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ERISA Alert

205 N. 10th Street, Suite 300 · Boise, Idaho 83702
208.342.5522 · 866.ERISALAW
www.erisalawgroup.com

The Flurry Associated With Form 5500 Filings Is A Good Thing

John C. Hughes, Esq.

The last several weeks has predictably been a busy time given the annual last minute scramble to properly complete many Form 5500s (and the associated audit reports) by the extended October 15 due date for calendar year plans. The process typically involves back and forth between plan sponsors, recordkeepers, CPAs, and benefits counsel. While this process is undoubtedly frustrating and burdensome, it provides employer plan sponsors (and the individual plan fiduciaries) with important benefits and protections.

As the Internal Revenue Service ("IRS") and Department of Labor ("DOL") point out, properly completing the Form 5500 is compelling. This includes a sufficient review of the drafts prior to filing. A Form 5500 (and/or an audit report) that lacks information, contains information that does not make sense, and/or contains conflicting information may very well trigger an IRS or DOL investigation of the plan. Such investigations will typically be considerably more burdensome, time consuming, and costly to an employer than would ensuring the Form 5500 is appropriately completed in the first place.

Additionally, government investigations increase the probability that qualification failures and/or fiduciary breaches will be discovered, potentially leading to the imposition of significant penalties. The proper review of a draft Form 5500 and audit report typically goes a long way in terms of identifying "wrong" answers so that red flags are not unnecessarily raised. A proper review also typically goes a long way in identifying problems that can be fixed before they spiral out of control. Ignorance is not bliss. Unknown and uncorrected plan problems usually only become more aggravated and complicated as time goes on.

There is a laundry list of omissions, inaccuracies, confusing, and/or incomplete entries that we often identify and appropriately address (see, for example, our July 2014 Newsletter). One of the more "usual suspect" wrong answers are descriptions of entries on the Form 5500 as "other," instead of actually describing the entry. For example, an investment consultant's services might be coded as "other services" instead of "consulting" on Schedule C of the Form 5500. The cryptic "other" description is not necessary, and it will have a tendency to garner the attention of the IRS and DOL. They may ask themselves (and more concerning, perhaps ask the employer, unfortunately at that point under investigation) -- "What are these 'other' services that are being performed?" Another Form 5500 related issue that presents itself with great frequency is the incidence of late deposit of participant contributions (that is, 401(k) contributions). It is

critical to properly (and quickly) correct this problem, and also to properly report it on the Form 5500 and in the audit report. This will ensure accuracy, and also decrease the likelihood of triggering an investigation.

Proper filing is perhaps even more important than ever for several other reasons. Two of these jump out. First, earlier this year, the DOL's Employee Benefits Security Administration ("EBSA") issued a lengthy report entitled "Assessing the Quality of Employee Benefit Audits." The EBSA report criticizes the quality of many employee benefit plan audit reports. The EBSA report calls for changes in the process, and the laws, regarding audit report preparation. In the meantime, the existence of the EBSA report will undoubtedly bring increased focus and attention to the audit reports that plan sponsors file with their Form 5500s. This will likely lead to scrutiny of overall plan matters for plan sponsors who file sloppy audit reports.

Second, the IRS recently announced that it is teaming up with DOL to identify employers who are required to file Form 5500s, but failed to do so. The IRS notes that penalties for missed filings may be imposed. In general, those penalties may be as high as $1,125 per day per Form 5500 that is not filed, until the Form 5500 is filed. The IRS indicates that it will use payroll and plan data in its records to identify missed filings. Accordingly, not surprisingly, the failure to file a Form 5500 will not keep a plan "below the radar," as there are other ways for the IRS to identify where there is a plan in place. Any plan sponsor contacted by the IRS relative to this issue should be sure to promptly respond. The IRS indicates that a "[f]ailure to respond may not, of itself, be cause for an audit; however, a failure to file a required return will necessitate other measures and possibly result in assessed penalties to ensure compliance."

In our experience, the nonfiling issue is most prevalent with regard to health and other welfare plans; the issue also often presents itself frequently with regard to the final Form 5500 filing of a merged retirement plan. The nonfiling issue raises an interesting question, which is whether a Form 5500 that is filed might be incomplete to such an extent that the IRS or DOL considers it to be delinquent, and thus subject to nonfiler penalties. This gets back to the discussion we began with -- it is best to ensure that your Form 5500 (and audit report) are properly completed and timely filed in the first place, so as to avoid discovering the answer to this question.

In summary, the Form 5500 content (like other plan matters) is the responsibility of the employer, not the TPA or other service providers. The process discussed above need not take place at the last minute, even though it often does. In any event, plan sponsors should be vigilant when it comes to this critical filing requirement. This will assist employers in filing correctly, not raising unnecessary red flags, and assessing matters so that they may discover, mitigate, or correct any problems early and on their own.

For more information for your plan, 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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