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ERISA Newsletter

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Form 5500 Season – A Few Considerations John C. Hughes, Esq.



Spring is here and with that brings April showers, May flowers, and also draft annual IRS Form 5500s! Close review of the Form 5500 is advised to ensure it is properly prepared and does not unnecessarily raise red flags to the Department of Labor (“DOL”) and/or Internal Revenue Service (“IRS”). We routinely encounter situations where the Form 5500 is improperly completed and/or not timely filed.

Both the IRS and DOL comment that improperly completed Form 5500s will increase the probability that they may take a closer look at plan matters. The following is a short list of considerations and questions aimed at helping plan sponsor employers avoid government investigation otherwise prompted by a “wrong” answer on the Form 5500.

1. Review and follow the Form 5500 instructions, and carefully review the accuracy of your responses. It is the employer plan sponsor that submits this information under penalty of perjury, not the service provider who may have prepared the draft Form 5500.
2. Use the correct plan name, plan sponsor name, and employer identification number (“EIN”). We see a lot of missteps in this regard. Often, it is just an error; other times, changes occur as the result of M&A activity that are not recognized and/or are not appropriately addressed.
3. Retain appropriate proof of the Form 5500 filing (and the filing of the Form 5558 extension form). These steps are often overlooked by plan sponsors. It is easy to obtain such proofs in order to avoid an argument with the DOL or IRS over the imposition of potentially significant fines for not filing or for filing late. In this regard, penalties for not filing or late filing can now be more than \$2,000 per day from the original filing due date.
4. If you do not file timely, participate in the DOL’s Delinquent Filer Voluntary Compliance (“DFVC”) program to avoid the more significant penalties discussed above.
5. The DOL issued a report not too long ago entitled “Assessing the Quality of Employee Benefit Plan Audits.” The report was very critical of the plan audit process and is bound to result in closer examinations of plan audit reports. As such, a close review of the associated audit reports in addition to the Form 5500s is warranted.

6. Properly identify, report, and correct late deposits (including preparing and filing Form 5330s). This remains a high priority issue for the DOL. Incorrect reporting and correction activity relative to this issue is rampant. Notably, we have encountered situations recently whereby the Form 5500 reporting for this issue prompts a letter from the DOL implying that if the employer does not correct under the DOL's Voluntary Fiduciary Correction Program ("VFCP") that the plan will be more broadly investigated.
7. The IRS added some new questions to Form 5500 last year aimed at identifying compliance issues (or more likely, noncompliance). After issuing the new version of the form with the questions, the IRS stated those questions should not be answered. Accordingly, do not answer those questions. Answering them might highlight a failure to follow the Form 5500 instructions, and may also communicate compliance problems.
8. Was a Form 8955-SSA appropriately prepared? This is a related filing generally due the same day as the Form 5500. Did it report small balances still sitting in the plan that should have been distributed (i.e., balances of \$5,000 or less)? Failure to automatically distribute (or rollover) small balances as provided by the plan is a qualification failure. This issue reveals itself practically every time we look at a Form 8955-SSA. It is easily avoidable.
9. The DOL and IRS often state that where an answer on the Form 5500 is described as "other," it will have a tendency to garner their attention. Accordingly, effort should be made to avoid using that response. As an example, we have seen recently loan interest being reported as "other," when in fact the instructions specifically provide a place to report accrued, but unpaid interest on participant loans.
10. Are you filing for all plans that must file, such as flexible savings accounts and/or health reimbursement accounts? Have "top hat" statements been filed with the DOL to avoid filing Form 5500s for any nonqualified deferred compensation plans?
11. If you are filing a Form 5500-SF (i.e., the short form), are you fulfilling the conditions for being able to do so, or is a regular Form 5500 required?

In summary, close review of the Form 5500 will likely save time and money later including the burden and expense associated with your staff responding to DOL and/or IRS inquiries and investigations, as well as the additional time and involvement of attorneys, CPAs, and other service providers. It is better to address these issues correctly up front. It also provides a good opportunity to identify weaknesses in fiduciary processes and/or qualification failures. It is better to discover and address those matters sooner rather than later.

For more information, please contact Jeff Mandell (jeff@erisalawgroup.com) or John C. Hughes (john@erisalawgroup.com), or call 208-342-5522 or 1-866-374-7252.

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