testing ensures that benefits for rank and file employees are proportional to benefits for owners/managers.

A **safe harbor 401(k) plan** is similar to a traditional 401(k) plan, but, among other things, must provide for employer contributions that are fully vested when made. However, the safe harbor 401(k) is not subject to many of the complex tax rules that are associated with a traditional 401(k) plan, including annual nondiscrimination testing.

Both the traditional and safe harbor plans are for employers of any size and can be combined with other retirement plans.

A **SIMPLE 401(k) plan** was created so that small businesses could have an effective cost-efficient way to offer retirement benefits to their employees. A SIMPLE 401(k) plan is not subject to the annual nondiscrimination tests that apply to the traditional plans. Similar to a safe harbor 401(k) plan, the employer is required to make employer contributions that are fully vested. This type of 401(k) plan is available to employers with 100 or fewer employees who received at least \$5000 in compensation from the employer for the preceding calendar year. In addition, employees that are covered by a SIMPLE 401(k) plan May not receive any contributions or benefit accruals under any other plans of the employer.

Once you have decided on the type of plan for your company, you will have flexibility in choosing some of the plan's features -- such as which employees can contribute to the plan and how much. Law requires other features written into the plan. For instance, the plan document must describe how certain key functions are carried out, such as how contributions are deposited in the plan.

Arrange A Trust Fund For The Plan's Assets

A plan's assets must be held in trust to assure that assets are used solely to benefit the participants and their beneficiaries. The trust must have at least one trustee to handle contributions, plan investments, and distributions to and from the 401(k) plan. Since the financial integrity of the plan depends on the trustee, this is one of the most important decisions you will make in establishing a 401(k) plan. If you set up your plan through insurance contracts, the contracts do not need to be held in trust.

Develop A Record Keeping System

An accurate record keeping system helps track the flow of money – contributions, earnings and losses in participants' accounts, plan investments, expenses, and benefit distributions. If you have a contract administrator or financial institution assist in managing the plan, that entity typically will help in keeping the required records. In addition, a record keeping system will help you, your plan administrator, or financial provider prepare the plan's annual return/report that must be filed with the Federal government.

Provide Plan Information To Employees

As you put your 401(k) plan in place, you must notify employees who are eligible to participate in the plan about your plan's benefits and requirements. A Summary Plan Description or SPD is the primary vehicle to inform participants and beneficiaries about the plan and how it operates. The SPD typically is created with the plan document. You will need to send it to all plan participants. In addition you may want to provide your employees with information that emphasizes the advantages of joining your 401(k) plan. Employee perks – such as pre-tax contributions to a 401(k) plan, employer contributions (if you choose to make them), and compounded tax-deferred earnings – help highlight the advantages of participating in the plan.

Operating A 401(k) Plan

Once you have established a 401(k) plan, you assume certain responsibilities in operating the plan. If you hired someone to help in setting up your plan, that arrangement also may have included help in operating the plan. If not, another important decision will be whether to manage the plan yourself or hire a professional or financial institution to take care of some or most aspects of operating the plan. Elements of a plan that need to be handled include:

- Participation
- Contributions
- Vesting
- Nondiscrimination
- Investing 401(k) Monies
- Fiduciary Responsibilities
- Disclosing Plan Information To Participants
- Reporting To Government Agencies
- Distributing Plan Benefits

Participation

Typically, a plan benefits a mix of rank-and-file employees and owner/managers. However, some employees may be excluded from a 401(k) plan if they:

- Have not attained age 21;
- Have not completed a year of service; or

Are covered by a collective bargaining agreement that does not provide for participation in the plan, if retirement benefits were the subject of good faith bargaining.

Employees cannot be excluded from a plan merely because they are older workers.

Contributions

Another design option you will have in establishing and operating a 401(k) plan is deciding on your business's contribution (if any) to participants' 401(k) accounts.

Traditional 401(k) Plan - If you decide to contribute to your employees' 401(k) accounts, you have further options. You can contribute a percentage of each employee's compensation to the employee's account (called a nonelective contribution), or you can match the amount your employees decide to contribute (within the limits of current law) or you can do both.

For example, you may decide to add a percentage – say 50 percent – to an employee's contribution, which results in a 50-cent increase for every dollar the employee sets aside. Using a matching contribution formula will provide additional employer contributions only to employees who make deferrals to the 401(k) plan. If you choose to make nonelective contributions, the employer makes a contribution to each eligible participant's account, whether or not the participant decides to make a salary deferral to his or her 401(k) account.

Under a traditional 401(k) plan, you may have the flexibility of changing the amount of nonelective contributions each year, according to business conditions.

Safe Harbor 401(k) Plan - Under a safe-harbor plan, you can match each eligible employee's contribution, dollar for dollar, up to 3 percent of the employee's compensation, and 50 cents on the dollar for the employee's contribution that exceeds 3 percent, but not 5 percent, of the employee's compensation. Alternatively, you can make a nonelective contribution equal to 3 percent of an employee's compensation to each eligible employee's account. Each year you must make either the matching contributions or the nonelective contributions.

SIMPLE 401(k) Plan - Employer contributions to a SIMPLE 401(k) plan are limited to either:

- A dollar-for-dollar matching contribution, up to 3 percent of pay; or
- A nonelective contribution of 2 percent of pay for each eligible employee.

No other employer contributions can be made to a SIMPLE 401(k) plan, and employees cannot participate in any other retirement plan of the employer.

The maximum amount that employees can contribute to their SIMPLE 401(k) accounts is \$12,000 in 2013, with estimated annual increases in \$500 increments each year.

An additional catch-up contribution is allowed for employees aged 50 and over. The additional contribution amount is \$2,500 in 2013.

Contribution Limits - Total employer and employee contributions to all of an employer's plans are subject to an overall annual limitation - the lesser of:

- 100 percent of the employee's compensation, or
- \$50,000 in 2012.
- \$51,000 in 2013.

In addition, the amount employees can contribute (401(k) elective deferrals) to their accounts before taxes under a traditional or safe harbor 401(k) plan is limited to \$17,500 in 2013, with estimated annual increases in \$500 increments each plan year.

Traditional and safe harbor 401(k) plans can allow the following additional catch-up contributions for employees aged 50 and over:

- 2013 - \$5,500

Vesting

Employee salary deferrals are immediately 100 percent vested – that is, the money that an employee has put aside through salary deferrals cannot be forfeited. When an employee leaves employment, he/she is entitled to those deferrals, plus any investment gains (or losses) on their deferrals.

In **SIMPLE 401(k) plans and safe harbor 401(k) plans**, all required employer contributions are always 100 percent vested.

In **traditional 401(k) plans**, all employee deferrals are 100 percent vested. You can design your plan so that employer contributions become vested over time, according to a vesting schedule.

Nondiscrimination

Realizing 401(k) plan tax benefits requires that plans provide substantive benefits for rank-and-file employees, not only for business owners and managers. These requirements are referred to as non-discrimination rules and cover the level of plan benefits for rank-and-file employees compared to owners/managers.

Traditional 401(k) plans are subject to annual testing to assure that the amount of contributions made on behalf of rank-and-file employees is proportional to contributions made on behalf of owners and managers. Safe harbor 401(k) plans and SIMPLE 401(k) plans are not subject to annual non-discrimination testing.

Investing 401(k) Monies

After you decide on the type of 401(k) plan, you can consider the variety of investment options. One decision you will need to make in designing a plan is whether to permit your employees to direct the investment of their accounts or to manage the monies on their behalf. If you choose the former, you also need to decide what investment options to make available to the participants. Depending on the plan design you choose, you may want to hire someone either to determine the investment options to make available or to manage the plan's investments. Continually monitoring the investment options ensures that your selections remain in the best interests of your plan and its participants.

Fiduciary Responsibilities

Many of the actions needed to operate a 401(k) plan involve the use of discretion in making decisions regarding the plan or exercising control over the assets of the plan -- whether you hire someone to manage the plan for you or do some or all of the plan management yourself. Using discretion in administering and managing the plan or controlling the plan's assets makes you or the entity you hire a plan fiduciary to the extent of that discretion or control. Thus, fiduciary status is based on the functions performed for the plan, not a title. Be aware that hiring someone to perform fiduciary functions is itself a fiduciary act.

There are a number of decisions with respect to a plan that are business decisions, rather than fiduciary decisions. For instance, the decisions to establish a plan, to include certain features in a plan, to amend a plan and to terminate a plan are business decisions. When making these decisions, you are acting on behalf of your business, not the plan, and therefore, you would not be a fiduciary. However, when you take steps to implement these decisions, you (or those you hire) are acting on behalf of the plan and thus, in making decisions, are acting as fiduciaries.

Basic Responsibilities - Those persons or entities that are fiduciaries are in a position of trust with respect to the participants and beneficiaries in the plan. The fiduciary's responsibilities include:

- Acting for the exclusive purpose of providing benefits to workers participating in the plan and their beneficiaries and solely in the interest of those participants and beneficiaries;
- Carrying out duties with the care, skill, prudence, and diligence of a prudent person familiar with such matters.
- Following the plan documents;
- Diversifying plan investments; and
- Defraying reasonable expenses of the plan.

These are the responsibilities that fiduciaries need to keep in mind as they carry out their duties – whether they are managing the whole plan or carrying out specific functions. The responsibility to be prudent covers a wide range of functions needed to operate a plan. And, since all these functions must be carried out in the same manner as a prudent person would carry them out, it may be in your best interest to consult experts in the various fields, such as investments and accounting.

In addition, for some functions, there are specific rules that help guide the fiduciary. For example, if your plan provides for salary reductions from employees' paychecks for contribution to the plan, then these contributions must be timely deposited. The law states that this must be accomplished as soon as it is reasonably possible to do so, but no later than the 15th business day of the month following the payday. If you can reasonably make the deposits in a shorter time frame, you need to make the deposits at that time.

Limiting Liability - With these responsibilities, there is also some potential liability. However, there are actions you can take to demonstrate that you carried out your responsibilities as well as ways to limit your liability.

The fiduciary responsibilities cover the process used to carry out the plan functions rather than simply the end results. For example, if you or someone you hire makes the investment decisions for the plan, an investment does not have to be a “winner” if the fiduciary can demonstrate it was part of a prudent overall diversified investment portfolio for the plan. Since a fiduciary needs to carry out activities through a prudent process, you should document the decision-making process to demonstrate the rationale behind the decision at the time it was made.

In addition to the steps above, there are other ways to limit potential liability. The plan can be set up to give participants control of the investments in their accounts. For participants to have control, they must have sufficient information on the specifics of their investment options. If properly executed, this type of plan limits your liability for the investment decisions made by participants. You can also hire a service provider or providers to handle some or most of the fiduciary functions, setting up the agreement so that the person or entity then assumes liability.

However, even if you do hire a financial institution or retirement plan professional to manage the whole plan, you retain some fiduciary responsibility for the decision to select and keep that person or entity as the plan’s service provider. Thus, you should document your selection process and monitor the services provided to determine if a change needs to be made.

Some items to consider in selecting a plan service provider:

- Information about the firm itself: affiliations, financial condition, experience with 401(k) plans, and assets under their control;
- A description of business practices: how plan assets will be invested if the firm will manage plan investments or how participant investment directions will be handled, and proposed fee structure;
- Information about the quality of prospective providers: the identity, experience, and qualifications of the professionals who will be handling the plan’s account; any recent litigation or enforcement action that has been taken against the firm; the firm’s experience or performance record; the firm’s plans (if any) to work with its affiliates in handling the plan’s account; and whether the firm has fiduciary liability insurance.

Once hired, these are additional actions to take when monitoring a service provider:

- Review the service provider’s performance;
- Read any reports they provide;
- Check actual fees charged;
- Ask about policies and practices (such as trading, investment turnover, and proxy voting); and
- Follow up on participant complaints.

Prohibited Transactions And Exemptions - There are certain transactions that are prohibited under the law to prevent dealings with parties that have certain connections to the plan, self-dealing, or conflicts of interest that could harm the plan. However, there are a number of exceptions under the law, and additional exemptions may be granted by the U.S. Department of Labor, where protections for the plan are in place in conducting the transactions.

For example, there is an exemption that permits you to offer loans to participants through your plan. If you do, the loan program must be carried out in such a way that the plan and all other participants are protected. Thus, the decision with respect to each loan request is treated as a plan investment and considered accordingly.

Bonding - Finally, persons handling plan funds or other plan property generally must be covered by a fidelity bond to protect the plan against fraud and dishonesty.

Disclosing Plan Information To Participants

Plan disclosure documents keep participants informed about the basics of plan operation, alert them to changes in the plan's structure and operations, and provide them a chance to make decisions and take timely action with respect to their accounts.

The **Summary Plan Description (SPD)** – the basic descriptive document - is a plain-language explanation of the plan and must be comprehensive enough to apprise participants of their rights and responsibilities under the plan. It also informs participants about the features and what to expect of the plan. Among other things, the SPD must include information about:

- When and how employees become eligible to participate in the 401(k) plan;
- The contributions to the plan;
- How long it takes to become vested;
- When employees are eligible to receive their benefits;
- How to file a claim for those benefits; and
- Basic rights participants have under the federal retirement law, the Employee Retirement Income Security Act (ERISA).

The SPD should include an explanation about the administrative expenses that will be paid by the plan. This document must be given to participants when they join the plan and to beneficiaries when they first receive benefits. SPDs must also be redistributed periodically during the life of the plan.

A **Summary of Material Modification (SMM)** appraises participants of changes made to the plan or to the information required to be in the SPD. The SMM or an updated SPD must be automatically furnished to participants within a specified number of days after the change.

An **Individual Benefit Statement (IBS)** shows the total plan benefits earned by a participant and information on their vested benefits. The IBS must be provided when a participant submits a written request, but no more than once in a 12-month period, and automatically to certain participants who have terminated service with the employer. In addition, many plans choose to provide on a quarterly basis individual account statements that show the assets in a participant's account, how they are invested, and any increases (or decreases) in investments during the period covered by the statement.

A **Summary Annual Report (SAR)** is a narrative of the plan's annual return/report, the Form 5500, filed with the Federal government (see Reporting to Government Agencies for more information). It must be furnished annually to participants.

A **blackout period notice** gives employees advance notice when a blackout period occurs, typically when plans change record keepers or investment options, or when plans add participants due to corporate mergers or acquisitions. During a blackout period, participants' rights to direct investments, take loans, or obtain distributions are suspended. There are strict rules that apply before and during blackout periods.

A Fee Disclosure notice appraises participants of annual fees charged by their brokers, recordkeepers & TPAs.

Reporting To Government Agencies

In addition to the disclosure documents that provide information to participants, plans must also report certain information to government entities.

Form 5500-Series - Plans are required to file an annual return/report with the Federal government. Depending on the number and type of participants covered, most employers who have a 401(k) plan must file one of the two following forms:

- Form 5500, Annual Return/Report of Employee Benefit Plan, or
- Form 5500-EZ, Annual Return of One-Participant (Owners and Spouses) Retirement Plan

For 401(k) plans, the Form 5500 is designed to disclose information about the plan and its operation to the IRS, the U.S. Department of Labor, plan participants, and the public.

Most one-participant plans (sole proprietor and partnership plans) with total assets of \$100,000 or less are exempt from the annual filing requirement. A final return/report must be filed when a plan is terminated regardless of the value of the plan's assets.

Form 1099-R - Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc. is given to both the IRS and recipients of distributions from the plan during the year. It is used to report distributions (including rollovers) from a retirement plan. See Form 1099-R and the Form 1099-R and 5498 Instructions for additional information.

Distributing Plan Benefits

Benefits in a 401(k) plan are dependent on a participant's account balance at the time of distribution (payout).

When participants are eligible to receive a distribution, they typically can elect to:

- Take a lump sum distribution of their account,
- Roll over their account to an IRA or another employer's retirement plan, or
- Purchase an annuity.

Terminating A 401(k) Plan

Although 401(k) plans must be established with the intention of being continued indefinitely, you (as an employer) may terminate your plan when it no longer suits your business needs. For example, you may want to establish another type of retirement plan in lieu of the 401(k) plan.

Typically, the process of terminating a 401(k) plan includes amending the plan document, distributing all assets, and filing a final Form 5500. You must also notify your employees that the 401(k) plan will be discontinued. Check with your plan's financial institution or a retirement plan professional to see what further action is necessary to terminate your 401(k). See Form 5310 and the Form 5310 Instructions for additional information.

Compliance

Even with the best intentions, mistakes in plan operation can still happen. The U.S. Department of Labor and IRS have correction programs to help 401(k) plan sponsors correct plan errors, protect participants and keep the plan's tax benefits. These programs are structured to encourage you to correct the errors early. Having an ongoing review program makes it easier to spot and correct mistakes in plan operations. See the Resources section for further information.

A 401(k) Checklist

1. Have you determined which type of 401(k) plan best suits your business?
2. Have you decided whether to make contributions to the plan, and, if so, whether to make nonelective and/or matching contributions? (Remember, you can design your plan so that you may change your rate of contributions if necessary due to business conditions.)
3. Have you decided to hire a financial institution or retirement plan professional to help with setting up and running the plan?
4. Have you adopted a written plan that includes the features you want to offer, such as whether participants will direct the investment of their accounts?

5. Have you notified eligible employees and provided them with information to help in their decision-making?
6. Have you arranged a trust fund for the plan assets or will you set up the plan solely with insurance contracts?
7. Have you developed a record keeping system?
8. Are you familiar with the fiduciary responsibilities?
9. Are you prepared to monitor the plan's service providers?
10. Are you familiar with the reporting and disclosure requirements of a 401(k) plan?

For help in establishing and operating a 401(k) plan, you may want to talk to a retirement plan professional that offers retirement plans – and take advantage of the help available.

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