Employee Benefits Course

DOL and IRS HOT TOPICS

Presenters

LAURA TAYLOR

Senior Consulting Manager, Plante Moran Employee Benefits Consulting

Laura is a senior manager in our employee benefits consulting group with more than 11 years of experience. She is a firm-wide technical leader for reporting and compliance issues related to qualified retirement and health and welfare benefit plans. Laura leads the team of consultants who prepare Forms 5500 and 8955-SSA. Her practice includes preparation and review of Forms 5500 and 8955-SSA; and design, administration, and assistance with compliance issues associated with qualified retirement plans. She frequently consults with clients on Form 5500 issues and has lead client training regarding Form 5500 and Form 5500 Schedule C reporting and issues. Laura is a member of the AICPA's 5500 Proposal Task Force, where she worked with audit and tax professionals to develop the AICPA's responses to the Department of Labor and other governmental agencies' two significant proposed changes to the Regulations and the Form 5500. Laura is also a member of an ad hoc group of benefit plan service providers and Form 5500 preparers. This group meets regularly to discuss upcoming accounting and regulatory changes and collaborates so that these providers can deliver best in class service to their respective clients. Laura works closely with our benefit plan audit clients to navigate complex issues such as identifying and correcting plan operational errors.

ZAC LAUMER, JD

Consultant, Plante Moran Employee Benefits Consulting

Zac is a consultant in our Employee Benefits Consulting Group and a licensed attorney. Zac has experience working with a wide range of financial, manufacturing, service, governmental and not-for-profit entities. Specifically, Zac's experience includes consulting on best practices and federal regulations related to qualified retirement plans and non-qualified deferred compensation arrangements.

Agenda

- IRS compliance updates
- Department of Labor (“DOL”) deposit requirements
- 457 regulation changes
- Form 5500 filing requirements and recent proposed changes
- Fiduciary/fee requirements

IRS Compliance Updates

- Compliance is still a top priority for IRS
- Current projects include:
  - 401(k) 4971(a) Tax reporting: IRS reviewing calculation and payment of excise tax paid for late deposits; triggered by filing Form 5330
  - Asset mismatch: IRS reviewing Forms 5500 where beginning of year assets reported are not consistent with prior year end of year
  - Failure to provide benefits: IRS reviewing plans that failed to provide benefits when required - triggered by reporting failure on Form 5500 (notable, missed RMDs should be reported)

IRS Compliance Updates

- Current projects continued:
  - Improper deduction: IRS comparing employer contributions reported on Form 5500 to deduction amounts reported on Form 1120 to identify discrepancies
  - Review for proper vesting upon partial termination
- Independent compliance reviews continue to be recommended – per recent survey approximately 60% conducted compliance review in the past 2 years

DOL Deposit Requirements

- Background
  - Participant deferral amounts become plan assets as of the earliest date they can reasonably be segregated from the employer's assets
  - In no event later than the 15th business day of the month following the month in which the participant contributions are deducted from pay
  - Failure to deposit amounts timely results in a prohibited transaction – the employer is considered to be "using" plan assets

DOL Deposit Requirements

- What is the definition of "Timely"?
  - "Timely" is generally determined based on an employer's specific circumstances
  - 15-day rule is not a safe harbor
    - Benefit plan audit standards require auditors to test contributions to ensure they fall within the 15th day rule
    - Note this is not the standard the DOL applies
    - Deferrals must be deposited as soon as reasonably possible after each payroll
  - Small (fewer than 100 participants at the beginning of the plan year) plans have a 7 business day safe harbor to deposit deferrals

DOL Deposit Requirements

- Example

Large employer withholds/deposits the following deferrals on the following dates:

Deferral Amount	Payroll Date	Deposit Date
$100,000	January 15, 2017	January 18, 2017
$125,000	January 29, 2017	January 29, 2017
$120,000	February 15, 2017	March 1, 2017
$130,000	February 26, 2017	March 1, 2017
$115,000	March 15, 2017	March 17, 2017
$120,000	March 31, 2017	April 2, 2017
$135,000	April 15, 2017	April 28, 2017
$130,000	April 30, 2017	May 7, 2017
$120,000	May 14, 2017	May 18, 2017
$125,000	May 28, 2017	May 28, 2017

DOL Deposit Requirements

- Example (continued)

Payroll Date	Business Days ‘till Deposit
January 15, 2017	1
January 29, 2017	0
February 15, 2017	10
February 26, 2017	1
March 15, 2017	2
March 31, 2017	2
April 15, 2017	9
April 30, 2017	5
May 14, 2017	2
May 28, 2017	0

Analysis:

-7 deposits made in 2 days or less

- 3 deposits made more than two days from withholding

*- 2 days may be the “**earliest date on which contributions can reasonably be segregated from the employer’s general assets”***

DOL Deposit Requirements

- Correction
  - To fully correct the late deposit of deferred amounts, plan sponsors must:
    - Deposit the deferred amounts, and
    - Calculate/deposit lost earnings
  - If the prohibited transaction is not corrected within the year, the transaction is considered to continue and the 15% excise tax applies to subsequent years
- Form 5330 Reporting
  - Required for any year a plan has late deposits
  - Excise tax applicable is equal to 15% of the calculated lost earnings
  - Does not apply to 403(b) plans
- Form 5500 reporting
  - Report on Line 4a through the year in which late contributions are corrected

DOL Deposit Requirements

- Voluntary Fiduciary Correction Program (VFCP)
  - Voluntary enforcement program sponsored by the DOL that is designed to encourage correction of potential ERISA violations
  - Provides correction procedures for 19 specific violations – delinquent participant contributions being one of them
  - Available to plans/plan sponsors that are not under investigation as defined in the regulations

DOL Deposit Requirements

- Benefits of the VFCP
  - Plans/plan sponsors that meet the VFCP conditions would not be assessed the ERISA penalties (with the exception of penalties associated with failure to file timely Forms 5500)
  - Receive a no action letter, indicating the DOL will not further investigate the plan/plan sponsor
  - Waiver of excise tax if certain conditions met
- DOL “invitation”
  - DOL is sending letters to plan sponsors who report late contributions on their 5500 inviting them to participate in the program
  - Recommend either going through the VFCP or responding to the letter and declining the invitation to the VFCP

Eligible 457(b) Plans

- Deferred compensation plan
- Contributions can be made through salary reduction, employer match, or an employer non-elective contribution
  - FICA applies to employee contributions
  - Employer contributions are also subject to FICA (not true with 403(b) or 401(a))
- 457(b) salary reduction contribution limits are independent of 403(b) salary contribution limits

Ineligible 457(f) Plans

- A plan generally reserved for a select group of executives or highly compensated employees
- Not subject to contribution limits like a 457(b) plan
- Compensation deferred under a 457(f) plan is subject to taxation when the amount is no longer subject to a substantial risk of forfeiture
  - An amount is subject to a substantial risk of forfeiture if the individual is required to perform substantial future services to be entitled to the amount

457(f) Proposed Regulations

New regulations provide added opportunities and flexibility in plan design

1. Short Term Deferrals
    - Allows for distributions to be made within the first 75 days of the year following the lapse in a substantial risk of forfeiture.
    - In certain situations, this feature has the potential to be very beneficial for both the participant and the employer.

457(f) Proposed Regulations

2. Rolling Risk of Forfeiture

- The employer and participant may agree to extend the substantial risk of forfeiture period and further defer the tax timing.
- In order to be eligible, certain requirements must be met:

    i. Written agreement
    ii. Minimum 2 year extension
    iii. Present value of benefits must increase 25%
    iv. Election must be made in year prior to additional services being provided

457(f) Proposed Regulations

3. Covenants Not to Compete

   - If certain requirements are met, a covenant not to compete could be considered as a substantial risk of forfeiture.

4. Bona Fide Severance, Sick Leave, and Vacation Plans

   - Section 457 excludes from the definition of deferred compensation any “bona fide” severance, sick leave, and vacation pay plans.

   - Proposed regulations have provided more clarity as to what is considered “bona fide”.

Form 5500 Filing Requirements and Recent Proposed Changes

- Overview
  - Used to report information about employee benefit plans (welfare and retirement) and Direct Filing Entities (DFEs)
  - Not a tax form
  - Applies to plans that are subject to ERISA
  - Filing requirements vary according to type of plan/arrangement
  - Due 7 months after plan year end (plans), with a 2 ½ month extension available
  - Late filing program with reduced penalties available for those who fail to file

Form 5500 Filing Requirements and Recent Proposed Changes

- 2016 Form 5500 changes
  - Majority of proposed questions from the 2015 series remain but again should be skipped
  - Increase in the penalty for failure to file a complete and accurate return
    - Increased to $2,063 per day
    - Will be indexed annually
  - Overview of 2016 questions
    - UBTI question removed entirely
    - Nondiscrimination testing, in-service distribution, requirement minimum distribution questions remain, but reworded (should be skipped)
    - New follow up question to PBGC insurance question on Schedule H/I
      - “If [the plan is covered by the PBGC insurance program], enter the My PAA confirmation number from the PBGC premium filing for this plan year.”
      - This question MUST be answered for 2016 filings.

Form 5500 Filing Requirements and Recent Proposed Changes

- Proposed Form 5500 regulations
  - Proposed regulations released in July 2016
  - Most significant overhaul to the return as a whole since the last major revisions in 1999 and 2009
  - Reasons for change
    - 5500 has not kept pace with market developments and change in laws covering employee benefit plans
    - Increasing problems with outdated and missing information being reported
    - Opportunity to satisfy certain Affordable Care Act (ACA) reporting requirements
  - Majority of revisions will take effect for plan years beginning on or after January 1, 2019

Form 5500 Filing Requirements and Recent Proposed Changes

- Proposed Form 5500 regulations
  - Goal #1: Modernizing financial and investment reporting by retirement plans
    - Schedule H
      - Asset/liability statement and income/expense statement in need of revisions
      - Proposed revisions designed to improve reporting of alternative investments, hard-to-value assets, and investment through collective investment vehicles and participant directed brokerage accounts
    - Streamline Schedule of Assets Held with a specific format
      - Allow plan sponsors to evaluate performance, liquidity and risk
      - More easily compare investment holdings to similarly situated plans
    - Form 5500-SF: required to provide a modest but additional breakout of plan investments on the asset and liability portion

Form 5500 Filing Requirements and Recent Proposed Changes

- Proposed Form 5500 regulations
  - Goal #1 (continued): Modernizing financial and investment reporting by retirement plans
    - Small plans not eligible to file a Form 5500-SF (hard to value investments)
      - Elimination of Schedule I
      - Required to file Schedule H along with Schedule of Assets Held
      - Would still be eligible for a waiver of independent qualified plan audit
    - Audit now driven from number of participants with account balances at the beginning of the plan year

Form 5500 Filing Requirements and Recent Proposed Changes

- Proposed Form 5500 regulations
  - Goal #2: Providing greater information regarding group health plans
    - Elimination of unfunded, small plan exemption for group health plans
      - Any group health plan, regardless of size, would be required to file a 5500
      - Government estimates an additional 2.1 million filings
      - Exemption would still exist for unfunded, small non-healthcare related benefit plans such as disability only, life only, etc.
    - Proposal of new Schedule “J”
      - Required for group health plans
      - Provide information about benefits and plan design characteristics, funding, grandfathered plan status, rebates received by the plan, service provider information, information on stop-loss, claims processing and payment information, wellness program information, and other compliance information

Form 5500 Filing Requirements and Recent Proposed Changes

- Proposed Form 5500 regulations
  - Goal #3: Enhancing data collection and usability
    - Allow for better review and monitoring of the investment data related to retirement plans
    - Some companies using the current Form 5500 series to analyze this information but cumbersome in current format

Form 5500 Filing Requirements and Recent Proposed Changes

- Proposed Form 5500 regulations
  - Goal #4: Improving service provider fee and expense information
    - Better align Schedule C with ERISA 408(b)(2) fee regulations
    - Make Schedule C easier to understand
    - Eliminate the concept of eligible indirect compensation and requires filers to report all types of compensation for ERISA 408(b)(2) covered service providers
    - Modify thresholds
      - Covered service provider (e.g., investment advisor, broker, recordkeeper, etc.) reduced from $5,000 to $1,000 in total compensation (direct and indirect)
      - Non-covered service providers remains at $5,000

Form 5500 Filing Requirements and Recent Proposed Changes

- Proposed Form 5500 regulations
  - Goal #4 (continued): Improving service provider fee and expense information
    - Schedule C would now be required for small retirement plans that are not eligible to file a 5500-SF and welfare plans that are funded by a trust with fewer than 100 participants
    - Defined contribution plans that file a 5500-SF or Schedule H would have to attach the comparison chart that is required to be furnished to participants under ERISA 404(a)(5)
    - Separate Schedule C proposed for each service provider
    - Formulas no longer allowed when indirect compensation present – service providers required to estimate actual dollar amounts

Form 5500 Filing Requirements and Recent Proposed Changes

- Proposed Form 5500 regulations
  - Goal #5: Enhancing compliance with ERISA and Internal Revenue Code
    - New questions proposed regarding
      - Plan operations
      - Service provider relationships
      - Financial management of plans
    - DOL and IRS anticipates these questions will compel fiduciaries to evaluate plan compliance
    - New questions will provide government with better information to effectively oversee and enforce existing rules and regulations

Fiduciary/Fee Requirements

- Who is a fiduciary under ERISA?
  - Frequently used to refer to a variety of service providers who perform certain services to the plan
  - Under ERISA, the classification of fiduciary is determined by the functions performed for the plan (generally not presence or absence of title)
  - Typically perform duties related to asset management, plan administration, and the provision of investment advice for a fee
  - Who is not a fiduciary?
    - Certain professionals, if acting only in their professional capacities (e.g. attorneys, accountants, actuaries, TPAs (other than §3(16) administrators), custodians), unless they are granted discretionary powers such as:
      - Authority to make decisions regarding benefit payments
      - Discretion in interpreting plan document
    - Persons performing ministerial functions for the plan (DOL Interpretive Bullentin 75-8, Question D-2)

Fiduciary/Fee Requirements

- Who is a fiduciary under ERISA?
  - When delegating fiduciary responsibilities, understand where others' responsibilities end and yours begin
    - Hiring outside providers
      - Require written contracts
      - Read the contracts carefully
      - Educate the administrative staff
    - Assigning responsibility to internal staff
      - Capture procedures and responsibilities in administrative manual
      - Distinguish the acts staff should engage or avoid for liability purposes, and make this information visible

Fiduciary/Fee Requirements

- What are my fiduciary responsibilities under ERISA?
  - Act in the best interest of plan participants and beneficiaries
  - Focus exclusively on providing benefits and defraying expenses
  - Perform duties with care, skill, prudence, and diligence
  - Minimize risk of losses through diversification
  - Adhere to plan documentation

Fiduciary/Fee Requirements

- What hazards do fiduciaries commonly encounter and how can I avoid them?
  - Expenses
  - Investments
  - Plan document noncompliance
  - Prohibited transactions

Fiduciary/Fee Requirements

- How can I mitigate exposure?
  - Internal controls
  - Regular review and evaluation
  - Documentation
- Remember
  - ERISA does not require that fiduciaries catch every error, but rather that they have taken reasonable steps to do so
  - Financial audits typically do not assess plan compliance

Fiduciary/Fee Requirements

- Are there any safeguards or additional means of protections?
  - Safeguards
    - Compliance with safe harbor features can reduce liability (e.g. ERISA 404(c) participant-directed investments, qualified default investment alternatives)
  - Protection
    - Fidelity bonds: protects the plan in the vent of a loss to the plan due to a fiduciary breach
    - Fiduciary insurance: protects the fiduciary in the event of a breach
    - Indemnity contracts: the plan cannot indemnify the fiduciary for a fiduciary breach, but the plan sponsor can

Thank you for attending

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